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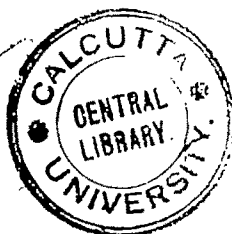
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\* Deceased September 27, 1959.



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# THE IDENTIFICATION AND APPRAISAL OF DIVERSE SYSTEMS OF PUBLIC ORDER

BY MYRES S. MCDUGAL

*Of the Board of Editors*

AND

HAROLD D. LISSWELL

*Yale Law School*

It is a commonplace observation that the world arena today exhibits a number of systems of public order, each demanding and embodying the values of human dignity in very different degree. Yet the problems connected with the identification of public order systems, and their appraisal in terms of impact upon the values of human dignity, have received so little systematic attention that scholars of many nations, in no sense exclusive of the United States, continue inadvertently to contribute to the confusions of everyday life manifest in the whole world community and all its component regions.<sup>1</sup>

<sup>1</sup> Criteria have not been elaborated for even preliminary identification of existing international systems, which vary in territorial spread from two-Power arrangements upward toward demanded or asserted universality. Suggestions are variously made in the literature of possibly useful classifications of systems in such terms as Western European (and North Atlantic), American (North, South), Soviet (European, Asian), British Commonwealth, Islamic, Hindu, Burmese, Southeastern Asian, and so on.

An excellent introduction to the problem may be found, with abundant references, in Jenks, *The Common Law of Mankind*, Ch. 2: "The Universality of International Law" (1958). Other representative recent writings include Northrop, "Contemporary Jurisprudence and International Law," 61 *Yale L.J.* 623 (1952); Aaron and Reynolds, "Peaceful Coexistence and Peaceful Cooperation," 4 *Political Studies* 281 (October, 1956); Snyder and Bracht, "Co-existence and International Law," 7 *Int. and Comp. Law Q.* 54 (1958); Fifield, "The Five Principles of Peaceful Coexistence," 52 *A.J.I.L.* 504 (1958); Triska, "A Model for Study of Soviet Foreign Policy," 52 *Am. Pol. Sci. Rev.* 64 (1958); Berlia, "International Law and Russo-American Coexistence," 79 *Journal du Droit International* 307 (1952); Kunz, "Pluralism of Legal and Value Systems and International Law," 49 *A.J.I.L.* 370 (1955); Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law," 45 *ibid.* 648 (1951); Schwarzenberger, "The Impact of the East-West Rift on International Law," 36 *Grotius Society Transactions* 229 (1950); Hazard, *Law and Social Change in the U.S.S.R.*, Ch. 11 (1953); Kulski, "The Soviet Interpretation of International Law," 49 *A.J.I.L.* 518 (1955); Schlesinger, *Soviet Legal Theory*, Ch. 10 (2d ed., 1951); Taracouzio, *The Soviet Union and International Law* (1935); Kelsen, *The Communist Theory of Law* (1955).

The program for the April-May, 1959, meeting of the American Society of International Law is built about the theme of "Diverse Systems of World Public Order Today."

The consequences of continued confusion are to impede the continuing efforts that are indispensable to the building of the new institutions of which there is such desperate need. Among traditional legal scholars it has long been customary to give unquestioning verbal deference to the proposition that if there is any international law at all, it is a universal law, embracing the organized governments of the world community as a whole, or at least all those bodies politic admitted to the ever-enlarging European "family of nations."<sup>2</sup> The existence of regional diversities in the interpretation of allegedly universal prescriptions, and in the fundamental policies about the allocation of power and other values sought by such interpretation, has been cloaked in the shadows of "decent mystery" by hopeful insistence that such divergent interpretations are but occasional aberrations which will disappear when the real universality of the relevant concepts is appropriately understood.

This make-believe universalism has had the effect of undercutting the authority of every doctrine put forward in the name of the whole body of nations. Even prescriptions rationally designed to serve community interest, when properly invoked and generally applied, have suffered the onus of bearing a classificatory label identical with the symbol which is also employed to identify propositions whose authority is dubious in the extreme, or wholly non-existent. Professional lawyers and men of affairs the world over exhibit the most extreme oscillation between over-affirmation of the authoritativeness of what they term "international law" and over-denial of the validity of any significant claims put forward in the name of such a system.

Among Anglo-American jurists it is thus habitual to wage a silent war of attrition against the conception of a comprehensive international law on behalf of terms like "conflict of laws" or "comity," which they treat as an *arcandum*, to be opened only by the exercise of transcendent subtleties legitimized under the recognized legerdemain of principles of jurisdiction.

<sup>2</sup>The common assumption is thus stated in Sauer, "Universal Principles in International Law," 42 *Grotius Society Transactions* 181 (1957): "It goes without saying that the notion of present-day international law implies universality because this law means a law for all nations of the world." Dr. Sauer notes a certain shrinkage, however, and observes "that the present condition of universal international law is a sad one." *Ibid.* 184.

The "universality" asserted or demanded, too often in attempted self-fulfilling description, by different writers and spokesmen exhibits of course many varying nuances in reference. Sometimes reference is made to the range of participants alleged to be subject to authoritative prescription and it is insisted that a single international law governs Western and non-Western, Christian and non-Christian, or Communist and non-Communist, states alike. On other occasions the emphasis in reference is upon alleged uniformity in application of prescriptions—that is, that the same results are achieved in the same or comparable contexts when the only difference lies in the identity of the parties to the controversy. Still again "universality" may merely express a demand that all states accept and implement the same set of policies relating to their external interactions. On rare occasions, the reference is explicitly and candidly to mere words, accompanied by demands that future interpretations of the words be made to conform to the requirements of a projected world order. Cf. Dickinson, *Law and Peace* 122 (1951).

derived from territorial sovereignty, nationality, and other technical concepts.<sup>3</sup>

Not the least obstructive result of this confusion is the failure to keep at the focus of responsible world attention both the *future oriented* nature of the challenge contained in the idea of universal legal order and the crucial fact that a legal order of inclusive scope can only come into existence in a process of interaction in which every particular legal advance both strengthens a world public order and is in turn itself supported and strengthened by that order. The processes of law have as their proper office the synthesizing and stabilizing of creative efforts toward a new order by the procedures and structures of authority, thereby consolidating gains and providing guidance for the next steps along the path toward a universal system. By pretending in one mood that international law is a contemporary and presumably well-constructed edifice while insinuating in another that it is a pretentious and dubious fantasy, the true dimensions of the task are concealed. Effective, comprehensive universality, despite the faint shadows of worldwide organization, does not now exist. It is for the future; and can be expected only as a reward of clarification and of relevant effort.

A pervasive present illusion is that lip service to the claim of universality for contemporary international law serves the cause of universality. On the contrary, the invocation of spurious universalism on all questions diverts creative concern from the vital issues on which the diverse systems of public order that now dominate the world scene are *not* united, and which, if they are to be resolved by peaceable persuasion rather than bellicose coercion, must be brought into the open and kept there as unremitting challenges to take appropriate action. Obscurity helps to perpetuate the divisions of the world; and in the deepest sense serves the interest of no one, for all mortals are in deadly peril of inadvertent as well as planned destruction in the wake of nuclear conflict.

Having full regard to the common interest in removing the cloud that overcasts the future, it must not, however, be supposed that all interests are identical, or that the existing decision-makers of all nation states are without what they regard as important stakes in continuing, rather than terminating, the present state of danger.

In view of the universal testimony in public and private about the suicidal peril of continuing the arms race, one may well exclaim: "How can such things be?" Are the top officials of the world so depraved in mind and character, so insistent upon egocentric power, that they would rather risk the end of man than agree to a genuinely universal system of public order?

With the demoniac case of Adolf Hitler fresh in mind, we cannot deny the possibility that totalitarian systems of public order are capable of

<sup>3</sup>For depiction and analysis, see Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 Yale L. J. 1087 (1956); Yntema, "The Objectives of Private International Law," 31 Canadian Bar Rev. 721 (1957).



bringing into power and keeping in power a personality whose self-image is so inflated by unconscious processes that he is ready to ruin the world if he cannot rule it. The bitter and shocking revelations by Khrushchev of the last mad years of Stalin provide us with another example of the pathologic horrors of systems that feed on dreams of world dominion imposed by blends of fascination and terror.

Despite these ominous precedents we do not assert that the primary danger from the present anarchic state of the world, so far as issues of elementary safety are concerned, is the spawning of another paranoid Caesar in Moscow. The continuing threat is more humdrum than that. We do not even need to make the assumption of malevolence, of individual depravity that prefers office to the sacrifices necessary to abate the nuclear danger. A much simpler explanation may very well account for the failure of leaders, notably of totalitarian leaders, to make whatever short-range sacrifices may appear necessary in order to install the operations essential to a truly universal system of international law.

We refer to the conditions that surround the political leader of totalitarian systems. Such a leader has come to the top by surviving the chronic uncertainties and risks of a police state. His every move is reacted to instantly, not by peaceably disposed competitors in free debate and election, who are campaigning for votes, but by ambitious assistants and nominal colleagues, whose only route to greater power is ruthless conspiracy and coercion, and who thus are necessarily out to ruin his career, if not to end his life. It cannot be assumed that under these menacing conditions the apparent leader of a totalitarian junta can lightly allow himself to appear to acquiesce, for example, in measures that authorize the bringing of foreign personnel into the arsenals of the totalitarian garrison. The overwhelming probability would appear to be that the first leaders who move in this direction will forfeit their political influence, and possibly their lives. These top figures, despite all their braggadocio and bombast, have been effectively paralyzed as leaders of co-operative achievement by a polity of mutual and deadly intimidation; they gyrate in endless convolution while the arms race gains breadth and malignance.

Yet the spokesmen of totalitarian Powers are the ones who, professing to be more orthodox keepers of the faith than their bourgeois opponents, pay most punctilious deference to the supposed universality of international law. And why? Strange as it may seem at first glance, the most convincing interpretation is that the existing imperfections of the system can be used by them to help prevent further advances toward a world order with genuine measures of security. For it is in the name of such allegedly universal doctrines of international law as sovereignty, domestic jurisdiction, non-intervention, independence and equality—all of which appear to fortify claims to freedom from external obligation—that the case is made to resist the institutional reconstructions which are indispensable to security.

In this grave posture of world affairs it can only make sense to put aside the veil that is provided by false conceptions of the universality of international law. An indispensable step toward a truly comprehensive system of world order is to disabuse all minds of the false myth that

universal words imply universal deeds. The effective authority of any legal system depends in the long run upon the underlying common interests of the participants in the system and their recognition of such common interests, reflected in continuing predispositions to support the prescriptions and the procedures that comprise the system. The discrediting of claims to universality which are in fact false is thus a first necessary step toward clarifying the common goals, interpretations, and procedures essential to achieve an effective international order capable of drawing upon the continuous support essential to global security by consent. By piercing the veil of pseudo-universality we may, further, diminish the degree of unwitting support that totalitarian Powers obtain from the persisting failure of many scholars and leaders of the non-Soviet world to disclose the true state of affairs. Too many people, professional and lay, have failed to see that insistence upon universality as now "existing" serves as a tactical screen to disguise the strategic goal of advancing toward an imposed universalization of the totalitarian form of public order. Soviet leaders hope to benefit the totalitarian objective by keeping the bodies politic of the non-Soviet world sufficiently divided to forestall joint exposure of the Soviet position and to prevent continuing conjoint pressure for progress by co-operation toward a world order of human dignity.

For the visible future at least the lead must of course be taken by scholars and public figures physically located in the non-Soviet world. It is obvious that scholars who reside in the non-Soviet world have much more freedom in the expression of unconventional ideas than their opposite numbers. In part this comes from the diverse social environments where they live and from which they draw support. In part the critical factor is ideological, reflecting freedom from, rather than subjection to, a deterministic materialistic metaphysics. The non-Soviet world has several well-established modern and industrial societies which make no demands to go beyond their national frontiers for the purpose of subordinating other peoples to a centrally administered socio-economic and political structure.

Scholars and public figures in the non-totalitarian world can use this relatively favorable environment to make critical appraisals—of the national self as well as the self of other nations. It is therefore feasible for them to dissolve the curtains of confusion created by the common practice of glorifying specific institutional practices instead of glorifying the goal values of human dignity and engaging in a *continuous reappraisal of the circumstances in which specific institutional combinations can make the greatest net contribution to the over-arching goal.*

Fortunately, advantage may be taken of the fact that the major systems of public order are in many fundamental respects rhetorically unified. ✓ All systems proclaim the dignity of the human individual and the ideal of a worldwide public order in which this ideal is authoritatively pursued and effectively approximated. They differ in many details of the institutionalized patterns of practice by which they seek to achieve such goals in specific areas and in the world as a whole.

The important point is that varying detailed practices by which overriding goals are sought need not necessarily be fatal to the future of mankind but can be made creative in promoting and expanding freedom, security and abundance. The modern world is a cauldron of aspiration for a better life on the part of millions of human beings hitherto devoid of any expectation of receiving serious consideration. Unless the institutional details of all systems of public order are open to reconsideration in the light of the contribution that they make to the realization of human dignity in theory and fact, the plight of the world community will remain as precarious as we know it to be today.

Not the least of the institutionalized devices that call for reappraisal are the doctrines and operations having the name of international law. We suggest that major contributions to world order would be the divorce of many of these putative principles from the contexts that give them spurious significance and the vindication of authoritative prescriptions that have genuine relevance to the goal values of human dignity.

The task is a prime responsibility of the scholarly world, and especially of jurisprudence and the social sciences generally. Some of the work has been done by traditional scholars, though too often in scattered and incomplete form. We shall outline a map of the undertaking that we have in mind and in whose execution we invite all like-minded scholars to participate. It will be made evident that we are calling, not for a single research project to be done once and for all, but for a continuing process designed to become part of the intelligence and appraisal functions of the world community. In common with all institutional details this inquiry will be open to perpetual reappraisal.

The map we recommend begins with (a) orienting ourselves in world social process, (b) identifying within this, a process distinctively specialized to power, (c) characterizing as the legal process those decisions that are at once authoritative and controlling, and (d) defining as the public order those features of the whole social process which receive protection by the legal process. From this map we proceed to (e) outline our commitment to the realization of a universal system of public order consistent and compatible with human dignity, (f) analyze the intellectual tasks that confront the scholar who accepts this overriding goal, (g) indicate some of the specific questions that arise in the consideration of any system of public order, and (h) refer to the scholarly procedures by which the task of inquiry can be executed on a satisfactory scale of depth and coverage.\*

#### WORLD SOCIAL PROCESS

Systems of public order are embedded in a larger context of world events which is the entire social process of the globe. We speak of

\*For background and development of social process analysis with special reference to law and politics see, among other studies, Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale L. J.* 203 (1943); Lasswell and Kaplan, *Power and Society* (1950).

"process" because there is interaction; of "social" because living beings are the active participants; of "world" because the expanding circles of interaction among men ultimately reach the remotest inhabitants of the globe. Interaction is a matter of going and coming, of buying and selling, of looking and listening; and more. The most far-reaching dimension is the taking of one another into account in the making of choices, whether these choices have to do with comprehensive affairs of state or private concerns of family safety. Such subjective events of mutual assessment tie people into the same process even when they retire behind the ramparts of castles and garrisons to prepare against an eventual day of reckoning.

The participants in the world social process are acting individually in their own behalf and in concert with others with whom they share symbols of common identity and ways of life of varying degrees of elaboration. Whether acting through one channel or the other the fundamental goal stays ever the same, the maximization of values within the limits of capability. A value is a preferred event; and if we were to begin to list all the specific items of food and drink, of dress, of housing and of other enjoyments, we should quickly recognize the unwieldiness of the task. Hence for the purpose of comparing individuals and peoples with one another we find it expedient to employ a brief list of categories where there is place for health, safety and comfort (well-being), for affection, respect, skill, enlightenment, rectitude, wealth and power. Human beings the world over devote their lives to the incessant shaping and sharing of values, activities which they accomplish by making use of patterns of varying degrees of distinctiveness.

Each identifiable "practice" is a pattern of subjectivities (perspectives) and of operations. The practices which are relatively specialized to the shaping and sharing of value we identify as an "institution." Hence we recognize institutions of government, specialized to the shaping and sharing of power; economic institutions, which focus upon the production, distribution, and consumption of wealth; religious and ethical institutions, specialized to the grounding and specification of responsible conduct; mass media and other institutions of enlightenment; schools of arts, trades and professions, and associated institutions of skill; pervasive patterns of social class, which are basic institutions of respect; the institutions of family and friendship (affection); and of health, comfort and safety (well-being). These institutions, organized and unorganized, utilize the resources of nature in greater or less degree in the shaping and sharing of preferred outcomes of the social process.

When we consider the globe as a whole we perceive that it is composed of communities of diverse size and degrees of institutional distinctiveness (culture). A short time ago Western Europe and North America were the sole possessors of modern science and technology, and of related patterns of culture. Today the culture of science is spreading toward universality as ancient civilizations are revived, and the relatively isolated folk societies of Asia, Africa, South America and the Pacific come within the orbit of modernization and industrialization.

## WORLD POWER PROCESS

Within the vast social process of man pursuing values through institutions utilizing resources, we are especially concerned with the characteristic features of the power process. A social situation relatively specialized to the shaping and sharing of power outcomes is an "arena"; and it is evident that the world at any given cross section in time is a series of arenas ranging in comprehensiveness from the globe as a whole, through great continental, hemispheric and oceanic clusters, to nation states, provinces and cities, on down to the humblest village and township. The identifying characteristic of an arena is a structure of expectations shared among the members of a community. The assumption is that a decision process occurs in the community; that is, choices affecting the community are made which, if opposed, will in all probability be enforced against opposition. Enforcement implies severe sanction.

When we scrutinize an arena in more detail, going beyond the minimum necessary for bare definitional purposes, it is possible to identify several categories of participants. Some are official organizations, or governments—national and international. Others are specialized to bringing influence to bear upon those who make the important decisions (political parties, political orders, pressure groups, gangs). Some are associations which, though active in the social process, do not concentrate upon power but primarily seek other values. The ultimate actor is always the individual human being who may act alone or through any organization.

Whatever the type of participants—group or individual—the actual conduct of participants in the power process depends in part upon their perspectives, which are value demands, group identifications and expectations. They may demand, for example, a rising standard of living; and the rising standard may be sought on behalf of the family with which one is identified, or on the basis of identification with depressed classes in a community. Demands may be accompanied by structures of expectation that place great reliance upon strategies of persuasion (or coercion) as the most likely means of influencing results.

Each participant has at his disposal values that he employs as bases for the influencing of outcomes. An inventory discloses that all values—power, wealth, respect, and so on—may be used to affect a decision outcome.

Base values are made effective by the strategies used to affect outcomes. Strategies are often classified according to the degree to which they rely upon symbols or material resources. Diplomacy depends primarily upon symbols in the form of offers, counter-offers and agreements among elite figures. Ideological strategy also uses symbols as the principal means of action, the distinctive mode being communications which are directed to large audiences. Economic instruments are goods and services; military strategy employs weapons. Every strategy uses indulgences (such as economic aid to allies) or deprivations (such as boycott of unfriendly Powers), and proceeds in isolation or coalition. The coalitions within an arena at a given time reflect the number and strength of the participants interacting in the arena. During the nineteenth century the world arena

was dominated by a few great Powers; in recent times the structure has to an increasing degree been bipolar.

The strategies of participants succeed or fail in the degree to which they culminate in military victory or defeat, or in the winning or losing of votes in intergovernmental organizations or direct negotiation among nation states.

The outcomes affect the value position of every participant in the world context in terms of every value and institutional practice. In addition, post-outcome effects may change the basic composition and modes of operation of the entire world community.

#### THE LEGAL PROCESS

Within the decision-making process our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions. Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not. The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law.

In order to identify and compare the rôle of law in the processes of power it is serviceable to distinguish seven functional phases of decision-making and execution. *Prescription* is the articulation of general requirements of conduct. Among the organs specialized to this function are constitutional conventions and legislatures. International law is articulated principally in the daily activities of foreign offices as they justify or attack, accept or reject, the claims put forward by themselves or others. Prior in time to prescription in a given sequence is *recommendation*, or the promoting of prescriptions. This function is actively performed by such official and semi-official bodies as international governmental organizations, national and trans-national political parties, and pressure groups. Also the *intelligence* function is typically prior in time to prescription or recommendation; it includes the gathering and processing of information about past events, and the making of estimates of the future, especially of the costs and gains of alternative policies. Official organs of intelligence are partly specialized to secret intelligence; but a very large part is open, and in free countries is very largely supplied by the press and by research and scholarly agencies. Since its founding the United Nations has performed a vast intelligence operation for all.

*Invocation* consists in making a preliminary appeal to a prescription in the hope of influencing results. Hence invoking activities are conspicuous in negotiation; they also include the justifying of claims defended or attacked by counsel before tribunals of the world community. Invocation is the function of public officers or the community agents who are confronted by the responsibility for labeling specific patterns of conduct in reference to legal norms. *Application* is the final characterization of a situation in reference to relevant prescriptions. When a court speaks at the end of

litigation, or an administrative organ decides a concrete case, each operation is an applying activity. The *appraisal* function formulates the relationship between official aims and subsequent levels of performance. Among special agencies of appraisal are auditors, inspectors and censors. Although the appraising function might be included with intelligence, its prominence in political controversy justifies independent recognition. The function of *termination* is the putting to an end of authoritative prescriptions and of arrangements arising within them.

#### A PUBLIC ORDER SYSTEM

Within the distinctions thus developed, we are able to clarify what is meant by a system of public order. The reference is to the basic features of the social process in a community—including both the identity and preferred distribution pattern of basic goal values, and implementing institutions—that are accorded protection by the legal process. Since the legal process is among the basic patterns of a community, the public order includes the protection of the legal order itself, with authority being used as a base of power to protect authority.

In this perspective it is evident that our world is composed of a series of community contexts beginning with the globe as a whole and diminishing in territorial range and scope. To the extent that it can be demonstrated that the globe as a whole is a public order system, and only to that extent, do we speak of universal international law. To the degree that territories larger than national states comprise a public order system, we refer to regional international law. Great Britain, for example, has figured simultaneously in more than one large region, and if we add the bilateral contexts which in some cases can be regarded as public order systems, Great Britain plays a rôle in many such configurations. Obviously today it is more accurate to speak of international *laws* or multi-national law than of international *law*.

Clearly, systems of public order differ not only in territorial comprehensiveness but also in the completeness of arrangements in terms of the different value processes regulated, and in the internal balance of competence for decision *inclusive* of the entire area in question and that for decision relating *exclusively* to component areas within it. To the extent that there is universal international law some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units. Regional international law has a corresponding separation between region-wide prescriptions and sub-regional units. Similarly, nation states like the United States distinguish between the inclusiveness of Federal authority and the proper domain of the internal States.

Among major distinctions between public order systems are the degree to which *specialized organs* have been developed to conduct the decision process in the inclusive territory, and the degree to which the organs employed by each component unit also carry on the decision process for the whole. It requires no demonstration that international law is largely the creation of organs of the latter type, since the bulk of the world legal

system has grown up in the "custom" of communicating foreign offices, supplemented by special conferences, and more recently by intergovernmental bodies whose tasks, speaking formalistically, are not "legislative" (that is, are not regarded as performing "prescriptive" functions).

It is not possible at present to describe the public order structure of the world community, since for the most part existing knowledge is fragmentary and noncomparable. Nor can we proceed with confidence to set detailed limits upon the relative completeness of legal systems and hence of systems and near-systems of public order. It is sufficient to say that, whatever lines are drawn between a system that the scientific observer calls "complete" and systems that are "incomplete," the present absence of authoritative and controlling arrangements for minimal security will preclude the acceptance of the entire world community, as at present constituted, from being classified among complete legal systems, and hence among complete public orders.

#### TOWARD A UNIVERSAL ORDER OF HUMAN DIGNITY

Our overriding aim is to clarify and aid in the implementation of a universal order of human dignity. We postulate this goal, deliberately leaving everyone free to justify it in terms of his preferred theological or philosophical tradition.

The essential meaning of human dignity as we understand it can be succinctly stated: it refers to a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power.

Given this overarching goal and the present posture of world affairs, what can scholars do individually and through the organization available to them to further the objective?

Manifestly, five intellectual tasks are pertinent to the solution of this as of any legal problem.

First, clarification of goal. Clarification can proceed in two directions, in justification of the commitment to the goal, or in detailed specification of what is meant in terms of social and power processes, and legal and public order systems. If we were to specify in detail the meaning of "widely shared participation" in social values, we would consider each of the value-institution processes of society in turn.

Second, description of trend. Having clarified the goal of human dignity, the next intellectual task is the discovery of the degree to which historical and contemporary events conform to or deviate from the goal.

Third, analysis of conditioning factors. Simple historical sequences are not enough to provide understanding of the factors which affect decision. We need to ascertain the factors that condition the degree to which goals have been achieved or failed of achievement.

Fourth, projection of future developments. Assuming that our individual or group efforts will not significantly influence the future, what are the probable limits within which goal values will be achieved?

Fifth, invention and consideration of policy alternatives. Assuming



that our efforts may have some impact upon the future, what policy alternatives will maximize our goals (at minimum cost in terms of all values)?

Each of these five intellectual tasks may be illustrated in further detail. We begin with the clarification of goals and indicate with a series of questions about each value what we mean by the sharing of values.

*Power.* To what extent is power widely or narrowly held? *E.g.*, how many members of the community are involved in amending the constitution, or enacting other prescriptions; or in the function of intelligence, recommendation, invocation, application, appraisal, termination? (The involvement may be direct, as in referenda, or indirect, as in representation.) To what extent are the processes of adjustment coercive or persuasive? *E.g.*, how intense is the expectation of violence? Of peaceful agreement?

*Wealth.* To what extent is the economy focused upon savings and investments? Upon rising levels of consumption? Upon shorter hours of work? *E.g.*, what tax and other fiscal measures make for forced saving or discourage saving and investment? Is there compulsory labor? Are there minimum income guarantees?

*Respect.* What is the commitment to caste or to mobile class forms of society? *E.g.*, does status depend upon position of family at birth? Or upon any other characteristic besides individual merit? To what extent is minimum respect accorded to everyone on the basis of mere membership in the human race? *E.g.*, prohibition of humiliating penalties; protection of privacy; protection of freedom of agreement against official and private limitation. To what extent are individual differences protected when they depend upon government? *E.g.*, protection of reputation.

*Well-Being.* To what extent is continued increase of numbers encouraged even at the expense of immediate improvement of the values available to individuals? *E.g.*, are birth restrictions promoted or opposed? What are the policies regarding care of the old? In what degree is the living population sought to be protected from mental and physical deprivation, *e.g.*, accident, disease and defect prevention; prevention of private and public violence? In what degree is the health, comfort or safety of the population restored after deprivations have occurred? *E.g.*, arrangements for care and cure.

*Skill.* To what degree is the body politic committed to optimum opportunity for the discovery and cultivation of socially acceptable skills on the part of everyone? *E.g.*, is there universal and equal access to educational facilities? Does the access continue to whatever level the individual is capable (and motivated) to make use of? In what measure does the body politic provide optimum opportunity for the exercise of accepted skills? *E.g.*, are there employment guarantees or suitable levels? Are new skills recognized and assisted readily? *E.g.*, prohibitions upon skill monopolies.

*Enlightenment.* To what extent does the community protect the gathering, transmission and dissemination of information, *e.g.*, guarantee freedom of press, of research, of research reporting? In what degree does the

community provide positive aid, *e.g.*, encourage the use of competent sources( though not permitting monopoly)?

*Rectitude.* To what degree does the body politic protect freedom of worship and of religious propaganda? To what extent is positive assistance given to foster freedom of worship and religious propaganda, *e.g.*, aid to doctrinal schools?

*Affection.* What is the protection given the family and other institutions of congeniality? *E.g.*, what are the barriers against disruption? What affirmative aid is given, *e.g.*, freedom in the choice of partner; in group formation; financial and other modes of help?

Next we turn to the description of trends. Our concern is for trends throughout the world community with special reference to all the bodies politic, however incomplete their level of political organization. The term "trend" is used to designate the present distribution of goals sought, the degree of their contemporary realization, and the extent to which this realization has become greater or less through time.

It is perhaps obvious that we are not to be satisfied with taking note of the fact that the ideal of human dignity is verbally accepted. We therefore propose to go beyond the dominant beliefs, assumptions and loyalties (the myth) of any given society and look into its operational technique. It is therefore ultimately necessary to conduct the studies that reveal the true state of affairs throughout the entire social process. Then we can sum up the state of public order according to the degree of effective sharing and the basic institutions that receive protection.

Each value-institution pattern has a specialized system of myth and of operational technique. The myth falls into three parts: doctrine, formula, folklore. Political doctrines, for instance, include the prevailing philosophies of politics and law. Economic doctrines include theoretical justifications of capitalism or socialism. Respect doctrines either justify social class discrimination or the opposite. And every other value has its doctrinal myth.

The political formula takes in all the constitutional, statutory and other authoritative prescriptions of the legal order that relate to the decision process. It is possible to find corresponding rules for the other values, such as wealth. Some of these rules receive legal backing; others are not supported by the community as a whole, but depend solely upon the support of a component group.

The political myth also includes popular lore about the heroes and villains of yesterday and today, and the notable events of history (and the future); similarly, for wealth, enlightenment, and the other values.

The operational technique exhibits the extent to which the perspectives constituting a myth are adhered to, or deviated from.

The foregoing categories provide a broad reference frame within which more detailed consideration can be given to the patterns of authority and control, and particularly the patterns of international law, characteristic of each legal system. We shall devote a separate section to the outlining of such questions.

Turning to the third intellectual task, the analysis of conditioning factors, it is necessary to make an inventory of the categories of factors to be investigated by the scholarly community. Scholarship which would be creative, must look behind technical formulas and authoritative procedures to the conditions that importantly determine which formulas and procedures are in fact employed. Relevant comparisons must take into account entire contexts rather than rely upon a few isolated variables divorced from the setting in which they occur. We shall go no farther than to indicate the five sets of conditioning (interacting) factors that must eventually receive attention. First, we mention *culture*, which is the term that characterizes the most distinctive patterns of value distribution and institutional practice to be found in the world community. Second, *class*. This word covers the position of individuals or groups in terms of the control of values. One may be upper, middle or lower (elite, mid-elite, or rank and file) in control over each value. Third, *interest*. The word is used to refer to groups less inclusive than a class or unbound by class. Specific occupational skills, for example, may cut across lines of class. Fourth, *personality*. The term designates the basic value orientations, practices and mechanisms characteristic of an individual. Fifth, *crisis* level. This expression, referring to conflict situations of extreme intensity, applies to each of the foregoing categories, but can be separated for convenience. In addition to those factors which pertain directly to values and institutions, place must be found for the impact of the entire resource environment, and of basic genetic capabilities, upon mankind.

The fourth task, that of projection of future developments that are likely to affect international law, requires a disciplined consideration of past trends conjointly with the available stock of scientific knowledge. One alternative—that of the total extinction of man—we can rule out of consideration for obvious reasons. But there are drastic new developments that we can wisely anticipate, notably in the field of science and technology. We are already in the early phases of penetrating outer space; and it is not too early to consider a range of contingencies which will arise as we come close to planetary exploration. The explosive growth of machine simulators of the brain, of experimental embryology, and of simple devices of contraception have given some intimation of how our fundamental ideas are likely to undergo drastic revision. If one projects present prospects in the physics of particles and energies, one perceives all sorts of major developments affecting man and his resource environment. We shall keep the present discussion within manageable limits by postponing further consideration of these potentialities.

The ever-present question in everyone's mind is whether we can invent or recognize policy alternatives that are likely to move us most rapidly, and at least social cost, toward a more perfect realization of a universal international law of human dignity. We shall have space to refer to one fundamental alternative to which the present analysis is intended to contribute. If we are to move knowingly and skillfully toward the goal, it will be necessary for the scholarly community to perfect the intelligence

and appraisal functions of those who are striving toward the realization of human dignity.

We turn to a more specific consideration of the existing state of affairs.

#### COMPARING INTERNATIONAL SYSTEMS OF PUBLIC ORDER

The questions with which we are concerned are those pertinent to the ultimate appraisal of the success or failure of any system of public order as instruments of the overarching goal of human dignity. We are chiefly interested in international systems, and particularly in the external impact of each system. Specific interpretations of many universalistic terms and propositions differ greatly on particular problems. Hence it is especially important to examine the diverse systems of public order whose several commitments affect the flow of events in the world arena.

The following questions about any particular system of public order, to be asked here of any grouping of states, are directed to the identification of its fundamental categories and techniques and to the appraisal of both its inner operations and external interactions in terms of impact upon the values of human dignity. With respect to each specific inquiry, we ask a double question: What is the proclaimed, explicit myth or implied assumption about myth? How in fact is the proclaimed or assumed myth interpreted and applied in particular instances of social interaction? We are concerned both for what values are expressed in the basic conceptual structure of the system about important problems and for how these concepts are applied in practice to affect the sharing of values and the degree of achievement of the basic goal values.

Relevant questions might be directed toward every aspect of social interaction, including any or all of the traditional problems of international law. For convenience we group questions about the conceptions and applications of any particular system of public order under the following three main headings: (1) Conceptions of Law (including perspectives of authority and techniques of effective control, as well as myth and practice about the interrelations of authority and control); (2) Features of Power Processes Protected by Law; and (3) Features of Basic Value Processes Protected by Law. It may be emphasized again that the questions we ask are intended to be suggestive only and not exhaustive.

##### (1) *Conceptions of Law*

The important questions here relate to both perspectives of authority and techniques in effective control. Most generally the questions are: What processes, structures and functions, of authority are established or recommended? What processes, structures and functions, of effective control are established or recommended? And what interrelations between authority and effective control are established, assumed, or demanded?<sup>5</sup>

<sup>5</sup> We recognize of course that authority and control may overlap and it is indeed precisely this overlap that we recommend as the most useful reference of the word "law." The asking of separate questions about authority and control may, we hope, promote realism in inquiry about their interrelations.

Concerning authority, more specifically, important questions relate to perspectives about both decision-makers and criteria for decision-making.

First, in regard to decision-makers: Who are regarded as authoritative decision-makers and by what processes are they established and identified as authoritative? What is the degree of community participation in such processes of establishment and identification? Are decision-makers in the various authority functions distinguished from parties to the interactions regulated? Do they include both national and international officials? Do they include representatives of non-governmental groups or parties? Who, with what qualifications, are selected by whom and how? What constitutive, legislative, executive, judicial, and administrative structures of authority are established or recommended? How, in sum, must such structures be appraised in terms of such fundamental *continua* as democracy—despotism, centralization—decentralization, concentration—deconcentration, pluralization—monopolization, and regimentation—individuation?

Second, in reference to criteria for decision: By what distinctive criteria—in terms both of the scope, range, and domain of values affected and of procedures by which decision outcomes are to be brought about—does the system of public order under inquiry recommend that decisions be taken? How are perspectives of authority grounded in terms of fundamental justifications of decision? Are ultimate references to trans-empirical or empirical events? If trans-empirical, are the references religious or metaphysical? If metaphysical, idealistic or materialist? If ultimate reference is empirical, is it to events within or without the social process? If transcendent of the social process, how characterized? If within the social process, is it by unclarified demand for “precedent,” “logic,” “validity” or other alleged rectitude norms or by systematic reference to expectations about social process values? If reference is to social process values, is demand made for caste or human dignity values? If the system declares an overriding goal of human dignity, what particular values and institutional practices are included in the conception of such goal? What degrees in the sharing of particular values are specified as required by human dignity? With what degree of universalism or inclusiveness are criteria of authority, whatever their ultimate reference, asserted and demanded? For what “community” is “common interest” proclaimed?

Important questions about criteria for procedures relate both to the structures of authority established or recommended for each policy function indicated above—prescription, intelligence, recommending, invoking, applying, appraising, terminating—and to the impact of the modalities by which each function is performed upon human dignity values. For each function the two most general questions are: What structures of authority (constitutive, legislative, executive, judicial, administrative) are specialized to the performance of this function? How does the performance, which is in fact established or recommended, impact upon all demanded values? Impressionistic indication of the type of more specific, relevant question with respect to each function may be indicated *seriatim*:

*Prescription.* What is the relative reliance, in the performance of this function, upon specialized organizations or tribunals, upon explicit agreement by participants in an arena, and upon unilateral decision by contending participants in the name of "customary law"? What principles and procedures are afforded for expediting the achievement of consensus and the making of agreements? To what "sources" of policy (prior uniformities in behavior and subjectivities of "rightness," general principles of mature systems, considerations of equity and fairness, opinions of the learned, and so on) are unilateral decision-makers authorized to turn in shaping and justifying decision? Does the system purport to accept the notion of "customary law" but reject the inherited general principles of mature societies? To what degree is there community participation in, and acceptance of, all procedures?

*Intelligence.* How effective and economic are specialized structures in bringing to the attention of decision-makers the information required for rational decision? How widely is available information shared in the community?

*Recommending.* How many different types of participants are permitted to engage in this function? How open is participation in advocacy of policies or decisions? Are opposition groups permitted or encouraged? Are the mass media of communication accessible to all?

*Invoking.* What is the degree in equality of access by all types of participants to the invoking machinery of the community? What participants are admitted to what arenas for invoking what prescriptions?

*Applying.* Is arrangement made or recommended for the impartial, third-party application of community prescriptions? Are appropriate procedures, and dispositions of effective power, afforded for prompt enforcement? Are procedures for enforcement compatible with human dignity?

*Appraising.* How effective are the structures afforded for appraising the economy and legality of decision? How open is the sharing of results of appraisals? May private groups make appraisals of the legality of government?

*Terminating.* How efficient is provision for the termination of obsolete prescription? Do the procedures afforded give effective expression to the demands of the people affected? What is the relative reliance upon termination by consensus of the parties affected and upon unilateral decision by one party? Is an appropriate balance sought and achieved between stability in expectations and necessary change, with minimum costs in terms of all values?

Concerning effective control, more specifically, the important general questions are two: What processes, structures and functions, of effective control are brought to bear in support of, and in turn receive reciprocal protection from authority? And, in contrast, what processes of effective power escape the control of authority? The first of these questions will be developed in some detail below. The second requires only brief illustration. The thrust of the inquiry is whether all participants in power

processes and all instruments of policy are effectively made subject to processes of authority.<sup>6</sup> In what degree do political parties, pressure groups, and other private associations achieve a privileged position above the law or are subordinated to the legal process? In what degree are the varying instruments of policy—diplomatic, ideological, economic, military—subjected to, or freed from the regime of law? More comprehensive illustration might of course outline detailed inquiry about democracy of access to, and dispersal of information about, effective power processes. The most complete inquiry would parallel that with respect to the process of authority.

## (2) *Features of Power Processes Protected by Law*

The first questions here relate to the allocation of competence, protected by processes of authority, between particular states and larger groupings, or the general community of states.<sup>7</sup> What inclusive competence is protected in the general community or larger groupings of states? What exclusive competence is protected in particular states? How economic is the balance achieved for the production and sharing of the values of human dignity for all mankind? Is it the balance which is best calculated to maintain minimal security, in the sense of freedom from intense coercion or threats of such coercion and freedom to promote the greatest production and widest sharing of other values? In what degree does the inclusive competence protected both secure democratic access by peoples to participation in decision-making which affects them and achieve an assumption of responsibility adequate to maintain application of inclusive policies in arenas both internal and external to particular states? In what degree does the exclusive competence protected secure states from arbitrary external intervention and promote freedom for initiative, experiment, and diversity in effective adaptation of policies to all the peculiarities of the most local contexts? Are technical concepts proffered by the particular system under inquiry—such as “international concern,” and equivalents, for protecting inclusive competence, and “sovereignty” and equivalents (including “domestic jurisdiction” “independence,” “equality,” and “non-intervention”) for the protection of exclusive competence—designed and interpreted in fact to promote a rational, productive balance between competences? Is

<sup>6</sup> Cf. Lipson, “The New Face of Socialist Legality,” 7 Problems of Communism (No. 4, July-Aug. 1958) 22, 29:

“What the reformers have not touched and will not touch is the political basis that necessarily prevents ‘socialist legality,’ Soviet-style, from meeting the standards of legality upheld by other countries. There will be no sure legal guarantees that the *troikas* and purges will not recur, that the cult of (some other) personality will not again become the religion of the state, and that terror will not lay waste another generation of Soviet citizens; indeed, there can be none as long as the party, and the elements of Soviet society striving for supremacy through or against the party, remain unwilling to grant effective autonomy to the legal system, keeping it above the political struggle as a safeguard of general order and liberty.”

<sup>7</sup> It is convenient to use the traditional words, “general community of states,” without imputation of universality, to refer to the largest grouping seeking common values.

"sovereignty," for example, subordinated to, or regarded as a part of, international law or is it conceived as a "discretionary power which overrides the law"?<sup>8</sup> Is "international concern" interpreted in practice to protect inclusive decision which is genuinely inclusive or used as a cloak to conceal arbitrary exclusive decision?

For the more detailed posing of these and other relevant questions, brief reference may be made *seriatim* to each of the important elements or phases in a power process: participants, arenas, bases of power, strategies, outcomes, and effects.

### *Participants*

Which of the effective participants in the world power process are accepted as full participants in processes of authority—that is, given access to authority structures and functions for the protection of their interests and subordinated to authority for insuring their responsibility to community policies? Which effective participants are admitted, or subjected, in lesser degree to what authority structures and functions? By what criteria are different types of participants accepted or rejected in varying degree? What territorially organized communities are accepted as authorized participants in what degree? What provision is made for regional groupings of territorial communities? Is the ultimate goal a monolithic "single state" or a pluralism of balanced regions? What rôle is accorded international governmental organizations? Are they conceded an independent rôle or regarded as mere diplomatic appendages of states? What rôle is accorded non-governmental groups? Are differences made between political parties and other private associations? Are individual human beings a recognized category of participants in processes of authority or are they regarded as mere objects of authority?

### *Arenas*

Are the various particular arenas provided for the performance of authority functions adequate to promote the resolution of controversies by persuasive, rather than coercive, means and to reduce to a minimum the number of decisions not taken in accordance with authority?

Are special criteria, other than those stipulated for the identification of generally authorized participants, imposed to regulate admission to particular arenas? When a new territorially organized community emerges, by changes in effective control and authoritative arrangements, from an older community, do authoritative prescriptions make a distinction between emergence by consent and by violence? Between indigenous internal change and change stimulated by external intervention by peoples from other communities? Between change in the name of a totalitarian world order and in genuine demand for indigenous freedom? Do relevant prescriptions achieve an economic balance between maintaining security in

<sup>8</sup> Jenks, note 1 above at 120.



the larger community and promoting genuine self-direction in the lesser communities?

Are principles and procedures about membership, representation, and credentials stipulated for international government organizations compatible with easy access by all interested participants or do they create controversy and continuous world tension?

Is provision made for the reciprocal recognition and protection by governmental participants of the private associations they variously charter and foster for the greater production of specific values, such as wealth and enlightenment? How open is the access of individual human beings to governmental arenas, political parties, pressure groups, and private associations?

Are decisions about recognition, membership, representation, and credentials established as inclusive or exclusive?

### *Bases of Power*

#### *A. Resources*

By what criteria may exclusive claims to resources such as land masses, internal waters, and airspace be established? Is peaceful use and succession protected against violent seizure?

By what criteria is a balance achieved between exclusive and inclusive claims to sharable and strategic resources, such as the oceans, international rivers, international waterways, Polar regions and outer space?<sup>9</sup> Does the balance achieved promote the most productive and conserving use for the benefit of all?

#### *B. People*

By what criteria are varying degrees of control over people as bases of power honored and protected? What discriminations are permitted between "nationals" and "aliens"? By what criteria may a territorial community impose its nationality upon or withdraw its nationality from an individual for varying purposes? What are the limits upon naturalization and denaturalization? What selective admissions, exclusions, and corrective measures, with respect to both physical access to territory and all value processes, is a territorial community permitted to impose for power purposes upon its nationals and upon aliens? Do relevant prescriptions protect the utmost individual voluntarism in affiliation and activity that is compatible with a reasonable community security?

#### *C. Institutions*

How adequately are participants protected in their freedom of decision, as to both internal and external arrangements, from external dictation?

<sup>9</sup> These questions are developed in more detail in McDougal and Burke, "Crisis in the Law of the Sea: Community Perspectives Versus National Egoism," 67 Yale L. J. 539 (1958); McDougal and Lipson, "Perspectives for a Law of Outer Space," 52 A.J.I.L. 407 (1958).

Are principles of non-intervention fashioned to catch the more subtle modalities of coercion or only the cruder, physical forms? Are protected freedoms appropriately balanced by imposition of responsibility for the maintenance of internal institutions adequate to the performance of community responsibility? Is "self-determination" invoked to secure and protect a genuine self-direction of people or merely as a slogan to promote destruction of existing communities?

Is the equality between states which is protected a real equality in sharing of power and responsibility or is it a pseudo-equality which defers by verbal legerdemain to the security considerations of the greater powers? Is it tacitly expected that discriminations will be made which are not explicitly provided?

### *Strategies*

With respect to each instrument of policy—diplomatic, ideological, economic, and military—what are the prescriptions about who can employ the instrument, with respect to whom, for what objectives, under what conditions, by what methods, and with what intensities in effects?

How adequate are prescriptions for promoting the persuasive, non-coercive use of instruments of policy?<sup>10</sup> Are adequate immunities and facilities afforded to diplomats and others to facilitate negotiation? Does the "peaceful settlement" demanded by a system express a real willingness to compromise and to seek an integrated solution in community of interest or is it a mere tactic in the poisoning of an opponent for ultimate destruction? Are provisions about the formation, application, interpretation, and termination of agreements rationally designed to protect the reasonable, mutual expectations of parties? When the "validity" of agreements is found, not in the mutual expectations of parties, but in alleged *objective* conditions, by what criteria is it decided which conditions create validity and which do not?

Do prescriptions contain a clear prohibition of the use of instruments of policy in modalities so coercive that they threaten a target participant's continuing bases of power and independence in decision? Does the prohibition upon too intense coercion extend to all instruments of policy, singly or in combination, or only to the military instruments? Is the use of force limited to the conservation, rather than to the expansion of values? Do prescriptions in the law of war about permissible combatants, areas of operations, objectives of attack, instruments and means of attack, and de-

<sup>10</sup> The distinction between persuasion and coercion may be clarified in terms of the number and cost of alternatives open to a participant. By persuasion we refer to interactions which leave open a number of alternatives with expectations of high gain and low cost. By coercion we refer to interactions which leave open few alternatives, with expectations of little or no gain and high costs.

We assume that the participants consciously pursue a range of realizable alternatives in representative situations in the social process. This assumption is necessary to indicate that people who have been trained to demand and expect few alternatives are not free.

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degrees of destruction, achieve a reasonable balance between humanitarianism and military necessity? Do the prohibitions of coercion and violence impose a community-wide responsibility or are "neutrals" tolerated?<sup>11</sup>

### *Outcome and Effects*

By what criteria—territoriality, nationality, passive personality, protective, universality, et cetera—are states accorded exclusive competence to prescribe and apply law for particular events or value changes? By what criteria—"acts of state," "immunities," et cetera—is it expected that a state which has acquired effective control over persons or resources will defer in decision to the law prescribed by another state? What varying degrees of competence are accorded states with respect to events within their own territory, in the territory of other states and in areas open to many or all? Do relevant prescriptions both permit states substantially affected in their community value processes by particular events to assert competence over such events and, when two or more states are so affected, promote compromise by requiring claimants to take into account the degree of involvement of the values of others in the same or comparable events? Do the prescriptions as a whole establish an appropriate stability in the expectations of participants that controversies will be handled in agreed ways without the disruptions of arbitrary assertion of power? Do they achieve an appropriate balance between subordinating non-governmental participants—individuals and private associations—to inclusive community authority and freeing such participants from parochial and arbitrary restraint for creative initiative in ordered exploitation of the world's resources, sharable and non-sharable?

Do prescriptions about aggregate changes—state and governmental succession—achieve a necessary balance between continuity in the application of general community policy and freedom for local communities to direct internal changes as they deem their unique conditions to require?

### *(3) Features of Basic Value Processes Protected by Law*

Ideally our inquiry here should extend to detailed examination of all the remaining community value processes—such as with respect to wealth, enlightenment, respect, well-being, skill, rectitude, and affection or congenial personal relations—in a manner comparable to that employed above with respect to power processes. Such inquiry would survey the degree to which authority has been brought to the protection of claims made with respect to general participation in interactions in which a particular value is shaped and shared, to access to certain particular situations of shaping and sharing, to continuing control of certain values as base values to affect the shaping and sharing of the value demanded, to the employment of strategies

<sup>11</sup> More detailed inquiry is outlined in McDougal and Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," 67 Yale L. J. 771 (1958).

of varying degrees of persuasion and coercion in interactions, and to certain outcomes in enjoyment or consumption of the value demanded. An omnipresent question would, of course, be with respect to each detail of every process whether participation is kept open and free to access by all interested parties or reserved as monopoly for a few.

For brief indication of the general method of inquiry we make reference only to a few important questions with respect to certain important values. We begin with "security," in its *maximum* sense of the sum of position, potential and expectancy with respect to all values, and then proceed to other values.

### *Security*

By "security" we here refer to demands for the maintenance of a public order which affords full opportunity to preserve and increase all values by peaceful procedures, free from more than a minimum level of coercion or threats of such coercion. In terms of the general analysis of power the questions grouped under the rubric of security emphasize, not so much the sharing as the mode by which the social process is carried on. Obviously the fundamental goal of human dignity commits us to the minimum use of coercion compatible with the most advantageous net position for all value outcomes.

For inquiry into any particular system, some of the more general questions may be indicated as follows: What policies are recommended as appropriate for the international community in regard to coercion? What objectives are asserted as permissible, and what impermissible, for employment of coercion? What operational meaning is given to proclaimed policies in terms of policies sought in fact? How are proclaimed and actual policies translated into specific conceptions of permissible and impermissible coercion? What, on the one hand, are the recommended conceptions of "aggression," "breaches of the peace," "threats to the peace," and "intervention," and, on the other, of "self-defense," "collective self-defense" and "police action"? Are these concepts given an operational meaning which in fact authorizes, and promotes, the defense of independence and territorial integrity? Are all instruments of coercion, including the techniques of externally instigated *coup d'etat*, brought within their compass? What factors in the context of the world arena are recommended to decision-makers for consideration in the making of specific interpretations in concrete instance? What structures of community authority are approved and recommended for application and enforcement of community policies? What recommendations are made about the procedures by which decisions are to be taken? What specific sanctions are approved and recommended for securing conformity to community policies? Is there willingness to place adequate effective power at the disposal of community organization or agency? Is there willingness to take the measures in reference to other values, such as in regard to standards of living, freedom of communication and inquiry, respect for human dignity, which are necessary to predispose peoples to the maintenance of a secure public order?

*Wealth—Economic Growth and Trade*

The demand of the lower income groups and nations around the globe to live a better life in the material sense has confronted the world community with most acute problems. Important questions about any projected system of world public order are: Does this order protect an economy which seeks an appropriate division of labor and the development and exploitation of resources on a world (or universal) scale or some lesser scale? By what policies, persuasive and coercive, are resources allocated? Do these policies embrace the most productive sharing of sharable resources? Are appropriate institutions provided for planning and development functions? What balance is achieved between the public and the private control of resources, or between central and decentralized control? Does this balance promote or retard the democratic functioning of other value process? Are wealth considerations subordinated to power considerations? How adequate is the protection and regulation of private claims to resources, and of the wealth activities of private associations across state lines? Are appropriate institutions provided for the most productive international exchange? What accommodation is afforded between free markets and state trading?

*Respect—The Articulation and Implementation of Human Rights*

The criterion of human dignity is most obviously applicable in relations including the degree of effective freedom of choice given to individuals in society. To respect anyone is to protect his choosing function so long as its exercise does not seriously imperil the corresponding freedom of others. For inquiry into how diverse systems of public order have distinctive approaches to all that affects human rights, we suggest questions as: Does this system begin with a presumption in favor of private choice? In favor of privacy? Does it provide equality of access to value processes upon grounds of merit or foster discriminations based upon caste, race, alienage, color, sex and so on? Does it prohibit or permit value deprivations incompatible with common humanity? Does it provide positive assistance to individuals on the basis of common humanity in overcoming handicaps? For what territorial community does the system demand human right? What specific content does it recommend, and reject, for international prescription, covenant or customary? Does this content embrace all or only a few values? How closely does it approximate, exceed or fall short of, such demands as are asserted in the Universal Declaration of Human Rights? What particular modalities, by inclusive decision, for the implementation of particular human rights does it accept or reject? Is there acceptance of disinterested, third-party decision?

*Enlightenment and Top Skills*

It is generally recognized by observers of the world scene that barriers to the gathering, transmission and dissemination of current information of

events around the globe help to sustain the local monopolies of intelligence that stand in the path of peace and order. Further, the enormous significance of scientific and technological know-how has emphasized the importance of prompt enlightenment as to fundamental discoveries about nature or society.

The relevant questions for spotlighting divergence in approach are as above: What positive facilities, governmental and private are afforded for promoting inquiry, communication, education and training? How open is access to all processes? Are discriminations made on grounds other than merit? Is freedom of expression, assembly, and association encouraged? Does the system promote the sharing of information, scientific knowledge, and cultural exchange, across state lines? What content and modes of implementation are proposed for international prescription? What limits are imposed upon the use of the ideological instrument for purposes of coercion?

### *Well-Being*

The importance of maintaining optimum standards of safety, health, and comfort is as axiomatic as the interdependence of all peoples with respect to such standards. Relevant questions relate both to the facilities provided—including all degrees of governmental involvement—for medical care, prevention of disease, healthful housing, appropriate food and clothing, sanitation, working conditions, leisure and recreation, et cetera, and for the area of community concern and effective prescription and application of policy.

### *Rectitude*

The reference here is to the consensus in conceptions of right and wrong sufficient to support all other institutional patterns of the world community toward which we aim. A society of human dignity implies a high degree of unity as to goal values and to the non-coercive practices by which goals are clarified and put into effect. More specifically, what is involved is a high degree of effective application in public and private of the formal standards of responsibility which are essential to attain and maintain the desired society.

Immediate questions relate to varying conceptions of individual and collective responsibility in national and international systems of criminal law and to accommodations between diverse systems, by extradition, protection of political offenders, rights of asylum, and so on. More long term questions relate to potentialities for adjusting national criminal laws and procedures to more comprehensive unities, for adapting local systems of ethics (with or without religious and metaphysical derivation) to more comprehensive unities, and for adapting prevailing moral sentiments for larger unities. Recurrent inquiry seeks the degree of freedom of choice in beliefs about right and wrong and the adequacy of facilities for the enjoyment of rectitude beliefs.

### *Affection (Including Loyalties)*

Goals here include the development of a sense of belonging to the whole community of mankind and concern for the common good (positive identification), the spread of congenial personal relationships in all groups regardless of cultural or class characteristics, and the development of non-destructive human personalities capable of entering into friendly contact with others. Relevant questions relate to authoritative formulae and procedures affecting the comprehensiveness of loyalties and memberships and the congeniality of personal relations. Of especial concern are any potentialities for adapting local doctrinal systems and sentiments to larger loyalties and for adjusting national and international prescriptions for facilitating more comprehensive memberships. The humanitarianism in family law and the degree to which this humanitarianism is projected across state lines are of obvious pertinence.

### *What the Scholar Does in Gathering and Processing Data*

There remain for brief consideration some of the technical problems that relate to the operations by which scholars gather and process the data required to identify and appraise systems of public order. We shall briefly characterize the strategy by which the facts of any given community context can be obtained. Broadly conceived, the most promising strategy of inquiry moves from the well known to the less known, in this case implying that a beginning is made by employing the operations familiar to all legal scholars, then proceeding to the phases of the situation for which the social and behavioral sciences provide the sharpest instruments. Legal scholars in international law must take direct responsibility for the plan as a whole, and for the execution of those parts that require the traditional training of lawyers. It is also essential that the legal scholar work in close association with specialists from related fields whose contributions are called for. Briefly:

*Operation 1.* Establish the provisional identity of a public order system within a community context by means of an inventory of explicit legal formulae.

The inventory can be made by examining constitutional charters, statutes and doctrines purportedly applied by decision makers in specific controversies. What value patterns and basic institutional practices are given *explicit* protection or aid in fulfillment? What value-institution patterns receive *implicit* support (that is, what does the scholar infer from the formal material, even though the language is somewhat ambiguous)?

By extending research through past time, changes of trend in the public order system, as tentatively understood, can be described.

*Operation 2.* Add accuracy and detail to the inventory obtained by means of *Operation 1* by describing the frequency with which each prescription found in the legal formulae is invoked or purportedly applied in controversies.

In the formal decision process authoritative prescriptions are mentioned with varying degrees of frequency by the parties who seek to justify their claims, and by decision makers who are performing functions of invocation or application. It is also true that authoritative prescriptions may be ignored in circumstances to which they refer (as viewed by the scholar-observer). It is pertinent also to note that authoritative language is often referred to *outside* the formal decision process (for instance, between private negotiators). Moreover, prescriptions *might* have been used in factual situations outside the legal process, though actually no one invoked them in controversies difficult if not impossible to distinguish from those which were eventually brought to the formal attention of decision-makers.

The data gathered by *Operation 2* makes it possible to relate the language of authority more directly to the facts of control. As a matter of definition it will often be clarifying for the scholar to specify the minimum level of frequency of invocation and purported application that he requires before accepting a particular pattern of authority and control as "law." The information assembled by *Operation 2* makes it feasible to classify specific authoritative statements, not only as law but as obsolete or obsolescent or emergent law. By extending research historically the trends in the role of each statement can be revealed.

*Operation 3.* Analyze all other sources for the purpose of making a fuller identification of the systems of public order provisionally revealed by the proceeding operations. Describe the legal process in the context of the decision process as a whole, and of the social process within the entire community context.

Most of the scholarly effort at this phase is devoted to obtaining data by methods that are not conventional to traditionally trained legal scholars. Hence reliance is put upon the finding of specialists upon the value-institution processes of wealth, respect, well-being, and so on. Likewise specialists upon the inherited nature of man and the physical resources by which he is surrounded, and with which he interacts, are to be made use of. The data obtained in *Operations 1 and 2*, which deal with aspects of the legal process, must be put in the context of all categories of significant factors (culture, class, interest, personality, crisis).<sup>12</sup>

To some extent the procedures of data gathering in *Operation 3* will be the interview or participant observation. Insofar as materials must be gathered which are residues of the historical process the basic methods are those familiar to historians. The growing application of experimental method has resulted in the use of "pre-tests" whose purpose is to reveal the direction and intensity of the predispositions current in a given group. These devices open up the future possibility of proceeding in more informed fashion to devise facilitating strategies for the realization of public order objectives.

<sup>12</sup> Compact summaries of the methods and findings of contemporary social science can be found in UNESCO's International Science Bulletin. See further Lasswell, "The Scientific Study of International Relations," 12 Yearbook of World Affairs 1 (1958).



All the facts assembled in each operation above will of course be contributory to the five intellectual tasks to be performed by scholars in the fields of international law. The data will interact with the clarification of values, the characterization of trend, the analysis of conditioning factors, the projection of future developments, and the invention and appraisal of alternative policies for the optimum realization of the clarified values of human dignity.

*The Contemporary Challenge to Scholars*

For some decades scholars of international law have been preoccupied with the task of establishing that the subject of their professional concern was in fact law and could not be dismissed as a miscellany of maxims principally useful for the admonishing of decision-makers to act ethically. The implicit assumption appears to have been that unless the universality of international law is established, there is no international law whatsoever; and further, that the most effective means of moving the world toward a universal body of law is to assert its contemporary reality in fact.

It is high time that the community of scholars abandon a conception of their rôle in history whose principal effect is to condemn them to inaccuracy and futility. The inaccuracy consists in the assertion of universality in fact, and relative futility is demonstrated by the contemporary division of the globe into diverse systems of public order whose leaders use the appeal to universality as a pawn and a screen in the tactics of world power.

The challenge to scholars is to resume their proper function which is to assist all who will listen to distinguish clearly between the current facts of the global context and estimates of future developments—and between estimates of policy alternatives that will merely move the world closer to some universal system of law and public order, however unfree, and alternatives that will in fact foster the common objective so frequently proclaimed by the authorized spokesmen of existing nation states, namely, the goal of realizing human dignity in theory and fact.

More specifically the challenge to scholars of international law is twofold: (1) to develop a jurisprudence, a comprehensive theory and appropriate methods of inquiry, which will assist the peoples of the world to distinguish public orders based on human dignity and public orders based either on a law which denies human dignity or a denial of law itself for the simple supremacy of naked force; and (2) to invent and recommend the authority structures and functions (principles and procedures) necessary to a world public order that harmonizes with the growing aspirations of the overwhelming numbers of the peoples of the globe and is in accord with the proclaimed values of human dignity enunciated by the moral leaders of mankind.

In this perilous epoch of threatened catastrophe legal scholars have an opportunity of unparelled urgency to assist in performing at least two indispensable functions: the function of providing intelligence and of making recommendations to all who have the will and capability of decision.

As old orders crumble and dissolve under the ever-accelerating impact of scientific, technological and other changes, the future becomes increasingly plastic in our hands, holding out the possibility of moulding a world

order nearer to the aspirations of human dignity, or of losing out to the most ruthless and comprehensive tyranny that man has ever known.

The impact of scholarly research and analysis can be to disclose to as many as possible of the effective leaders, and constituencies of leaders, throughout the globe the compatibility between their aspirations and the policies that expedite peaceful co-operation on behalf of a public order of human dignity. In a sense the present incompatibility is already obvious to every individual who possesses even a modicum of authentic information about the chronic threat of accidental as well as deliberate disaster. Besides the aspiration to remain alive, and to keep family and nation alive, there are legitimate aspirations to remain in a potent power position for all values. Research and analysis can indicate to the leader even of non-democratic regimes which policies, if adopted, are likely to maintain them in an advantageous position, as they guide their peoples through peaceful transitions toward a more perfect realization of public orders of freedom and responsibility on a local and global scale.

Scholars are in a position to make, to apply, and to disseminate awareness of, the basic distinction between preferred goals and specific institutions. The goal of widespread participation in all values throughout the social process is the fundamental criterion of policy. This must receive specific form, for example, in institutional practices of popular government, of graduated income distribution, and of an open class system. It is of the utmost importance that particular institutional devices shall be open to continuous and competent investigation to assess the actual contribution that they are making to the overriding goal. Productive controversy can rage over the definition of human dignity in specific institutional terms, and also over the technical measurements applied by scholars to the appraisal of their operations. Instead of institutional symbols such as "capitalism" *versus* "socialism," "territorial" *versus* "functional" representation, "centralized" *versus* "decentralized" planning, considered abstractly and affirmed dogmatically, the focus of attention and debate can usefully shift to the appraisal of contemporary structures according to their positive or negative impact upon present and prospective value-shaping and sharing. ✓

The task of appraisal, as we have continually emphasized, is more than the examination of statutes, treaties, regulations, and proclaimed judicial doctrines. The relevant context that requires investigation is the constellation of factors affecting the creation and interpretation of authoritative language throughout the entire decision process. Under ascertainable circumstances appropriately authoritative language can foster the realization of effective systems of public order at every level of inclusiveness up to and including the community of mankind, systems consistent and compatible with the overriding goal of human dignity. As a contemporary step in the direction of such universality it is imperative that spokesmen for the field of international law cease proclaiming the present universality of international law, and drop the assumption that it is a matter of indifference what system of public order achieves universality. This is the challenging opportunity that "our time of trouble and "age of anxiety" offers to all scholars everywhere. ✓

# THE RÔLE OF ADJUDICATION IN INTERNATIONAL RIVER DISPUTES

THE LAKE LANOUX CASE

BY JOHN G. LAYLIN

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AND

RINALDO L. BIANCHI

*Of the Michigan and District of Columbia Bars*

There are some who say that adjudication has no rôle to play in the settlement of disputes over the uses of waters of international rivers. One author writes:

Should independent nations ever be so poorly advised as to submit one of their rivers to litigation in a world court, they will have started down the tortuous road, from which there may be no return. . . .

"Once a State is certain about its rights, or part of them," he reasons, ". . . these rights will stand in the way of easy agreement."<sup>1</sup> Another author states:

. . . there is absolute unanimity amongst various writers who have made a special study of the problem in reaching the conclusion that water disputes present a classic example of disputes which cannot be solved in any objective manner by juridical decisions.<sup>2</sup>

Neither author mentions the unanimously adopted resolutions of various Bar Associations recommending that co-riparian states resort to adjudica-

<sup>1</sup> Scott, "Kansas v. Colorado Revisited," 52 A.J.I.L. 432, 454 (1958). References in the text to adjudication or arbitration will include every kind of impartial third-party determination.

<sup>2</sup> "The Problem of the Indus and its Tributaries—An Alternative View," 14 The World Today 266, 275 (1958). A large number of states have entered into agreements to arbitrate or adjudicate river disputes that defy solution by agreement. The authors of these treaties do not share the view quoted in the text.

In fairness to the authors of the articles cited in this note and in note 1, above, it must be acknowledged that their articles may have been written before they had an opportunity to evaluate the results of the Geneva Conference on the Law of the Sea (convened on Feb. 24, 1958, and adjourned on April 28, 1958). While this Conference did not deal with the law governing international rivers, the notable support given by it to the settlement by adjudication of disputes concerning the uses of other waters of common interest might have fundamentally affected the views of these authors. See Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, 52 A.J.I.L. 862 (1958), and provisions for adjudication of disputes in the Convention on Fishing and Conservation of the Living Resources of the High Seas, *ibid.* at 851, 854.

tion if they fail to settle their disputes by agreement.<sup>3</sup> The present writers, who are currently engaged in seeking to resolve two international river disputes by negotiation,<sup>4</sup> agree that adjudication can play and has played a useful rôle in promoting solution of such disputes.

What, it may be asked, differentiates river disputes from other disputes—particularly from those also involving the sharing of a common resource? Disputes over fishing rights on the high seas have, for instance, not infrequently been referred to adjudication. No one, so far as we are aware, has asserted that this has set a bad example. What, then, is peculiar to the problems of sharing the use of the waters of an international river? There are some important differences. In the first place, the geographical position of one riparian often is such that it can adversely affect the rights of others without acting outside its own boundaries. A lower riparian has, for instance, certain advantages, not enjoyed on the high seas, over the shipping interests of an upper riparian or non-riparian; similarly an upper riparian has an advantage over, say, the irrigation interests of a lower riparian. These advantages led in times past to the assertion that the physical might measured the legal right.<sup>5</sup> Though this view has been discredited,<sup>6</sup> apologists for states that still seek to use their geographical advantage as leverage to strike the best possible bargain look askance at any concept of impartial third-party determination.

International river disputes may be distinguished in another way. The common remedy of response in monetary compensation following a breach of an international obligation is rarely adequate in the case of a substantial change in the regime of a river system on which nations depend for their livelihood. A man dying of thirst cannot be revived with monetary compensation for his water, even when tendered in advance. The

<sup>3</sup> See Principle VI of Resolution adopted by the International Law Association (I.L.A.) at its Forty-Seventh Conference held in 1956 at Dubrovnik, Yugoslavia, quoted below, p. 76, and Principle 2 of Resolution adopted by the Inter-American Bar Association at its Tenth Conference held in 1957 at Buenos Aires, Argentina, quoted below, p. 73. See also note 21 below. In a Resolution on the Uses of the Waters of International Rivers, the 48th Conference of the International Law Association held at New York in September, 1958, unanimously recommended that in case of a failure of consultations to produce agreement within a reasonable time, the riparian states should seek a solution "in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedures envisaged in Article 83 thereof." Art. 33 of the Charter includes "arbitration" and "judicial settlement."

On May 17, 1958, the Committee on Uses of International Waters of the American Bar Association (A.B.A.) approved a resolution which upholds the duty of riparian states to refrain from unilateral action in case of disagreement with co-riparians, and supports the U. S. Department of State (see note 20 below), the Inter-American Bar Association (see note 21 below) and the Committee on the Uses of Waters of International Rivers of the I.L.A. (see note 21 below) in their views that adjudication is an appropriate means of resolving international river disputes. See comments on above resolution of A.B.A. Committee in Senate Committee on Public Works, Lake Michigan Water Diversion, Sen. Rep. No. 2482, 85th Cong., 2d Sess., pp. 15, 24 (1958).

<sup>4</sup> The Helmand and the Indus river disputes. The writers are in a law firm that is currently advising Iran and Pakistan.

<sup>5</sup> See note 41 below.

<sup>6</sup> See notes 36 and 41 below.

consequences to a nation may be no less fatal, as noted by David E. Lilienthal after visiting an area in Pakistan from which India had temporarily withheld irrigation supplies.<sup>7</sup> There is such interdependence between the riparians of an international river system that action by one within its own borders is likely to affect the others beneficially or adversely. It is therefore next to impossible for one state to adopt a view of its rights and interests and act on them without passing and executing judgment on the corresponding rights and interests of its co-riparians. It has been observed that co-riparians are like partners.<sup>8</sup> This interdependence of riparians is such as to create special rights and duties. Adjudication accordingly has a special rôle in international river disputes.

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Most disputes over the distribution amongst co-riparian states of the benefits to be derived from an international river involve disagreements over questions of fact. Even where the primary facts are known and agreed upon, differences are likely to arise as to the engineering and economic conclusions to be drawn from the basic data. Such differences are to be expected. Where a change is proposed and there is no disagreement as to the applicable principles of law, and consultation fails to resolve the differences, experience has demonstrated the desirability of proceeding with mediation or conciliation through a good officer assisted by a staff of objective technical experts.

Even in disputes involving disagreement over the governing principles of law, or their application, the parties are likely to benefit most if the final solution is worked out by procedures leading to agreement. "The most satisfactory settlement of disputes of this kind," one commission concluded, "is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided

<sup>7</sup> "Pakistan includes some of the most productive food-growing lands in the world in Western Punjab (the Kipling country) and the Sind. But without *water for irrigation* this would be desert, 20,000,000 acres would dry up in a week, tens of millions would starve. No army, with bombs and shellfire, could devastate a land as thoroughly as Pakistan could be devastated by the simple expedient of India's permanently shutting off the sources of water that keep the fields and the people of Pakistan alive. India has never threatened such a drastic step, and indeed denies any such intention—but the power is there nonetheless." (Lilienthal, "Another Korea in the Making?" *Collier's*, Aug. 4, 1951, p. 58, col. 1.) India has since threatened to cut off Pakistan's supplies in 1962. Speech of Shri S. K. Patil, Minister for Irrigation and Power, in the Lok Sabha on March 26, 1958. See press release of Information Service of India, Embassy of India, Washington, D.C., M.R. 27/58, June 13, 1958, for comments on Mr. Patil's statements. There are, however, signs of better second thoughts. According to the July 15, 1958, issue of *India News*, a periodical of the Embassy of India in the United States, Mr. Patil has in a later speech (June 30, 1958) indicated that "India will do nothing to affect prejudicially riparian rights of Pakistan."

<sup>8</sup> "International law recognizes the right on the part of every riparian state to enjoy as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation . . ." *Société Energie Electrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri* (Decision of Italian Court of Cassation, Feb. 13, 1939). *Annual Digest of Public International Law Cases* (Lauterpacht) 121, 122, No. 47 (1938-40).

by political or administrative frontiers.”<sup>9</sup> This is the first of six principles formulated by the “Rau Commission” set up to resolve a dispute over a proposed change in the physical regime of the Indus system of rivers. It is significant that this encouragement to resolution by agreement came from a body empowered to make recommendations to a central government for an authoritative determination of the issues involved.<sup>10</sup> But the Commission also demonstrated one of the rôles of adjudication. The parties, guided by the six general principles<sup>11</sup> as applied by the Com-

<sup>9</sup> Report of the Indus [Rau] Commission and Printed Proceedings 10 (Simla, 1941; reprinted in Lahore, 1950).

<sup>10</sup> The United States Supreme Court has often indicated that resolution by agreement is generally the preferable method of settling water disputes. In *Hinderlider v. LaPlata Company*, 301 U. S. 92, 105 (1937), Justice Brandeis said:

“... The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was a relatively simple one of a boundary. In two such cases this Court suggested ‘that the parties endeavor with the consent of Congress to adjust their boundaries.’ In *New York v. New Jersey* (256 U. S. 296, 313), which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific.”

In *New York v. New Jersey*, 256 U. S. 296, 313 (1921), the Court said:

“We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and by mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.”

<sup>11</sup> The Commission was appointed in 1941, pursuant to the Government of India Act, 1935, to report upon a complaint by the Province of Sind concerning injuries to it threatened by proposals of the Punjab, an upstream riparian, to impound and divert waters of tributaries of the Indus River. The Chairman of the Commission was Sir Benegal N. Rau, then a judge of the Calcutta High Court and later a member of the International Court of Justice. At the outset, the Commission proposed for comment by the parties certain general principles of law, and these were accepted unanimously by the primary disputants and the five other States and Provinces which appeared in the proceedings. These principles are stated in the Report, *op. cit.* note 9 above, at 10–11 as follows:

“Subject to correction in the light of what you may have to say, the following principles seem to emerge from the authorities:

“(1) The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political or administrative frontiers. (Madrid Rules of 1911 and Geneva Convention, 1923, Articles 4 and 5.)

“(2) If once there is such an agreement, that in itself furnishes the ‘law’ governing the rights of the several parties until a new agreement is concluded. (Judgment of the Permanent Court of International Justice, 1937, in the Meuse Dispute between Holland and Belgium.)

“(3) If there is no such agreement, the rights of the several Provinces and States must be determined by applying the rule of ‘equitable apportionment’, each unit getting a fair share of the water of the common river. (American decisions.)

“(4) In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one: ‘priority of appropriation gives superiority of right’. (*Wyoming v. Colorado*, 259 U. S. 419, 459, 470.)

mission to the specific issues blocking an accord, were able to work out the technical details involved and to arrive at the desired agreement.<sup>12</sup> Procedures other than direct negotiation, including adjudication, can thus play a constructive rôle in removing the obstacles to agreement.<sup>13</sup>

This rôle appears to have been overlooked by the authors who have opposed reference of river disputes to impartial third-party determination. Focusing as they do on the positive advantages of agreement, they are carried beyond the tenable position that this is the most satisfactory means, to an argument that negotiation is the only desirable means.<sup>14</sup> They ignore the constructive part which third-party resolution of stubborn issues can play in promoting agreement. In looking only at the positive results flowing from accomplished compacts or treaties, they overlook the negative results of refusal to arbitrate away the stumbling blocks to agreement.

The contention that agreement by negotiation is the only means of resolving river disputes has, in an interesting way, been itself a subject of arbitration. That arbitration was possible, of course, only because of agreement to arbitrate. When the advocates of resolution by negotiated agreement refine their position to include acceptance of an obligation to arbitrate issues that resist solution by negotiation, their position will be purged of its negative character.

The arbitration referred to is the recent one between France and Spain. It is known as *L'affaire du Lac Lanoux*.<sup>15</sup> The issue submitted was whether a change proposed by France in its part of a river system shared

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"(5) For purposes of priority the date of a project is not the date when survey is first commenced, but the date when the project reaches finality and there is a fixed and definite purpose to take it up and carry it through. (*Wyoming v. Colorado*, 259 U. S. 419, 494, 495; *Connecticut v. Massachusetts*, 282 U. S. 660, 667, 673.)

"(6) As between projects of different kinds for the use of water, a suitable order of precedence might be (i) use for domestic and sanitary purposes; (ii) use for navigation, and (iii) use for power and irrigation. (*Journal of the Society of Comparative Legislation, New Series, Volume XVI, No. 35, pages 6, 7.*)"

As to the question of priorities the Commission continued: "We may observe in passing that the ranking of different uses in a particular order of precedence depends on the circumstances of the river concerned. And even as regards the same river, different authorities may take different views." (*Ibid.* at 11.)

<sup>12</sup> The parties agreed on the distribution of the waters and, in accordance with the report of the Commission, that one party was bound to reimburse the other for works to be built by the latter for the benefit of the former. The amount to be paid was not agreed upon and the question would have been referred to His Majesty in Council for a final decision but for the interposition of Partition and the establishment of India and Pakistan as independent countries.

<sup>13</sup> The Indus Commission played a rôle somewhat between conciliation and adjudication or arbitration. It won agreement to the principles, then applied them in the form of recommendations to the central authority, which had the power to, and in all likelihood would, implement them in its orders.

<sup>14</sup> Scott, note 1 above; "The Problem of the Indus and its Tributaries—An Alternative View," note 2 above.

<sup>15</sup> *Affaire du Lac Lanoux*, Sentence du Tribunal Arbitral, Paris, 1957 (hereinafter cited as *Sentence*). The Award appears also in 29 *Revue Gén. de Droit Int. Pub.* 79-119 (1958); and is digested below, p. 156.

with Spain would, if carried out without the prior agreement of Spain, constitute a violation of stated treaties.<sup>16</sup> The Tribunal reasoned that, in determining whether Spain's agreement was necessary, it should first find whether the change would affect Spain adversely. It found that Spanish interests would not be adversely affected. The question then became: Is agreement necessary before making on French territory a change that would not adversely affect Spain? The Tribunal examined this under *le droit international commun* as well as under the treaties between Spain and France. The treaties, it found, did not require prior agreement. The question thus resolved itself to this: Is prior agreement required under customary international law to a change in the regime of an international river by a riparian that sustains before an arbitral tribunal its contention that the change will not adversely affect the interests of its co-riparian?

The Tribunal held that under these circumstances agreement was not necessary. The case is not significant for this holding. It is significant for its demonstration of the way a stumbling block to agreement can be removed by arbitration. So long as Spain objected, believing, as it did, that the proposed change might adversely affect its interests and that France would be violating its treaty obligations, this objection—given a French desire not to offend Spain—effectively blocked both agreement to the change and harmless change without agreement. The arbitration removed this stumbling block, thereby permitting the parties to set to work agreeing upon details.

The holding of the Tribunal goes further than to demonstrate this rôle of arbitration in promoting agreement. It brings out that insistence by one side upon the right to be the sole judge of the merits of its own contentions opens the door to possible international liability.<sup>17</sup> This will bring little comfort to those who, while contending that agreement is the only way of settling an international river dispute, have built this contention on the premise that, lacking agreement, neither side is under any legal prohibition to make unilaterally whatever changes the advantages of its geographic position permit.<sup>18</sup>

The alternative to agreement, the Tribunal said, is normally arbitration whenever the judgment of two states, arrived at reasonably and in good faith, is in contradiction as to the facts or as to the applicable rules. In such a case,

there would appear to be a dispute which the parties normally seek to resolve by negotiation, or in the alternative, by submitting to the authority of a third party . . . [Authors' translation.]<sup>19</sup>

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<sup>16</sup> Boundary Treaty of Bayonne of May 26, 1866, and the "Acte Additionnel" of the same date. The texts of these treaties can be found in 56 Brit. and For. State Papers 212 *et seq.*

<sup>17</sup> *Sentence* at 50.

<sup>18</sup> "The Problem of the Indus and its Tributaries—An Alternative View," note 2 above, at 274; see also note 86 below.

<sup>19</sup> *Sentence* at 50.



The commitment to arbitrate will frequently induce agreement by negotiation. Before discussing this rôle of arbitration, there is a middle position suggested by a conclusion in a legal memorandum submitted by the Department of State to a committee of the United States Senate in April, 1958. The State Department was facing the problem raised by the fact that some changes in the regime of an international river may have consequences so serious that it is not enough for a state proposing to make the change to stand ready to compensate in the event that it should be held that its action affected adversely the legal rights of a co-riparian. It faced also the problem that in such a situation it would be as unsatisfactory were the objecting co-riparian to arrogate to itself the right to judge whether its rights would be adversely affected as for the riparian proposing the change to be the judge of the correctness of its position. Its conclusion is as follows:

3(a) A riparian which proposes to make, or allow, a change in the existing regime of a system of international waters which could interfere with the realization by a co-riparian of its right to share on a just and reasonable basis in the use and benefits of the system, is under a duty to give the co-riparian an opportunity to object.

(b) If the co-riparian, in good faith, objects and demonstrates its willingness to reach a prompt and just solution by the pacific means envisaged in Article 33 (1) of the Charter of the United Nations, a riparian is under a duty to refrain from making, or allowing, such change, pending agreement or other solution.<sup>20</sup>

The pacific means envisaged in Article 33 (1) of the Charter of the United Nations include arbitration and judicial settlement. A similar conclusion by the Committee on the Uses of Waters of International Rivers of the American Branch of the International Law Association recognizes the duty of a riparian to refrain from making changes so long as an objecting co-riparian "demonstrates its willingness to reach a prompt and just solution by the pacific means envisaged in the Charter of the United Nations, including a determination by the International Court of Justice or other agreed tribunal."<sup>21</sup>

The above formulations recognize the rôle that adjudication can play, even though the parties are unwilling to commit themselves to compulsory adjudication in all cases. In effect they say that if a co-riparian wishes to hold up changes in a river regime on the ground that they would adversely affect its rights, it may do so only if it is willing to have the validity

<sup>20</sup> Memorandum of the U. S. Department of State, 85th Cong., 2d Sess., Sen. Doc. No. 118, pp. 90-91 (1958), prepared by William L. Griffin, entitled "Legal Aspects of the Use of Systems of International Waters with Special Reference to the Columbia-Kootenay River System under the Treaty of 1909 and under Customary International Law" (hereinafter cited as "Dept. of State Memorandum").

<sup>21</sup> Principle III in Principles of Law and Recommendations on the Uses of International Rivers—Statement of Principles of Law and Recommendations with a Commentary and Supporting Authorities Submitted to the International Committee of the International Law Association by the Committee on the Uses of Waters of International Rivers of the American Branch, p. xi (Washington, D. C., 1958, Lib. Cong. Cat. Card No. 58-12111; hereafter cited as "Principles . . . American Committee"). Cf. Principle 3 of Resolution of Inter-American Bar Association, quoted below, pp. 73-74.

of its objection tested by third-party determination. The rule of law as formulated by the State Department and by the American Branch Committee of the International Law Association protects the proposing riparian from a stalemate that in effect would amount to a veto. This rôle of arbitration provides a means of protecting each side from the unfortunate consequences of acts justified only by unilateral decision.

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Let us now turn to the even greater rôle that can be played by a commitment given by each side to resort to third-party determination. A commitment to submit to adjudication may prevent stalemates and promote a more constructive solution by inducing restraint and reasonableness on both sides.<sup>22</sup> This is beautifully illustrated in the *Lake Lanoux Case*. The question submitted in the case of Lake Lanoux was, it will be recalled, a relatively simple one. The dispute in its earlier stages was anything but simple. But on July 10, 1929, twelve years after the beginning of the dispute, France and Spain signed a general arbitration treaty under which they agreed to submit all unresolved disputes either to arbitration or to adjudication by the World Court. As will be seen, the recognition of this obligation, together with the realization that new uses coming later into being might induce an impartial tribunal to award less than could be won by mutual accommodation, undoubtedly encouraged the successive concessions that were made, until the only issue that remained was, as has been seen, a very simple one.

Lake Lanoux lies wholly within French territory and is fed entirely by streams rising in France. It empties naturally through a tributary of the Carol which crosses into Spain and empties into the Segre River. Since 1917, France and Spain had been unable to come to terms on the question of the right of France to proceed with the utilization of the waters of Lake Lanoux under several plans advanced over the years. France contemplated using the Lanoux as a reservoir and then diverting its waters to the basin of the Ariège, a wholly French river, where it could profit by a precipitous drop for the production of electric energy.<sup>23</sup>

<sup>22</sup> "It is important, too, to bear in mind that the mere fact that a court is open for dealing with disputes and that the parties may be compelled to appear before it is often enough to spur parties into settling their differences amicably out of court. This might well be the case in some international disputes as well as in cases of a private nature." "International Order Under Law," address by William P. Rogers, Attorney General of the United States, prepared for delivery at the Forty-Eighth Biennial Conference of the International Law Association, New York University Law Center, New York, N. Y., Sept. 2, 1958; Mimeographed Release of the Department of Justice, p. 9 (1958); 39 Dept. of State Bulletin 536 at 539 (1958).

<sup>23</sup> According to the French *Mémoire*, Lake Lanoux, one of the largest Pyrenean lakes, lies at an altitude of approximately 2,174 meters, is about three kilometers in length and 500 meters in width, and has a surface of 86 hectares. Its depth is at some points as great as 58 meters. The volume of water it collects naturally is about 17 million cubic meters. The planned construction of a barrage of the height of 45 meters would turn Lake Lanoux into a reservoir capable of storing approximately 70 million cubic meters of water. The water would be channeled through a tunnel toward

It was physically possible for France to return to the Carol from a higher reach of the Ariège water equivalent (in amount and rate of flow) to the total diversion. The original French proposal contemplated, however, no replacement of supplies to the Carol River, notwithstanding that there were important irrigation uses in Spain dependent upon such supplies. It appears that France intended to provide only monetary indemnity to Spain for the losses to be suffered by reason of the proposed diversion. This was an extreme position and it drove Spain to an opposite extreme. Spain replied that France could not lawfully change the natural course in France of a river flowing into Spain without the prior consent of Spain, even though the flow at the border were to remain unchanged.

France then offered to return to the Carol River a flow adequate to meet "Spain's real needs." It may be assumed that this represented what the French considered to be necessary to maintain what France considered to be Spain's existing uses. This concession did not win Spain's consent.

The French next offered to return to the Carol an amount of water from the Ariège equivalent to the full inflow at Lake Lanoux. Spain continued to object on the ground that the change would subject the flow into Spain to French control. To meet this, the French offered to permit a Spanish representative with the privileges of a consular agent at all times to be present to join in the measurement of the inflow of Lake Lanoux and to verify that an equivalent return was being made from the Ariège. This added concession, however, did not win agreement.

The Spanish Government came forward with an alternative plan. It met the Spanish objection by keeping the waters of Lake Lanoux beyond human power to drain them from the basin of the Carol. While it would have enabled France to produce hydro-electric power, the amount would have been less than under the French proposal. The reduction in power potential was not acceptable to the French. In a last effort to win Spanish consent, the French agreed to manage the delivery of Ariège water in such a way that the quantity would not only be the same as that naturally received from Lake Lanoux, but the deliveries would be at times more advantageous to Spanish agriculture. Even with this added feature, the Spanish Government refused to agree to the French project. The governments of the two nations thereupon submitted to arbitration the question

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the Atlantic watershed and directed to a power station where it would be run through a turbine after dropping straight from a height of 780 meters. This project would enable France to produce enough electricity, even during the peak hours, to serve a city of 326,000 inhabitants throughout the year. To return to the Carol River the waters diverted from it, the French project contemplates the construction of a tunnel, 5 kilometers in length, which would take water from the Ariège to the Carol at a rate of approximately 5 cubic meters per second and at a point higher than where the headworks of a canal which serves Spanish users are located. The headworks would lie in French territory. The planned diversion amounts to 25% of the entire flow of the Carol, the waters of which are used in Spain by 18,000 farmers. (*Affaire du Lac Lanoux*, *Mémoire du Gouvernement de la République Française* 3-13 [Paris, 1957].)

whether the project with all the concessions made by the French required the agreement of Spain.<sup>24</sup>

The effect of an obligation to arbitrate in bringing the parties closer together in the *Lake Lanoux Case* must to an extent be surmised. There is, however, an instance where officers of one of the parties to an international river dispute gave public expression as to the effect of a commitment to arbitrate. The statements were made by a State Department lawyer and the Chairman of the Senate Foreign Relations Committee. The opinion of the lawyer was given in response to questions put by Senators considering consent to the ratification of a treaty settling differences that had arisen with Mexico over the distribution of waters of the Rio Grande and Colorado rivers.

The treaty provided for the United States to guarantee delivery to Mexico of a supply of water in excess of the amount believed by some of the Western States to be necessary. The amount was less than was then flowing into Mexico. The attorney of the State Department pointed out that if Mexico put this to beneficial use, it might acquire rights to more water than it had accepted in the negotiations.<sup>25</sup> Certain of the Senators took the position that the United States, being upstream and not committed to arbitrate, could not be injured by the Mexican assertion of rights. They argued that a Senate reservation to the 1929 Inter-American Arbitration Treaty excused the United States from giving Mexico an opportunity to test its rights. The attorney of the State Department ex-

<sup>24</sup> After years of intermittent negotiations, which began in 1917, and after delays owing to the second World War, France and Spain reached a standstill agreement in 1949 during a meeting of the "International Commission of the Pyrenees." It was decided to establish a "Mixed Commission of Engineers" the task of which was to study the possibility of solutions open to the parties. France and Spain agreed, as part of the proceedings of the International Commission of the Pyrenees, not to make changes in the regime of their common waters until further agreement. The duration of this agreement became a matter of dispute in the arbitral proceedings. During the work of the Mixed Commission a first project was examined which proposed the restitution of only 1200 liters per second, from May 1 to Sept. 30, and 600 liters per second from Oct. 1 to April 30, and the indemnification of users whose needs might not be met by these allocations. In 1954 France offered to make full restitution. In November, 1955, France offered further to guarantee a delivery of an annual volume of 20 million cubic meters of water and to permit the Mixed Commission to check on all construction phases, the regularity of restitutions, and to allow a representative of Spain with consular status to have access to all the works at any time in order to assure himself that the French pledge was being properly administered and carried out. In February, 1956, France conceded further the possibility of regulating the return of the waters in such a way as to increase their availability to Spain in periods of greater need and to establish a reserve for the benefit of Spain during dry years. Agreement having proved impossible, the two countries decided to submit the dispute to arbitration in May, 1956; a *compromis* was signed in November, 1956. In September, 1956, the French Ambassador at Madrid announced that France would undertake to maintain the *status quo* until a decision was reached by the Arbitral Tribunal.

<sup>25</sup> Statement by Benedict M. English, Assistant to the Legal Adviser of the Department of State, in Hearings before the Senate Committee on Foreign Relations on Treaty with Mexico Relating to the Utilization of Waters of Certain Rivers, 79th Cong., 1st Sess., Pt. 5, pp. 1738-1752 (1945).

pressed the opinion that Mexico could require the United States to arbitrate.<sup>26</sup> There then followed a discussion off the record. Chairman Tom Connally said, "Lift your pen, Mr. Reporter." After the reporter's pen again touched paper, the following was recorded:

Senator MILLIKEN. I most respectfully suggest that no one from the State Department be pushed to give an opinion, either off or on the record, that might be thrown in our teeth if we do not have a treaty. This witness has stated that he has brought in here an assemblage of cases and authorities which should be considered in the light of the authorities and cases that were brought here by Mr. Shaw. This witness brings these cases here, as I understand it, for that limited purpose. I will not say it is improper, but I think it is highly inadvisable to press any of these State Department witnesses beyond that point.

Senator DOWNEY. Mr. Chairman may I call this to your attention: If, apparently, the position taken by this witness and the State Department witnesses, as I understand it, is correct, as I think most of us understand it, then I say that we should be advised thereby and not lose one day in stopping Mexico from building up any future right. If I got the correct implication from the testimony——

The CHAIRMAN. How can you do that unless you adopt this treaty?<sup>27</sup>

A few moments later the following colloquy was recorded:

Senator DOWNEY. So far as you know, has the State Department yet taken any steps toward requiring a disclaimer of right from Mexico, or in any other way, to prevent this right you speak of from developing, whatever it may be?

Mr. ENGLISH [the lawyer of the Department of State]. I have no knowledge of the situation relating to the Colorado River waters at all; I simply came here to discuss the sole question of arbitration.

Senator DOWNEY. Do you not think, in view of what you have said here, that the State Department should immediately formulate

<sup>26</sup> Mr. B. M. English, the attorney of the State Department, summed up his testimony as follows:

"In conclusion, we respectfully submit the following:

"First, the contention that under the Senate reservation to the 1929 inter-American arbitration treaty the United States can properly refuse to arbitrate any matter which it does not desire to arbitrate, is unsound and unsupportable.

"Second, the contention that under that treaty the United States can properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

"(a) The practice of states as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.

"(b) The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.

"(c) The writing of authorities on international law in opposition to the Harmon doctrine.

"(d) The trail smelter arbitration, to which we referred." (Hearings, note 25 above, at 1751.)

<sup>27</sup> Hearings, note 25 above, at 1754.

such a plan as will best protect the water users in the United States and the States of the United States against Mexico's acquiring an expanding use in the waters of Boulder Dam and the Colorado River?

The CHAIRMAN. Has not the State Department done that in this treaty according to your view? <sup>28</sup>

There were strong forces in Mexico and the United States in favor of a fair agreement, but there was also strong opposition by local interests. This opposition was overcome by the demonstration that the United States was obliged to arbitrate, and that an arbitral decision after Mexico might have acquired further vested rights would lead to a result less to the liking of the opposing local interests than the results under the treaty. The commitment to arbitrate thus, by official admission, induced agreement.<sup>29</sup>

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There is still another rôle played by adjudication. This is to provide guideposts or precedents for the solution of later disputes by agreement.

The interstate cases that have been decided by the United States Supreme Court have assisted negotiators in the resolution of twenty river disputes by interstate compact. Even a cursory reading of these compacts shows that agreement was reached through recognition of the principles laid down in the litigated cases.<sup>30</sup> By analogy these interstate adjudications provide guideposts for the resolution of inter-nation disputes by negotiated treaties or by adjudication leading to agreement. Tribute to their value as precedents is given in the *Sentence* of the Lake Lanoux Arbitral Tribunal.<sup>31</sup> The fact that the decisions of American and other federal courts concern disputes between member states of federations does not impair the analogical value of the principles carved out in such decisions. The fundamental policies to be weighed in passing on matters involving water economics, and the types of factual problems involved are not different essentially in interstate and international disputes. The existence, in the latter cases, of separate sovereignties, not subject to the compulsory jurisdiction of a higher authority, is no more than an obstacle to the growth of international judicial precedents. It renders the analogy the more apposite.

The Lake Lanoux Tribunal drew from these federal decisions, from international adjudications and from the "practice" and "conviction" of states to give the latest expression to certain juridical principles. These principles will be of assistance in the solution of other river disputes by

<sup>28</sup> *Ibid.* at 1754-1755.

<sup>29</sup> Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, 59 Stat. 1219 (1945).

<sup>30</sup> American Compacts, Treaties, and Adjudications are collected in Documents on the Use and Control of the Waters of Interstate and International Streams (U. S. Department of the Interior, Washington, 1956). Among foreign judicial decisions dealing with the uses of waters of interstate or international rivers are the following: *Württemberg and Preussen v. Baden*, 116 *Entscheidungen des Reichsgerichts in Zivilsachen*, Supplement, p. 18 (*Deutscher Staatsgerichtshof*, 1927), and *Société Energie Electrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri*, note 8 above.

<sup>31</sup> *Sentence* at 40.

agreement or adjudication or by a combination of the two.<sup>32</sup> They are in harmony with the formulations of learned societies working in this field and the conclusions of the United States Department of State.<sup>33</sup>

The decisions at the international level are too few to have caught up with the wealth of precedents in the practices of riparian states revealed not only in their actions and in the official pronouncements of their representatives, but also in the pattern developed in hundreds of water treaties. The decisions being few, it seems appropriate to review in some detail those principles which the Lake Lanoux Tribunal recognized in its opinion.

Significantly, the Tribunal refrained from academic distinctions between the principles that are fully recognized as constituting existing international law, those that are coming into recognition, and those that are still aborning. The disputant states eschewed the same distinctions. Many were nevertheless recognized by them in negotiations over Lake Lanoux and in the briefs before the Tribunal.<sup>34</sup> These principles were

<sup>32</sup> A bibliography on the legal aspects of the non-navigational uses of international rivers appears in Principles . . . American Committee 109-129, *op. cit.* note 21 above.

The comprehensive works on the law governing the uses of international rivers include: Smith, *The Economic Uses of International Rivers* (1931); Andrassy, "Les relations internationales de voisinage," in 79 *Hague Academy Recueil des Cours* 77-182 (1951, II); Sevette, *Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interests* (U.N. Doc. E/EOE/136, Geneva, 1952; this work will be cited as *EOE Report*); Berber, *Die Rechtsquellen des Internationalen Wassernutzungsrechts* (Munich, 1955); Hartig, *Internationale Wasserwirtschaft und Internationales Recht* (Vienna, 1955); *Principles of Law Governing the Uses of International Rivers—Resolution Adopted by the International Law Association at its Conference Held in August, 1956, at Dubrovnik, Yugoslavia, together with Reports and Commentaries Submitted to the Association* (Washington, D.C., 1957, Lib. Cong. Cat. Card No. 57-10830; hereafter cited as "Principles . . . Dubrovnik"); Andrassy, *Utilisation des eaux internationales non-maritimes (en dehors de la navigation)* (Institut de Droit International, Geneva, 1957); *Principles of Law Governing the Uses of International Rivers and Lakes—Resolution Adopted by the Inter-American Bar Association at its Tenth Conference Held in November, 1957, at Buenos Aires, Argentina, together with Papers Submitted to the Association* (Washington, D.C., 1958, Lib. Cong. Cat. Card No. 58-12112; hereafter cited as "Principles . . . Buenos Aires"); Dept. of State Memorandum, *op. cit.* note 20 above.

<sup>33</sup> A summary of the work of international bodies in the field of international river law, together with the texts of declarations, resolutions and conventions appears in Appendix A of Principles . . . American Committee (*op. cit.* note 21 above) at 53 *et seq.*

<sup>34</sup> France and Spain devoted substantial parts of their briefs to an analysis of their rights as co-riparians apart from the obligations arising from treaties. Their adherence to a substantive rule of reason stands out despite their basic divergence over the necessity of prior agreement under the circumstances of the case. The French *Mémoire*, in a chapter entitled "Le Droit des Gens," at pp. 58-66, begins its analysis of customary international law by stating that the proposed diversion is in conformity with the principles of international law apart from treaty, and remarks that a consideration of international custom is not superfluous for the purposes of the case. In order to identify the principles of existing customary international river law, the *Mémoire* considers, article by article, the pertinent provisions of the Declaration of Madrid of 1911 of the Institut de Droit International (see text in 24 *Annuaire de l'Institut de Droit International* 365 (1911) and in Principles . . . American Committee, *op. cit.* note 21 above, at 54), and comments after each principle that the French project conforms

thus acknowledged practically. In endorsing them the Tribunal has added to their juridical stature.

1. One article of a treaty between France and Spain laid down that all stagnant or running waters are subject to the sovereignty of the state in which they are located, "except for the modifications agreed to between

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with it. The part of the Declaration requiring prior agreement before alterations are made in the regime of international rivers is claimed by France to apply only to cases in which the quantity or quality of water at the border is changed. Since the French project entails no such change, it is argued, France is respecting customary international river law.

The pertinent provisions of the Geneva Convention of 1923 (see text in 36 L.N.T.S. 75 and in Principles . . . American Committee, cited note 21 above, at 56) are also analyzed one by one in the French *Mémoire*, and it is argued that the proposed diversion does not violate them.

Concerning the validity of the above declaration and convention as indicative of the present state of customary international river law, the *Mémoire* states:

"They are the results of efforts which have not always been crowned with success and followed by action. But their importance is no less great, thanks to the competence and authority of their authors and to the very extensive scope, one might say universal scope, of the rules which they have attempted to establish." (*Affaire du Lac Lanoux*, *Mémoire du Gouvernement de la République Française* 64-65, Paris, 1957; authors' translation.)

The French *Mémoire* summarizes the principles to be derived from the authorities as follows:

"As far as this litigation is concerned, the following [rules] may be particularly retained: Sovereignty, on its territory, of a State desirous of carrying out hydroelectric developments; correlative duty, for it, not to injure gravely the interests of a neighboring State; convenience of informing a neighboring State of contemplated projects, of discussing them with it, if it need be; opportunity of searching for an agreement including, if appropriate, guarantees of execution; but no duty, if the interests of the latter State do not suffer serious prejudices, to obtain its consent before undertaking the works." (*Ibid.* at 65; authors' translation.)

The Spanish *Mémoire*, at pp. 61-78, stated that the examination of treaties regulating the rights of co-riparians is a proper method of inquiry into the conception of general international river law held by states in general, since in many cases treaties contain applications of general principles to specific circumstances. A number of bilateral and multilateral treaties are then analyzed in the *Mémoire* to show that co-riparians have often undertaken to refrain from making changes in the existing regime of international rivers without first securing the consent of interested co-riparians.

The decisions of the German, Swiss, and American federal courts are reviewed in the *Mémoire* to indicate that the principle that no substantial change can be brought about by one riparian without the consent of co-riparians is supported in the available opinions of courts having to decide questions analogous to those arising from the uses of international rivers.

More than 30 publicists are listed in the *Mémoire* as supporting the view that a prior agreement is mandatory before a riparian may effect a substantial change in the regime of the waters of international rivers and lakes. It is recognized by the Spanish Government that different authors justify their views on the basis of different theories, but the conclusion is reached that they all agree on the basic proposition that international law, apart from treaty, sanctions not only the equality of rights of co-riparians, but also the necessity of prior agreement among co-riparians, whenever a substantial alteration of the regime of the waters is contemplated.



the two Governments."<sup>85</sup> Citing this, France contended that all possible limitations to its sovereign right to act as it chose must stem from the treaties. Referring to the article, the Tribunal answered:

This text itself contains a reservation to the principle of territorial sovereignty . . . ; some provisions of the Treaty [of Bayonne] and of the Acte Additionnel of 1866 declare the most important limitations; *there can be other limitations*. [Emphasis added; authors' translation.]<sup>86</sup>

2. France further contended that the limitations to its sovereign right to dispose freely of the waters of its international rivers and lakes must be strictly construed because they were in derogation of sovereignty. The Tribunal concluded:

. . . it has been argued before this Tribunal that these limitations must be strictly construed because they are in derogation of sovereignty. The Tribunal is not able to countenance such an absolute formula. Territorial sovereignty plays the part of a presumption.

<sup>85</sup> Art. 8 of the Acte Additionnel of 1866 reads: "All stagnant and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments. Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow." (Authors' translation.)

<sup>86</sup> *Sentence* at 33. A dwindling minority of writers has maintained that international law does not impose any obligations on riparian states desirous of using the waters of international rivers within their jurisdictions. The ECE Report, in its review of some thirty writers (at 51-68), finds that not more than three or four still take this position.

A related position is taken by Berber, *op. cit.* note 32 above, at 104, who nevertheless brands the doctrine of absolute territorial sovereignty as based upon an individualistic, anarchical conception of international law.

For the majority view that co-riparians are under mutual obligations not to cause serious injuries to each other's interests and are entitled to share in the common waters on a reasonable basis, see the following: Brierly, *The Law of Nations* 204-205 (5th ed., 1955); 1 Oppenheim, *International Law* 346-347 (8th ed., Lauterpacht, 1955); Sevette, *op. cit.* note 32 above, at 209 *et seq.*; Sauser-Hall, "L'utilisation industrielle des fleuves internationaux," in 83 *Hague Academy Recueil des Cours* 465-586 (1953, II); Eagleton, "The Use of the Waters of International Rivers," 33 *Canadian Bar Review* 1021 (1955); Andrassy, *op. cit.* note 32 above; Dept. of State Memorandum, note 20 above; Principles . . . American Committee, *op. cit.* note 21 above; Principles . . . Buenos Aires, *op. cit.* note 32 above; Laylin, "The Uses of the Waters of International Rivers," in Principles . . . Dubrovnik, *op. cit.* note 32 above, at 1; 48th Conference of the International Law Association (New York, 1958), Resolution on the Uses of the Waters of International Rivers. The Resolution adopted by reference the Report of the Committee on the Uses of the Waters of International Rivers, quoted in part in note 41 below; see also p. 74 below.

Leaning toward the opposite extreme that a riparian may do nothing to affect a co-riparian without prior agreement are: Cardona, "El régimen jurídico de los ríos internacionales," 56 *Revista de Derecho Internacional* 24 (La Habana, 1949); De Yanguas Messia, "El aprovechamiento hidroeléctrico de los ríos internacionales en las zonas fronterizas españolas," 1 *Revista de la Facultad de Derecho de la Universidad de Madrid* 9 (1957); Theller, "Los ríos, lagos y canales internacionales," in Principles . . . Buenos Aires, *op. cit.* note 32 above.

It must bow before all international obligations, whatever their source, but it yields only to them. [Authors' translation.] <sup>37</sup>

3. States were said by the Tribunal to be conscious of the seriousness of the conflicting interests which the industrial uses of international rivers bring into question and of the *necessity* of reconciling these interests by means of *mutual concessions*. The way to achieve such a compromise was said to be the conclusion of comprehensive agreements.<sup>38</sup> After indicating that the principle of mutual concessions or of compromise of conflicting interests is the supreme rule, the Tribunal outlined the scope of a riparian's freedom of action, apart from treaties, as follows:

International practice reflects the conviction that States have a duty to seek to enter such agreements; thus there exists an obligation to accept in good faith all negotiations and contacts which will place them [the states], through a broad comparison of interests and through mutual good will, in the best position to conclude such agreements . . . [Authors' translation.] <sup>39</sup>

The Tribunal premised its reasoning on a substantive rule of reason<sup>40</sup> of international law governing the uses of international rivers. Support for this principle was found expressly in the two constituent elements of international custom, namely, "international practice" and the "conviction" of states.<sup>41</sup>

<sup>37</sup> *Sentence* at 33. Following this reasoning to its logical conclusion, the Tribunal declared that it would adopt the following rules of interpretation:

"Provisions of conventional law which are clear need no interpretation; . . . when interpretation is called for, it must be arrived at according to international law; international law does not sanction any absolute or rigid method of interpretation; it is thus permitted to take into account the spirit which dictated the Pyrenean Treaties as well as the rules of customary international law." (*Sentence* at 34-35; authors' translation.)

<sup>38</sup> *Sentence* at 46-47.

<sup>39</sup> *Ibid.* at 47.

<sup>40</sup> Other phrases for this concept are found in the authorities which speak in terms of a principle of "equitable apportionment" (American Decisions, note 30 above; Dept. of State Release, note 41 below), the entitlement of co-riparians to a "reasonable and equitable share" (New York Resolution of the International Law Association, Sept., 1958, note 41, below), or to a sharing of the waters on a "just and reasonable basis." (Dept. of State Memorandum, *op. cit.* note 20 above.) See authorities cited in notes 32, 36, above, and in note 41 below.

<sup>41</sup> The Tribunal's conclusions as to the present state of international law as reflected in "international practice" and in the "conviction" of states are a far cry from an early view of the scope of sovereign rights expressed by U. S. Attorney General Harmon in 1895. During a dispute with Mexico over the use of the waters of the Upper Rio Grande in places where both banks are in the United States, the Attorney General rendered an opinion to the effect that "the rules, principles and precedents of international law impose no liability or obligation upon the United States." (21 Ops. Att'y. Gen. 267 [1895].) It is doubtful whether such an opinion ever truly reflected existing international law. See especially Appendices B and C in Principles . . . American Committee, *op. cit.* note 21 above at 74, 84, for an analysis of the history and vicissitudes of the Harmon opinion at home and abroad. A recent statement by a witness of the Department of State testifying before the Senate Committee on Interior and Insular Affairs rejected utterly the Harmon doctrine. In the course of hearings on the question of the proposed diversions by Canada of waters from the Upper Columbia River, Deputy Assistant Secretary of State Frederick W. Jandrey, Jr., had this to say:

4. The Tribunal resorted expressly to this substantive rule of reason while construing the treaties between Spain and France.<sup>42</sup> One provision which required notice of a change that might impair the rights of the co-riparian expressed as its object the safeguarding of "all the interests."<sup>43</sup>

"Among other things our memorandum deals with this view and points out that international law, as it has developed in this field in recent years, has solidified the principle of the equitable apportionment of waters which cross international boundaries. The fundamental doctrine concerned is, of course, that of not using one's own property rights to injure the property rights of others." (Statement of Frederick W. Jandrey, Jr., Deputy Assistant Secretary of State for European Affairs, on Upper Columbia River Development, April 21, 1958. Mimeographed Release of Dept. of State, p. 3 [1958].)

The official endorsement of the substantive rule of reason on the part of the United States is embodied in a set of principles appearing in the memorandum referred to by Mr. Jandrey. See note 20 above.

Besides the evidence supplied by international practice, the statements and resolutions adopted by learned societies corroborate the rule of reason and to a remarkable extent parallel the ideas expressed by the Tribunal.

Almost fifty years ago, the Institut de Droit International at its Madrid Conference in 1911, asserted that the dependence of riparian states upon each other "excludes the idea of complete autonomy for either along that portion of the natural course coming under its sovereignty." (See 24 *Annuaire de l'Institut de Droit International* 170 *et seq.* [1911]; Declaration of Madrid, *ibid.* 365.)

Several reports presented at the Seventh Inter-American Conference held at Montevideo in 1933 show an unmistakable concurrence in the principle of equality of rights of co-riparians. The principle was stated in what became known as the Declaration of Montevideo. See Text of Declaration in Final Act of the Seventh International Conference of American States, International Conferences of American States 88-89 (First Supp., 1933-1940) (Carnegie Endowment for International Peace, Washington, 1940).

Recently the Inter-American Bar Association at its Xth Conference in Buenos Aires in November, 1967, unanimously adopted a resolution in which the principle of equality of rights of co-riparians is stated to be existing international law. See p. 73 below.

Support to the substantive rule of reason was given also by the International Law Association (I.L.A.) in 1956, in a resolution adopted as a basis for further study. See p. 74 below. A recent study conducted by a panel of experts for the United Nations, on integrated river basin development, recommends that states adopt the I.L.A. principles as a sound approach in the negotiation and settlement of international river disputes. (Integrated River Basin Development 33 (U.N. Doc. E/3066), New York, 1958.)

The Forty-Eighth Conference of the International Law Association, meeting in New York Sept. 1-7, 1958, adopted unanimously a minimum statement of "Agreed Principles of International Law," in which it is stated that "... each co-riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin." See note 36 above.

<sup>42</sup> Immediately after outlining in broad terms the present status of international law as derived from "international practice" and the "conviction" of states, the Tribunal proposed to apply the principles specifically by saying: "This suggestion will be kept in mind later in dealing with the question of establishing which obligations rest on France and Spain concerning contacts and negotiations prior to putting into operation a project such as that of Lake Lanoux. [Authors' translation.]" (*Sentence* at 47.)

<sup>43</sup> The provision in question was Art. 11 of the *Acte Additionnel* of 1866, which provides that when either France or Spain intends to carry out works which may change the regime or the volume of boundary or successive watercourses whose waters are

The question was raised whether the word "interests" as so used covered only specific legal rights. The Tribunal found that under its general rule of reason, "interests" included interests beyond specific legal rights. It said:

It is necessary to take into account all interests, whatever their nature, which risk being affected by the works undertaken, even if they do not correspond to a specific right. [Authors' translation.] <sup>44</sup>

This conclusion, the Tribunal stated, was in accord with the "tendencies which are manifest in matters of hydroelectric development in international practice." (Authors' translation.) <sup>45</sup>

5. In determining whether the interests of a co-riparian are adversely affected, it is not enough that the riparian proposing to make a change in the river regime decide unilaterally that the change will not impair its co-riparian's interests. As against the proposing state, the state exposed to the repercussions is the best judge of its own interests and has a right to information necessary to form its own judgment as to the probable

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being used by riparians in the other state, each country must give notice to the proper authorities of the other country in order to give them an opportunity to object and to render possible the safeguarding of all interests which might be affected. It is interesting to note that France itself, notwithstanding its upstream interests in this dispute, construed the above article in accordance with the substantive rule of reason. In an official note of May 1, 1922, of the Prime Minister and Minister of Foreign Affairs, M. Poincaré, France objected to the enlarged jurisdiction of a Mixed Commission, saying that it was "incompatible with her sovereign rights. Every State has in practice the right to carry out, on its territory, independently, such works as it pleases. In case of alterations of the regime of waters whose counterpart is being used by riparians of another State, it must only subordinate the execution to the safeguarding of the interests of these riparians. *These principles are those of natural law. Article 11 of the Treaty of 26 May 1866 has added nothing.* It has confined itself to indicating the procedure aimed at insuring its enforcement in the relations between France and Spain." (*Affaire du Lac Lanoux, Contre-Mémoire du Gouvernement de la République Française*, p. 6 [Paris, 1957]; authors' translation; emphasis added.)

The French Contre-Mémoire, at p. 7, refers to this "natural law" and maintains that, since no alteration of the regime or volume of the Carol River was planned, no violation would follow. In addition the brief indicates the French interpretation of the duties resting on France under Art. 11. The French Government stated that "Il va de soi" that a state must respect the rights and interests of a lower riparian in one of three possible ways, depending on the circumstances: (1) by indemnification in the form of payments or replacement of the waters appropriated ("soit par voie d'indemnisation en espèces ou en nature"); (2) by incorporating in its projects appropriate technical and legal guarantees ("soit en assortissant son projet de garanties techniques ou juridiques appropriées"); (3) even by giving up its project if it cannot avoid a serious injury to the interests in question ("soit même en y renonçant s'il ne peut éviter de léser d'une manière sensible les intérêts en cause"). *Ibid.* at 29.

<sup>44</sup> *Sentence* at 59. The Tribunal was applying at this point the substantive rule of reason which it had enunciated previously. See notes 39 and 42 above.

<sup>45</sup> The consideration of all riparian interests involved is a common theme running through all of the declarations and resolutions issued so far by learned societies. For a summary of the work of international bodies in the field of international river law, together with texts, see Appendix A in *Principles . . . American Committee (op. cit. note 21 above)* at 53 *et seq.* For a review of the protection of existing lawful uses of international rivers in the practice of states, see Appendix E, *ibid.* at 100.

effect upon it of the proposed change. The Tribunal stated the rule in these terms:

The State exposed to the repercussions of works undertaken by a neighboring State is the only judge of its own interests, and if the neighboring State has not taken the initiative, the right of the other to exact information on the works or concessions which form the object of a project could not be denied. [Authors' translation.] <sup>46</sup>

The right to receive appropriate and correct information on the existing regime and probable changes to be effected in a common river is co-terminous with the fundamental duty to respect a riparian's legitimate interests. No co-riparian can evaluate the full extent of its rights without such information.<sup>47</sup>

6. The method of safeguarding a co-riparian's interests was also indicated by the Tribunal. The Tribunal speaks of "the rules of good faith." These require that the consultations and negotiations be genuine—not formalities. In the words of the Tribunal:

The upstream State has, under the rules of good faith, the obligation to consider the different interests in question, to attempt to give them all satisfactions consistent with the pursuit of its own interests and to demonstrate a real solicitude to reconcile the other riparian's interests with its own. [Authors' translation.]<sup>48</sup>

Though the appreciation of the fulfillment of this duty is a delicate matter in the opinion of the Tribunal, "the judge is in a position to proceed to this appreciation on the basis of the data supplied by the negotiations." [Authors' translation.] <sup>49</sup>

7. The rules of reason and good faith as substantive law governing the sharing of uses of international rivers were applied by the Tribunal to procedural rights and duties:

As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obligated to associate the downstream State with the elaboration of its projects. If, during the conversations, the downstream State submits other projects, the upstream State must examine them, but it has the right to prefer the solution indicated by its project, if such project takes into consideration *in a reasonable manner* the interests of the downstream State. [Emphasis added; authors' translation.] <sup>50</sup>

8. Subjecting the regime of a river to more human control and withdrawals of some supplies from the basin are not necessarily irreconcilable

<sup>46</sup> *Sentence* at 59. See note 44 above.

<sup>47</sup> Principle V of the Statement of Principles of Law of the Committee on the Uses of Waters of International Rivers of the American Branch of the I.L.A. reads:

"V. A riparian may not unreasonably withhold from a co-riparian, or refuse to give it access to, data relevant to the determination or observance of their respective rights and duties under the existing regime of the system of international waters, or data with respect to any proposed change in the regime." (Principles . . . American Committee, *op. cit.* note 21, above, at xii. See also the commentary on Principle V, *ibid.* at 9-12.)

<sup>48</sup> *Sentence* at 59-60. See note 44 above.

<sup>49</sup> *Ibid.* at 60.

<sup>50</sup> *Ibid.* at 61. See note 44 above.

with the proper protection of the interests of a co-riparian. It should be borne in mind that the Tribunal, in finding that Spanish interests would not be adversely affected by the proposed French project, noted that only one fourth of the supplies of the waters crossing the border would be affected by the project, that the waters to be withdrawn from the basin were to be replaced *in toto*, and that the co-riparian would have the right to have agents with consular privileges present at all times to assure that the replacement equaled the withdrawal. It should also be kept in mind that the Tribunal further noted the absence of any charge that the quality or the temperature of the supplies to be substituted would be unsatisfactory. Had the Spanish Government shown that the quality or temperature of the water would be unsatisfactory, the Tribunal observed, Spanish consent to the change might have been required.<sup>51</sup>

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At a time when the forces of law and order need ever increasing recognition in the international arena, the notion that states willing to submit international river disputes to adjudication are ill advised has a strange ring indeed. For those who are bent on promoting the rule of law in international relations, the cry of inadequacy of courts in this field betrays a nostalgia for a fast-fading conception of international law in which naked power holds greater sway than recognized principles of justice.

The constructive rôle of adjudication of interstate disputes in promoting agreement cannot reasonably be denied. The obligation to respond before an impartial court has induced agreement by promoting reasonableness in an area of state relations involving interests which are no less vital to one riparian state than to another. The analogy for nations is complete. Claims stubbornly maintained by a riparian nation unwilling to test them before an impartial tribunal are the cause of frustrations and delays. So long as a riparian proposing a change or one opposing the change is unwilling to subject the validity of its position to third-party determination, the soundness of its position is suspect.

In a broader community perspective, the principles of procedure and substance weighed and applied by impartial tribunals, called upon to decide live controversies, offer promising aids for the solution by agreement of other water disputes. This contribution of adjudication is far from imponderable or insignificant. It has already shown its vitality within federated countries where a great number of compacts have been fashioned upon principles forged by judicial decisions. It will be increasingly felt and appreciated at the international level as the example set by France and Spain is followed generally.

<sup>51</sup> *Ibid.* at 38.

# THE USE OF WATERS OF INTERNATIONAL DRAINAGE BASINS UNDER CUSTOMARY INTERNATIONAL LAW

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## I. INTERNATIONAL PRACTICE

Well over one hundred treaties which have governed or today govern water uses in international drainage basins have been entered into all over the world. These treaties, and the negotiations leading to them, indicate that there are principles limiting the power of states to use such waters without regard to injurious effects on co-riparians. These treaties restrict the freedom of action of at least one, and usually all, of the signatories. The number of states parties to these treaties, their spread over time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties and negotiations persuasive evidence of law-creating international practice.<sup>1</sup>

### 1. *United States-Mexico: Upper Rio Grande, 1906*<sup>2</sup>

In 1894 and 1895 Mexico protested diversion of the Rio Grande in the United States to the detriment of existing Mexican uses. Mexico contended that

... the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.

\* This article is partly based upon a memorandum prepared by the author and submitted by the Department of State on April 21, 1958, to the Senate Committee on Interior and Insular Affairs in connection with hearings on the Columbia River. Sen. Doc. No. 118, 85th Cong., 2d Sess.

<sup>1</sup> See, e.g., *The Wimbledon*, P.C.I.J., Ser. A, No. 1, p. 25; *Crichton v. Samos Navigation Co.*, Ann. Dig. 1925-26, p. 3; Stone, *Legal Controls of International Conflict* 135 (1954).

It is possible to discuss only a few leading illustrations. Smith, *The Economic Uses of International Rivers* (1931), abstracts or summarizes 51 treaties from 1785 to 1930. Sevette, *Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest* (U.N. Doc. E/ECE/136 (1952)), adds about 40 more treaties. These two studies will hereafter be cited as "Smith" and "ECE Rept.," respectively. Other treaty summaries are found in Hirsch, "Utilization of International Rivers in the Middle East," 50 A.J.I.L. 81 (1956), and Berber, *Die Rechtsquellen des Internationalen Wassernutzungsrechts* 89-94 (Munich, 1955).

<sup>2</sup> This discussion is in part based upon Simsarian, "The Diversion of Waters Affecting the U. S. and Mexico," 17 Tex. L. R. 27 (1938).

In response to the request of the Secretary of State for an opinion on the Mexican contentions, Attorney General Harmon concluded that because the United States had sovereignty over the Rio Grande in its territory, therefore international law imposed no obligation upon the United States to share the water with Mexico, or pay damages for injury in Mexico caused by diversions in the United States.<sup>3</sup>

Shortly after the Harmon opinion the two governments instructed the International Boundary Commission to investigate and report on the Rio Grande situation. In their joint report of November 25, 1896, the Commissioners said that the only feasible way to regulate the use of the water so as to secure the legal and equitable rights of each country was to build a dam at El Paso; and that Mexico had been wrongfully deprived for many years of its equitable rights. The Commissioners recommended the matter be settled by a treaty dividing the use of the waters equally, Mexico to waive all claims for indemnity for past damages.

Mexico informed the United States in December, 1896, that it was prepared to enter into the recommended treaty. However, the United States response was delayed and in January, 1901, Mexico again protested diversions and said that it favored a treaty along the lines of a bill introduced in the Senate in March, 1900, by Senator Culberson of Texas. This bill called for an international dam at El Paso and distribution of the water between the two countries. In recommending that the bill pass, the Senate Committee on Foreign Relations reported that by its passage the Mexican damage claim in excess of 35 million dollars would be amicably adjusted and a feasible mode would be provided for regulating the use of the water so that each country would receive its legal and equitable rights. However, this bill did not pass and in February, 1905, Congress enacted a statute for a dam at Engle, New Mexico.

In response to further Mexican protests, the United States in December, 1905, cited the Harmon opinion, but said the question was academic because "both governments have announced their purpose to deal with the question on principles of highest equity and comity between neighboring states," and submitted a draft treaty.

In the treaty of May 21, 1906,<sup>4</sup> the United States agreed to deliver to Mexico in the bed of the river 60,000 acre feet annually in accordance with an annexed schedule without cost to Mexico. It is clear that the treaty is not based upon the common recognition by the two governments of the Harmon opinion, as it preserves the formal legal position of each. The treaty recites that the delivery of water by the United States is not a recognition by it of any Mexican claim to water, and that it does not concede any legal basis for Mexican damage claims, and that by the making of the treaty the United States does not concede the establishment of any general principle or precedent. The treaty also recites that Mexico waives all past, present, and future claims arising from diversions in the United States. Moreover, the United States' draft treaty contained a phrase that

<sup>3</sup> 21 Ops. Atty. Gen. 274 (1895).

<sup>4</sup> U. S. Treaty Series, No. 455, 34 Stat. 2953.



its action in entering into the treaty "is prompted only by considerations of international comity," but this phrase was omitted from the treaty as signed.

## 2. *United States-Canada: Boundary Waters and Other Questions, 1909*

In 1907 it was recognized by both the Canadian and United States governments that factual conditions existing along their boundary made it imperative that the greatest possible common ground be found for dealing with water problems. It was becoming increasingly apparent that existing and potential water problems were so numerous that some alternative to resort to the diplomatic channel on a case-by-case basis had to be found. It was recognized on both sides that the situation called for a treaty settling existing differences and establishing procedures for the handling of future cases. The only question, broadly speaking, was the nature of the settlement and procedures to be agreed upon.

In May, 1907, Secretary of State Root, and British Ambassador Bryce joined in asking Mr. George Clinton (United States) and Mr. George Gibbons (Canada) to prepare a draft treaty. The Clinton-Gibbons draft called for an international commission having jurisdiction to decide all existing and future cases involving water uses of joint concern without regard to categories of waters, in accordance with the following general principles, apparently believed in general to be existing law:

1. Navigation was not to be impaired by other uses.
2. Diversions or obstructions in either country which might cause injury in the other were to be subject to the latter's consent.
3. Each country would be entitled to the use of half the waters along the boundary for power generation.
4. Each country would be entitled to an "equitable" share of all water for irrigation.<sup>5</sup>

The Clinton-Gibbons draft was not acceptable to the United States, and it submitted a draft treaty calling only for a joint commission of inquiry to investigate and report on cases referred to it by either government.<sup>6</sup> Canada objected, saying that "the time is opportune for the adoption of certain principles which should govern the use and diversion of boundary streams and waters, including waters which in their course cross the International Boundary"; and that the advisory board proposed by the United States would not be a satisfactory solution.<sup>7</sup>

The United States replied that its main objection to the Clinton-Gibbons draft was that the matters to be referred to the proposed international commission would necessarily involve many questions of policy which under the United States system of government must be determined by the treaty-making power. The United States also expressed the view that general

<sup>5</sup> See Numerical File 1906-1910, Dept. of State, Nat. Archives, Vol. 484, 5934/6-7 (Sept. 24, 1907); Sen. Doc. 118, pp. 10-15.

<sup>6</sup> *Ibid.* 5934/18a (Jan. 29, 1908); Sen. Doc. 118, pp. 21-22.

<sup>7</sup> *Ibid.* 5934/19 (March 23, 1908); Sen. Doc. 118, pp. 23-25.

knowledge regarding water uses had not yet been sufficiently developed to justify the incorporation of the proposed general principles into a treaty.<sup>8</sup>

From the two extremes of a judicial commission to pass upon all uses *versus* a commission of inquiry, the negotiations moved rapidly toward common ground, each side making concessions, and the treaty was signed on January 11, 1909.<sup>9</sup> It was agreed to differentiate between "boundary waters," *i.e.*, those along which the boundary runs, and other waters; and with regard to the former, each country was agreed to have equal rights, with future uses subject to the approval of an international joint commission in accordance with principles laid down in the treaty (Articles III and VIII). But a special agreement was made for apportionment of the Niagara River on a different basis (Article V).

With regard to obstructions in waters flowing from boundary waters or in waters flowing across the boundary, which obstructions would raise the level on the other side of the boundary, it was agreed that the approval of the international joint commission would be necessary (Articles IV and VIII). No discussion was made of the fact that this limits the freedom of action of each country with respect to waters wholly within its territory.

The existing dispute on the St. Mary and Milk Rivers, flowing across the boundary from the United States to Canada, was settled by agreement on apportionment which protected existing uses (Article VI).

However, with regard to future uses of waters flowing across the boundary or into boundary waters, the United States felt it could not accede to the Canadian position. The United States, therefore, proposed, and Canada accepted, that each country reserve "exclusive jurisdiction and control" of such waters within its own territory (Article II).

It has been said that Article II incorporates the Harmon opinion, but the record is to the contrary. If the United States negotiators had intended this, they most likely would have said so in documents written by them, especially in connection with waters flowing across the boundary or into boundary waters. However, no internal memoranda of the United States negotiators, nor United States correspondence with Canada, has been found containing any mention of the Harmon opinion.

The United States negotiators undoubtedly referred orally to the Harmon opinion, but the Canadian Government in December, 1910, did not regard the treaty as incorporating it. When the House of Commons was debating a bill to implement the treaty, the Minister of Public Works said that in his opinion the United States was right in contending the Harmon opinion correctly stated international law. When the leader of the opposition asked, "Has the government accepted that contention?", the Minister replied, "No, the treaty is not framed on that theory."<sup>10</sup>

### 3. *United States-Mexico: Lower Rio Grande and Colorado Rivers, 1944*

Pursuant to Congressional authorization, three United States Commissioners were appointed "to cooperate with representatives of the Govern-

<sup>8</sup> *Ibid.* 5934/25 (June 4, 1908); Sen. Doc. 118, pp. 26-29.

<sup>9</sup> U. S. Treaty Series, No. 548, 36 Stat. 2448; 4 A.J.I.L. Supp. 239 (1910).

<sup>10</sup> Debates, H. of C., Dom. Can., Sess. 1910-11, Vol. I, p. 907; Sen. Doc. 118, p. 54.

ment of Mexico in a study regarding the equitable use of the waters of the lower Colorado Rivers, for the purpose of securing information on which to base a treaty with the Government of Mexico relative to the use of the waters of these rivers."<sup>11</sup> In March, 1930, the American Commissioners submitted a report concluding that United States and Mexican interests would be served by agreement on the recognition and perpetuation of existing uses.<sup>12</sup>

In 1935, the United States Commissioner on the International Boundary Commission, United States and Mexico, was authorized by Congress to cooperate with a Mexican representative in further study of these waters to obtain additional information as a basis for the negotiation of a treaty.<sup>13</sup> The treaty was signed November 14, 1949.<sup>14</sup> As to the lower Rio Grande, it allocated the water and provided for joint construction of agreed works so as to ensure the continuance of existing uses and maximum development. The cost of diversionary works is prorated in proportion to the benefits received by each country, and the costs of hydro-electric works are shared equally.

As to the Colorado, the United States agreed to deliver to Mexico 1.5 million acre feet annually, and a specified share of surplus waters. Each government agreed to construct and operate certain works at its own expense, certain others jointly in proportion to their use by each, and certain others to be built and operated by the United States at Mexican expense.

When the treaty came before the Senate Committee on Foreign Relations an opponent testified he would not undertake to say what was the international law of Sweden, South Africa or any other country, but the Harmon opinion was a correct statement of international law as practiced by the United States. With regard to this testimony an assistant to the Legal Adviser of the Department of State testified to his opinion as follows:

... It seems obvious, I think, that if there is any international law dealing with the subject of allocation of international streams, that law is necessarily the same for every nation, whether the United States, Mexico, Sweden, or South Africa.

As for the Harmon opinion, the conclusion reached therein that from the standpoint of international law Mexico was entitled to no waters of the Rio Grande was apparently based primarily on language used by the Supreme Court in the celebrated Schooner Exchange Case, to the effect that the jurisdiction of a nation within its own territory is necessarily exclusive and absolute and susceptible of only self-imposed limitations. It may be well to point out that that case did not deal with the question of allocation of waters of international rivers or with the alleged right of one State through which such a river flows to do as it saw fit with the waters, or any other related subject. The sole question before the court was whether the courts of the United

<sup>11</sup> Pub. Res. No. 62, 69th Cong., March 3, 1927.

<sup>12</sup> Rept. of the Am. Sec., Int. Water Comm., U. S. and Mex., 71st Cong., H. Doc. No. 359, pp. 23 and 28.

<sup>13</sup> Act of Aug. 19, 1935, 49 Stat. 66.

<sup>14</sup> U. S. Treaty Series, No. 994, 59 Stat. 1219.

States had jurisdiction over a vessel of a foreign government while wholly within the territorial limits of the United States.<sup>15</sup>

After discussing treaties, judicial decisions, and publicists, the witness summarized his testimony as follows:

Second, the contention that . . . the United States can properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

(a) The practice of states as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.

(b) The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.

(c) The writing of authorities on international law in opposition to the Harmon doctrine.

(d) The Trail Smelter Arbitration, to which we referred.<sup>16</sup>

Mr. Frank Clayton, Counsel for the United States Section of the International Boundary Commission, testified in part as follows:

. . . Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware. . . . I have made an attempt to digest the international treaties on this subject . . . in all those I have been able to find, the starting point seemed to be the protection of the existing uses in both the upper riparian country and the lower riparian country, without regard to asserting the doctrine of exclusive territorial sovereignty. Most of them endeavor to go further than that and to make provision for expansion in both countries, both upper and lower, within the limits of the available supply.<sup>17</sup>

#### 4. *Sweden-Norway: Common Lakes and Watercourses, 1905*

Article II. In accordance with the general principles of international law, it is understood that the works mentioned in Article I [diversions, raising or lowering of water levels] cannot be carried out in one of the two states without the consent of the other, in each case where such works, in influencing the waters situated in the other state, would have the effect either of noticeably impairing the use of a watercourse for navigation or floating of timber, or of otherwise bringing about serious changes in the waters of a region of a considerable area.<sup>18</sup>

#### 5. *Egypt, Sudan, and Great Britain: The Nile, 1925-1929, 1954-1955*

In 1925 the British High Commissioner in the Sudan assured the Egyptian Foreign Minister that the British Government "have no intention to

<sup>15</sup> Hearings before Committee on Foreign Relations on Treaty with Mexico Relating to Utilization of Waters of Certain Rivers, 79th Cong., 1st Sess., Pt. 5, pp. 1740-1741 (1945).

<sup>16</sup> *Ibid.* 1751.

<sup>17</sup> Hearings, cited above, Part 1, at 97-98.

<sup>18</sup> Smith 167 (translation).

trespass upon the natural and historic rights of Egypt in the waters of the Nile, which they recognize today no less than in the past."<sup>19</sup> This assurance was repeated in the Nile Waters Agreement of 1929, in which it was also agreed that no measures would be taken in British-controlled territory, without Egypt's agreement, "which would, in such manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level."<sup>20</sup>

In preparing for the negotiations which led to this agreement, the British Foreign Minister instructed his representatives as follows:

The principle is accepted that the waters of the Nile, that is to say, the combined flow of the White and Blue Niles and their tributaries, must be considered as a single unit, designed for the use of the peoples inhabiting their banks according to their needs and their capacity to benefit therefrom; and, in conformity with this principle, it is recognized that Egypt has a prior right to the maintenance of her present supplies of water for the areas now under cultivation, and to an equitable proportion of any additional supplies which engineering works may render available in the future.<sup>21</sup>

Since Sudan is the later organized irrigation consumer historically and is the upper riparian, most of the working arrangements of the 1929 Agreement apply to it. The present validity of the Agreement has been questioned by Sudan on the ground that it was negotiated between Great Britain (on behalf of Sudan) and Egypt. However, in 1955 the Sudan said: "It is not disputed that Egypt has established a right to the volumes of water which she actually uses for irrigation. The Sudan has a similar right."<sup>22</sup> The Sudan fixes its "established right" at only 4 billion cubic meters, and Egypt's at 48 billion.<sup>23</sup> The two governments agree that new supplies, if made available on the Nile, must be apportioned equitably, but disagree on the basis of the equitable division.<sup>24</sup>

In a series of notes exchanged between May 30, 1949, and January 5, 1953, the British and Egyptian governments agreed on the construction of the Owen Falls Dam at the outlet of Lake Victoria.<sup>25</sup> This is a multi-purpose project to generate power for Uganda and store irrigation supplies mainly for Egypt. The notes provide that the construction and operation of the dam are the responsibility of Uganda authorities in co-operation with an Egyptian resident engineer and his staff. The Egyptian engineer has the paramount authority in the regulation of the discharge of the dam.

It was also agreed that the Egyptian Government would pay the following:

<sup>19</sup> Brit. Treaty Series, No. 17, p. 33 (1929).

<sup>20</sup> Smith 212-214.

<sup>21</sup> Paper regarding negotiations for a treaty of alliance with Egypt, Egypt No. 1, Cmd. No. 3050, p. 31 (1928).

<sup>22</sup> "The Nile Waters Question," Min. of Irrigation and Hydroelectric Power, Khartoum, p. 13 (1955).

<sup>23</sup> *Ibid.* 5.

<sup>24</sup> *Ibid.* 36-41.

<sup>25</sup> Brit. Treaty Series, No. 30 (1954), Cmd. 9132; *ibid.*, No. 85 (1955), Cmd. 9642.

(1) That part of the cost "which is necessitated by the raising of the level of Lake Victoria and by the use of Lake Victoria for the storage of water."

(2) The cost of compensation of the interests affected by all new flooding around Lake Victoria within the range of three meters or, in the alternative, the cost of "equivalent facilities and amenities to those at present enjoyed by the organizations and persons affected, and the cost of such works of reinstatement as are necessary to insure a continuance of" prior conditions.

(3) The sum of £980,000 "as compensation for the consequential loss of hydroelectric power."

With regard to co-operation in the matter of meteorological and hydrological data, it was agreed that such information obtained by Uganda would be supplied to the Egyptian Government, and that the Egyptian resident engineer may inspect the Uganda observation posts to insure that data is properly gathered. The Egyptian Government agreed to contribute a stated sum toward the expense of obtaining and computing such data.

*6. Multilateral: Convention of Geneva Relating to the Development of Hydraulic Power Affecting More Than One State, 1923*

This convention was adopted by the Second International Conference on Communication and Transit held at Geneva in 1923.<sup>26</sup> That limitations are acknowledged to be imposed by existing international law appears unequivocally from the statement in Article I that states are free to carry out in their territory operations for the development of hydraulic power "within the limits of international law." Joint studies are prescribed in order to arrive at solutions most favorable to the interests as a whole of the states concerned with due regard to existing and prospective works. In the case of proposed operations "which might cause serious prejudice . . . the States concerned shall enter into negotiations with a view to the conclusion of agreements." There is also a compromissory article. A protocol to the convention states that it does not "in any way modify" international legal responsibility for injury done by hydraulic construction.

The Indus (Rau) Commission said that if this convention is typical, "it would seem to be an international recognition of the general principle that inter-State rivers are for the general benefit of all the States through which they flow irrespective of political frontiers."<sup>27</sup>

*7. Multilateral: Declaration of the Seventh International Conference of American States, 1933*

This declaration was adopted at Montevideo in 1933, the United States and Mexico making reservations.<sup>28</sup> The declaration proceeds upon the principle that, since co-riparians have the equal right to exploit international rivers within their territory, any alteration which "may prove in-

<sup>26</sup> 105 League of Nations Treaty Series 223.

<sup>27</sup> 1 Rept. of Indus Commission 22 (1942), discussed below.

<sup>28</sup> 28 A.J.I.L. Supp. 60 (1934).

jurious" to a riparian must have its consent. Proposed works must be announced to co-riparians, who must reply "within a period of three months, with or without observations. In the former case, the answer shall indicate the name of the technical expert or experts to be charged by the respondent with dealing with the technical experts of the applicant." There is also a compromissory provision.

8. *Multilateral: Cambodia, Laos, Thailand, and Viet-Nam, Lower Mekong Basin, 1951-1957*

In 1951 the Economic Commission for Asia and the Far East (ECAFE) suggested initiation of a study of the lower Mekong within Laos, Thailand, Cambodia and Viet-Nam. This study was to start with an examination of flood problems and later to cover the broader aspects of water resource development. The suggestion was approved by the four governments.

Field investigations were conducted by ECAFE in 1951, but it was not possible to make further study of the development of navigation, irrigation and power until 1956. The results of these investigations were reported to ECAFE at its thirteenth session in March, 1957, and published in October, 1957.<sup>29</sup> At the session the delegations of the four governments presented a joint statement as follows:

*The delegations of the lower Mekong riparian countries,*

. . . . .

*Consider* that this study is of real usefulness for their economic development;

*Express the wish* that such studies be continued jointly by the four countries concerned in order to determine with more detail in what measure the various projects concerning hydroelectric power, navigation, irrigation, drainage and flood control can be of use to a number of countries.<sup>30</sup>

The four governments called a joint meeting of experts at Bangkok May 20-23, 1957, to discuss in detail the projects recommended in the ECAFE report and to consider further steps. The experts recognized the interdependence of the recommended projects and considered that co-operative and co-ordinated action was indispensable for integrated development of the lower Mekong basin.

## II. GENERAL PRINCIPLES OF LAW <sup>31</sup>

The consistent pattern of the practice of states in entering into agreements concerning uses of the waters of international basins may itself be regarded as recognition of the existence of general principles of law in that regard. Thus the ECE Report, while conceding that treaties "do not

<sup>29</sup> Development of Water Resources in the Lower Mekong Basin, E/CN.11/457, ST/ECAFE/SER.F/12.

<sup>30</sup> *Ibid.* iii.

<sup>31</sup> In numerous cases international courts have referred to general principles of law as a source of international law and have invoked them as a basis for their decisions. See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

necessarily express a national principle or reflect customary practice," states that:

Nevertheless, the examination of these conventions is of value insofar as it provides a clue to the conception of international law held by nations generally. If, in fact, the same problem is resolved in the same way in a large number of agreements, it may be concluded that that solution is in line with the principles generally recognized by civilized States.<sup>32</sup>

In 1862 the Netherlands Government stated in a letter to its ministers in London and Paris that

The Meuse being a river common to both Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other.<sup>33</sup>

Professor Sauser-Hall, after reviewing the domestic law of the United States, Switzerland, Italy, Germany and France, concludes that a generally recognized principle is: "no diversion of a stream which is of a character to strongly prejudice other riparians or communities whose territories are bordered by or traversed by the same stream."<sup>34</sup> His view is that this principle is a contribution by analogy of domestic law to international law.

According to Lauterpacht:

The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of International Law. This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage. . . . The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim, *sic utere tuo ut alienum non laedas* [so use your own as not to injure another's property], is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of torts in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognized by civilised States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.<sup>35</sup>

### III. JUDICIAL DECISIONS: INTERNATIONAL

Several international arbitral awards have recognized the existence of the duty of a state in the exercise of its territorial sovereignty to prevent its territory being used in a manner causing injury to another state. No international decision supporting any purported principle of absolute sovereignty has been found.

<sup>32</sup> Pp. 204-205.

<sup>33</sup> Smith 217.

<sup>34</sup> "L'Utilization Industrielle des Fleuves Internationaux," 83 Hague Academy Recueil des Cours 517 (1953).

<sup>35</sup> 1 Oppenheim, International Law 345-347 (8th ed., Lauterpacht, 1955).



1. *Afghanistan-Iran (Persia): Helmand River, 1872, 1905, 1951*

In 1870 the British Government appointed Major General Goldsmid to settle a dispute over the boundary between Persia and Afghanistan and the water of the Helmand River. The boundary as drawn placed the greater length of both banks of the river in Afghanistan, but a part of the delta area where the principal irrigation was practiced remained in Persia. Also an area containing supply canals for parts of Persia was transferred to Afghanistan. The Goldsmid award provided that:

It is, moreover, to be well understood that no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand.<sup>36</sup>

Disagreement having arisen over the technical application of the Goldsmid award, the British Government in 1905 designated Colonel A. H. McMahon to make recommendations for its implementation. McMahon issued what purported to be an "award" providing in part that Persia was entitled to one third of the flow as the amount "requisite for irrigation of Persian lands." The McMahon "award" also provided that each country within its territory could make new canals or reopen old canals, "provided that the supply of water requisite for irrigation on both sides is not diminished." Also, if necessary, either country was to be allowed to improve installations and excavate canals in the other's territory.<sup>37</sup> Although Persia, and later Afghanistan, declined to accept the McMahon "award," it is not without value as an "advisory opinion."

After 1905 the question of water supply was handled by an international joint commission which measured the flow and decided upon its division when necessary. Apparently most of the water was used by Iran because Afghanistan had no use for it. Several temporary apportionment agreements were made in the 1930's, and attempts to reach a permanent settlement were interrupted by World War II. In the later 1940's droughts and plans for new uses led to further negotiations and the creation of a commission to investigate and make recommendations. The commission, composed of engineers from Canada, Chile, and the United States, recommended in part that

the traditional beneficial uses which have been established in [the Iranian and Afghan delta areas] should be recognized. An agreement should be reached that in normal years the monthly requirements now established will not be depleted by new upstream uses. . . .

The rate of storage in the Kajakai Reservoir should be so limited that the required normal flows to maintain existing uses in the delta are not depleted. . . .<sup>38</sup>

<sup>36</sup> 1 St. John, Lovett & Smith, *Eastern Persia: An Account of the Journeys of the Persian Boundary Commission, 1870-71-72*, Appendix B (1876).

<sup>37</sup> "Principles of Law Governing the Uses of International Rivers" (Lib. of Cong. Cat. Card No. 57-10830), Papers prepared for the International Law Association Conference at Dubrovnik, Yugoslavia, 1956.

<sup>38</sup> *Ibid.*

## 2. *Ecuador-Peru: Zarumilla River, 1945*

An arbitral award rendered by the Chancellery of Brazil ("Aranha formula") states:

Peru undertakes, within three years, to divert a part of the Zarumilla River so that it may run in the old bed, so as to guarantee the necessary aid for the subsistence of the Ecuadorian populations located along its banks, thus ensuring Ecuador the co-dominion over the waters in accordance with international practice.<sup>39</sup>

## 3. *Canada-United States: Air Pollution, 1941*

The United States and Canada agreed to arbitrate issues arising out of a privately operated smelter at Trail, B. C., fumes from which were causing damage in the United States.<sup>40</sup>

Canada having conceded liability for past damage, the Tribunal first undertook to assess damages. With respect to the question whether the smelter should refrain from causing future damage, the Tribunal decided it need not determine whether it was to apply international law or United States law because the latter in the matter of air pollution "is in conformity with the general rules of international law."<sup>41</sup> In this connection the Tribunal said that there are

... certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.<sup>42</sup>

After discussing several United States Supreme Court cases and a decision of the Federal Court of Switzerland in a suit between Cantons, the Tribunal concluded:

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

. . . . .

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the

<sup>39</sup> Informe del Ministro de las Relaciones Exteriores a la Nacion, p. 623 (Quito, 1946) (translation).

<sup>40</sup> U. S. Treaty Series, No. 893, 49 Stat. 3245. The Tribunal consisted of Charles Warren (U. S.), Robert Greenshields (Canada), and Jan Hostie (Belgium).

<sup>41</sup> 35 A.J.I.L. 684, 713 (1941).

<sup>42</sup> *Ibid.* 714.

conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.<sup>43</sup>

#### 4. *France-Spain: Lake Lanoux, 1957*

The outlet of Lake Lanoux, in the eastern Pyrenees of France, flows into the Carol River which then crosses into Spain where it joins the Segre River. To generate power, France proposed to divert Lake Lanoux water over a mountain drop into the Ariège River in France. In negotiations Spain insisted that France not proceed without Spain's consent. France offered to return an equal amount of water from the Ariège via a tunnel to the Carol before it crosses into Spain. Later France proposed to return water according to Spanish agricultural needs, rather than follow the rhythm of natural flow, and to create for Spain an annual reserve for droughts. It was agreed to submit to an *ad hoc* tribunal the question whether the French proposal would violate Spain's rights under the Treaty of Bayonne and its "Acte Additionel."<sup>44</sup>

The parties argued their cases under both customary international law and the treaty, and the Tribunal took the view that in interpreting the treaty, it would resort to customary international law.<sup>45</sup> The argument of France that treaty limitations regarding waters in France must be strictly construed, because in derogation of sovereignty, was disposed of by the Tribunal's statement that: "Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations."<sup>46</sup>

France argued that as co-riparians each party has a certain "*droit naturel*" for which the treaty merely establishes a protective procedure by requiring:

When in one of the two States it is proposed to construct works or to grant new concessions which might change the regime or the volume of a watercourse whose lower or opposite part is being used by riparians of the other Country, prior notice will be given . . . so that, if they should threaten the rights of the riparians of the adjoining sovereignty, a timely complaint may be lodged with the competent authorities, and thereby all the interests that may be involved on both sides will be safeguarded. . . .<sup>47</sup>

France argued that under customary international law Spain's consent was not required because by restitution of water there would be no alteration of the water regime in Spain. Spain argued that under customary international law no substantial alteration of an existing regime could be

<sup>43</sup> *Ibid.* 716-717.

<sup>44</sup> Signed May 26, 1866; 56 Brit. and For. State Papers 212.

<sup>45</sup> *Affaire du Lac Lanoux, Sentence du Tribunal Arbitral (1957)*, pp. 34-35; digested below, p. 156; see also Laylin and Bianchi, above, p. 34 *et seq.*

<sup>46</sup> Award cited above, p. 33 (translation).

<sup>47</sup> Art. XI, *Acte Additionel, ibid.* 229 (translation).

undertaken without the co-riparian's consent, even if the quantity of water crossing its boundary remained the same at any given time.

The Tribunal held<sup>48</sup> the proposed diversion would not violate the treaty because there would be no alteration of the waters of the Carol.

The Tribunal noted Spain could have argued that due to the complexity of the proposed works there could be no assurance of restitution of water equal in quality or quantity to the natural contribution of Lake Lanoux to the Carol River. Since Spain had not argued this possibility, the Tribunal felt it could not consider it, but the clear implication of the Tribunal's language is that such factors are relevant to the determination of legally permissible action.

The Tribunal expressed, as follows, its view that under existing customary international law co-riparians are equally entitled to reasonable use of the waters of an international drainage basin, and its view regarding a co-riparian's consent:

13. The Spanish Government has endeavored to establish also the content of present positive international law. . . . Certain principles which it demonstrates are, supposing the demonstration accepted, without any interest for the problem presently under examination. Thus, admitting that there exists a principle prohibiting the upstream State from changing the waters of a river in their natural conditions to the serious injury of a downstream State, such a principle cannot be applied to the present case because the Tribunal has established, in regard to the first question examined above, that the French project does not alter the waters of the Carol. In reality, States today are perfectly conscious of the importance of conflicting interests which the industrial utilization of international rivers places in dispute and of the necessity of reconciling them by mutual concessions. The only way to arrive at these compromises of interests is by the conclusion of agreements on an increasingly comprehensive basis. International practice reflects the conviction that States must strive to conclude such agreements; there would thus be an obligation to accept in good faith all the negotiations and contacts which must, by a wide comparison of interests and by reciprocal good will, put them in the best position to conclude agreements. . . .

But international practice thus far does not permit us to go beyond this conclusion; the rule according to which States may utilize the hydraulic force of international watercourses only on condition of a *prior* agreement between the interested States cannot be established either as a custom, or even less as a general principle of law. . . .<sup>49</sup>

21. Article 11 of the Additional Act imposes a double obligation on the States in which it is proposed to build works or to grant new concessions which might change the regime or the volume of a successive watercourse. The one is to give prior notice to the competent authorities of the bordering country; the other is to set up a system

<sup>48</sup> The *Sentence* was signed only by the Tribunal's President, Sture Petré (Sweden); other members were: Paul Reuter (France), Plinio Bolla (Switzerland), Antonio de Luna (Spain), and Fernand de Visser (Belgium).

<sup>49</sup> *Ibid.* 46-47 (translation).

of claims and safeguards for all the interests which would be affected on one side and on the other.

The first obligation does not call for much commentary, as its sole object is to permit the application of the second. Nevertheless, the eventuality of an injury to the regime or to the volume of waters envisaged in Article 11 could in no case be left to the exclusive evaluation of the State which proposes to execute these works or to grant concessions; the affirmation of the French Government according to which the projected works could cause no prejudice to Spanish riparians is not sufficient, contrary to what has been claimed, . . . to free the French Government from any of the obligations under Article 11. . . . The State exposed to the repercussions of works undertaken by a neighboring State is the sole judge of its own interests, and if the latter has not taken the initiative, the right of the former to exact notification of works or concessions which are the object of a project could not be denied.

22. The determination of the contents of the second obligation is more delicate. The "claims" alluded to in Article 11 relate to the different rights protected by the Additional Act, but the essential problem is to establish how "all the interests which might be affected on the one side and on the other" must be safeguarded.

First of all it must be determined what are the "interests" which have to be safeguarded. Under a strict interpretation, Article 11 could be claimed to cover only interests which correspond to a riparian right. Nevertheless, various considerations already discussed by the Tribunal lead to a broader interpretation. All the interests which might conceivably be affected by the works undertaken must be taken into account whatever their nature may be, even if they do not correspond to a right. Only such a solution corresponds to the terms of Article 16, to the spirit of the Pyrenean Treaties, and to the tendencies which have been manifested in matters of hydroelectric development in present-day international practice.

The second question calls for a determination of the method by which these interests may be safeguarded. If this method necessarily implies meetings and discussions, it will not be fulfilled by adhering to requirements of a merely formal nature such as noting claims, protests or regrets presented by the downstream State. The Tribunal is of the opinion that the upstream State has, according to rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own.

23. In the present case, the Spanish Government reproaches the French Government for not having based the development project of the waters of Lake Lanoux on a foundation of absolute equality; this is a double reproach. It attacks simultaneously form and substance. As to form, the French Government is claimed to have imposed its project unilaterally without associating the Spanish Government in it so as to search together for an acceptable solution. Substantively, the French project is asserted not to maintain a just balance between the French interests and the Spanish interests. The French project,

in the Spanish view, would serve perfectly French interests aimed especially at the production of electric energy called "de pointe," [when the demand for energy is at its peak during the day] but would not take into sufficient consideration Spanish interests in irrigation. According to the Spanish Government, the French Government refused to take into consideration projects which, in the opinion of the Spanish Government, would have necessitated a very small sacrifice of French interests and yielded great advantages for the rural economy of Spain. . . .

On a theoretical basis the Spanish thesis is unacceptable to the Tribunal; for Spain tends to put rights and simple interests on the same plane. . . .

France may make use of her rights; she cannot ignore Spanish interests.

Spain may demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its projects. If, in the course of discussions, the downstream State submits projects to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own project, provided it takes into consideration in a reasonable manner the interests of the downstream State.<sup>50</sup>

The Tribunal said that France was only making use of its right in carrying out the project entirely in France, and Spain has no right to obtain a development plan based on Spain's agricultural needs. If the French plans were abandoned, Spain could not demand other works in France for Spain's benefit. Therefore, Spain is only entitled to the adoption by France of measures insuring the reasonable protection of Spain's interests. In this regard:

When one examines the question of whether France either in the course of the dealings or in her proposals has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligations to take into consideration adverse interests in the course of negotiations, and the obligation to give a reasonable place to these interests in the adopted solution. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not dispensed from giving a reasonable place to adverse interests in the solution it adopts because the conversations had been interrupted, though owing to the intransigence of its partner. . . .<sup>51</sup>

#### IV. JUDICIAL DECISIONS: "QUASI-INTERNATIONAL"

The mutual relations of member entities of national unions have a quasi-international character, and in determining their respective rights national courts and commissions have often decided in accordance with analogous international legal principles, although not always expressly purporting

<sup>50</sup> *Ibid.* 58-61 (translation).

<sup>51</sup> *Ibid.* 63 (translation).

to apply international law. This is also true of a few cases in non-federal states.<sup>52</sup>

1. *Switzerland: Aargau v. Zurich, 1878* <sup>53</sup>

Aargau contended that a dam in Zurich deprived it of rights in the flow of water. Under a Zurich statute dams were allowed, provided that loss to others was prevented by compensating works, or that the parties reached agreement. The dam complained of had been licensed under this statute on condition of the deposit of a sum to the account of downstream parties. The court dismissed the action on the ground that Aargau's right to a reasonable share of the flow was not infringed because the Zurich statute made equitable provision for the protection of downstream parties. Any injury could be remedied by use of the sum deposited to construct a dam which would provide the downstream parties with the necessary water.

The starting point of the court's reasoning is that riparians do not own the water and, because of the sovereign equality of riparians, none may exercise its sovereign rights within its territory in such a way as to invade the sovereign rights of its co-riparians. The ruling rests essentially upon the principle of "equitable apportionment of benefits."

2. *Italy: Société Energie Electrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri, 1939* <sup>54</sup>

This case between private French and Italian companies was essentially concerned with the enforcement of a French judgment in Italy, but in its opinion the court said:

International law recognises the right on the part of every riparian State to enjoy as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation. . . . However, although a State in the exercise of its right of sovereignty, may subject public rivers to whatever régime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this régime, the opportunity of the other States to avail themselves of the flow of water for their own national needs.<sup>55</sup>

The court also pointed out that the conflict between the rights of sovereignty and the duty of respecting the rights of other riparians was generally settled by means of treaties—as evidenced by such navigation treaties as those affecting the Rhine, the Scheldt, the Elbe, and the Danube. These, the court said, illustrate "the principle of solidarity among States in the enjoyment of the important common sources of wealth."

<sup>52</sup> Space limitations make it possible to discuss only a few of the leading water dispute cases. The *Trail Smelter* case, above, is typical of the use of national decisions by international tribunals as guides for the determination of international law.

<sup>53</sup> *Schweizerische Bundesgericht, Entscheidungen des Sch. B.*, IV, 34; Smith 89, 104.

<sup>54</sup> *Italian Court of Cassation, 1938-40 Ann. Dig.*, No. 47, p. 120.

<sup>55</sup> *Ibid.* 121.

### 3. *Germany: Württemberg and Prussia v. Baden, 1927*<sup>56</sup>

In the decision of this essentially water diversion dispute between members of the German Federation, the court said it must apply international law concerning international rivers, which it regarded to be:

... The exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure the interest of other members of the international community. Due consideration must be given to one another by States through whose territories there flows an international river. No State may substantially impair the natural use of the flow of such a river by its neighbor. This principle has gained increased recognition in international relations, in particular in modern times when the increased exploitation of the natural power of flowing water has led to a contractual regulation of the interests of States connected by international rivers. The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighboring State, but also the relation of the advantage gained by one to the injury caused to the other.

### 4. *The United States:*

#### (a) *Kansas v. Colorado (1907)*<sup>57</sup>

Kansas sought a decree to restrain Colorado from diversion of the Arkansas River. Colorado law followed the rule that priority of appropriation for beneficial use governed the allocation of available water. Kansas law followed the rule of equitable apportionment even as between junior and senior prior appropriations.

The Court found that diversions in Colorado had caused some detriment in Kansas. But the Court weighed this detriment against the benefit to Colorado, and declared that equality of right and equity between the two States forbade an interference with existing diversions in Colorado. The Court stated that Kansas could institute new proceedings whenever it appeared that through material increase of diversion in Colorado substantial interests of Kansas were being injured to the extent of destroying the equitable apportionment of benefits between the two States.

#### (b) *Wyoming v. Colorado (1922)*<sup>58</sup>

Wyoming instituted proceedings to restrain Colorado, and two Colorado corporations, from a proposed diversion of the Laramie River which threatened to deprive Wyoming of water it had been using for some time. The laws of both States followed the prior appropriation rule. In its argument Colorado expressly relied upon the Harmon opinion, which argument the Court disposed of as follows:

<sup>56</sup> Deutsches Staatsgerichtshof, Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 116, Supp., p. 18; Smith 54, 117.

<sup>57</sup> 206 U. S. 46. See article by Robert D. Scott, 52 A.J.I.L. 432 (1958).

<sup>58</sup> 259 U. S. 419.



The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right.<sup>59</sup>

The Court divided the waters in accordance with seniority of appropriation for beneficial use without regard to the boundary between the two States.

(c) *Nebraska v. Wyoming* (1945)<sup>60</sup>

This case concerned the use of water from the North Platte River, Nebraska alleging that diversions in Wyoming and Colorado were in violation of the rule of priority of appropriation in force in all three States and depriving Nebraska of water to which it was equitably entitled. The Court applied the equitable apportionment rule, stating:

That does not mean that there must be a literal application of the priority rule. We stated in *Colorado v. Kansas*, supra, that in determining whether one State is "using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted." . . . But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.<sup>61</sup>

5. *India: Sind v. Punjab* (1942)<sup>62</sup>

In 1939 Sind Province brought a complaint under the Government of India Act of 1935 on the ground that existing and proposed diversions of

<sup>59</sup> *Ibid.* 466.

<sup>60</sup> 325 U. S. 589.

<sup>61</sup> *Ibid.* 618.

<sup>62</sup> 1 Rept. of the Indus Commission, July 13, 1942 (Lahore, Supt. Govt. Printing, Punjab, 1950).

the Indus system in Punjab would impair existing uses in Sind. A Commission, with Sir Benegal N. Rau as chairman, was established to hear the dispute, and other interested States and Provinces were made parties and submitted their views.

The first action of the Commission was to formulate the following statement of principles "which seemed . . . to emerge from a study of the practice in other countries." The participants were invited to comment upon these principles, and after study, all of the participants accepted them and they were again enunciated in the final report of the Commission:

(1) The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political or administrative frontiers. (Madrid Rules of 1911 and Geneva Convention, 1923, Articles 4 and 5.)

(2) If once there is such an agreement, that in itself furnishes the "law" governing the rights of the several parties until a new agreement is concluded. (Judgment of the Permanent Court of International Justice, 1937, in the Meuse Dispute between Holland and Belgium.)

(3) If there is no such agreement, the rights of the several Provinces and States must be determined by applying the rule of "equitable apportionment", each unit getting a fair share of the water of the common river. (American decisions.)

(4) In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one: "priority of appropriation gives superiority of right". (Wyoming *v.* Colorado, 259 U. S. 419, 459, 470.)

(5) For purposes of priority the date of a project is not the date when survey is first commenced but the date when the project reaches finality and there is a fixed and definite purpose to take it up and carry it through. (Wyoming *v.* Colorado, 259 U. S. 419, 494, 495; Connecticut *v.* Massachusetts, 282 U. S. 660, 667, 673.)

(6) As between projects of different kinds for the use of water, a suitable order of precedence might be (i) use for domestic and sanitary purposes; (ii) use for navigation and (iii) use for power and irrigation. (Journal of the Society of Comparative Legislation, New Series, Volume XVI, No. 35, pages 6, 7.)<sup>68</sup>

#### V. INDIVIDUAL PUBLICISTS

It is remarkable that only a few of the publicists who have considered this subject maintain the view that riparians have unlimited sovereign rights to use at will the waters in their territory, and that the great majority of them come to the conclusion that the essence of international law upon the matter is the principle of mutual rights and obligations between co-riparians in their uses of waters of international basins, and, in the event of competing uses, equitable apportionment of the waters or of their benefits.

<sup>68</sup> *Ibid.* 10-11.

Berber characterizes the view of absolute territorial sovereignty as

based upon an individualistic, anarchical conception of international law, in which selfish interests are exclusively taken as the rule of conduct and no solution is offered regarding the opposite interests of upper and lower riparians.<sup>64</sup>

Andrassy, in lectures at the Hague Academy of International Law, made a detailed analysis of the studies of publicists, and concludes that international law does impose obligations on co-riparians.<sup>65</sup> Andrassy has also reviewed the position of the few publicists supporting the view of absolute sovereign rights.<sup>66</sup> He disagrees, and affirms the existence of principles in limitation of sovereignty. The alleged principle of absolute sovereignty has never been acted upon by any state and must be relegated to the realm of abstraction.

Lauterpacht says:

Like independence, territorial supremacy does not give an unlimited liberty of action. . . . A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance, to stop or to divert the flow of a river which runs from its own into neighbouring territory.<sup>67</sup> But the flow of non-national, boundary and international rivers is not within the arbitrary power of one of the riparian states, for it is a rule of International Law that no State is allowed to alter the natural condition of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.<sup>68</sup>

As regards the utilisation of the flow of [international] lakes . . . the position is the same as with regard to the utilisation of the flow of rivers.<sup>69</sup>

Brierly<sup>70</sup> observes that:

The practice of states, as evidenced in the controversies which have arisen about this matter, seems now to admit that each state concerned has a right to have a river system considered as a whole, and to have its own interests weighed in the balance against those of other states; and that no one state may claim to use the waters in such a way as to cause material injury to the interests of another, or to oppose their use by another state unless this causes material injury to itself. This principle of the "equitable apportionment" of all the benefits of the river system between all the states concerned is clearly not a single problem which can be solved by the formulation of rules applicable to rivers in general; each river has its own problems and needs a sys-

<sup>64</sup> *Op. cit.* 15 (translation).

<sup>65</sup> "Les Relations Internationales de Voisinage," 79 *Recueil des Cours* 104 (1951).

<sup>66</sup> *Utilisation des Eaux Internationales Non Maritimes (en dehors de la Navigation)*, Institut de Droit International (1957).

<sup>67</sup> *Op. cit.* 290-291.

<sup>68</sup> *Op. cit.* 474-475.

<sup>69</sup> *Op. cit.* 477, note 2.

<sup>70</sup> *The Law of Nations* 204-205 (5th ed., 1955).

tem of rules and administration adopted to meet them. The way of advance seems therefore to lie, as Professor Smith suggests, in the constitution of authorities to administer the benefits of particular river systems.

Latin American publicists are also in accord with the basic principles of mutual rights and duties of co-riparians of a system of international waters. Typical of their views are the remarks of Professor Cardona of Mexico:

The internationality of river basins presupposes a combination of rights and duties that are common to the neighboring states. . . . It follows that the legal order that governs this combination of rights and duties affects the exercise of the territorial sovereignty of each state over its own territory.

The principle applicable to this order, and one which is amply recognized in international law, is that a state may exercise its rights of territorial sovereignty in the form and to the degree that it deems desirable but on the condition that it does not impair the right of a neighboring state.

Professor Cardona's conclusion is that international law imposes a "just distribution of the uses between the two parties" on the basis of present and future needs.<sup>71</sup>

The ECE Report<sup>72</sup> summarizes the views of twenty-five publicists of the 19th and 20th centuries, only one of whom, *viz.*, Lauterpacht, is referred to above. The Report shows that only three, or possibly four, of them maintained the view that riparians have unlimited sovereign rights to use at will the waters in their territory. The Report's conclusions, based upon its study of all sources of international law, are in part<sup>73</sup> as follows:

. . . . .

We have found that when a waterway crosses two or more territories in succession, each of the States concerned possesses rights of sovereignty and ownership over the section flowing through its territory. The same applies to frontier waterways. Each state possesses equal rights on either side of the boundary line.

. . . . .

A State has the right to develop unilaterally that section of the waterway which traverses or borders its territory, insofar as such development is liable to cause in the territory of another State, only slight injury or minor inconvenience compatible with good neighbourly relations.

On the other hand, when the injury liable to be caused is serious and lasting, development works may only be undertaken under a prior agreement.

Conversely, a State has no right to oppose the hydro-electric development of a section of an international waterway situated in the territory of another State if this will entail only slight injury to itself. In the event of serious injury, the States concerned should enter into

<sup>71</sup> "El Régimen Jurídico de los Ríos Internacionales," 56 Revista de Derecho Internacional 24, 26 (La Habana, No. 111, 1949).

<sup>72</sup> Pp. 51-68.

<sup>73</sup> Pp. 209-213.

negotiations and supply each other in advance with all the information necessary for the execution of the projects in hand.

Is it possible, however, to establish a criterion as a basis for the distinction between slight and serious injury?

. . . . .

. . . The truth is that it is impossible to lay down any hard and fast principle; only appraisalment of the injury inflicted in concrete cases can determine how serious it is. But since a formula must be found, that of good neighbourly relations will be retained.

The concept of injury in international law is very complex indeed. It is difficult to set an absolute limit beyond which the injury is sufficient to provide legitimate grounds for opposing the action taken by another State.

Should the criterion for a distinction be sought in the absolute value of the development works to be carried out, i.e., the international economic advantages they represent, or rather in the extent of the modification caused to the "essential and utilizable" character of the waterway; or finally—which would seem preferable—in the relative value of this modification in relation to the utility of the development?

If a slight injury is to be taken into account, the danger is that a State may for a trivial reason refuse to take part in the necessary development. The limit therefore depends on the good will of States, on their readiness to negotiate and on the good relations between them. And if they sustain slight injury as a result of good neighbourly relations, that merely gives them the right to take part in the negotiations in order to claim fair compensation.

. . . . .

## VI. PRIVATE ASSOCIATIONS OF INTERNATIONAL LAWYERS

### 1. *The Institut de Droit International*

At Madrid in 1911, the *Institut* adopted a declaration of principles preceded by a statement that the physical interdependence of riparians excludes the absolute autonomy of any one riparian in the use of a system of international waters. The Madrid Declaration reads in part<sup>74</sup> as follows:

I. When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc. thereof.

The foregoing provisions are likewise applicable to a lake lying between the territories of more than two States.

II. When a stream traverses successively the territories of two or more States:

1. The point where this stream crosses the frontiers of two States, whether naturally, or since time immemorial, may not be changed by establishments of one of the States without the consent of the other;

2. All alterations injurious to the water, the emptying therein of injurious matter (from factories, etc.) is forbidden;

<sup>74</sup> 24 *Annuaire* 170; *ECE Rept.* 261.

3. No establishment (especially factories utilizing hydraulic power) may take so much water that the constitution, otherwise called the utilisable or essential character of the stream shall, when it reaches the territory downstream, be seriously modified;

4. The right of navigation by virtue of a title recognized in international law may not be violated in any way whatever;

5. A State situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation;

6. The foregoing rules are applicable likewise to cases where streams flow from a lake situated in one State, through the territory of another State, or the territories of other States.

The *Institut* has recently appointed a new committee to prepare a draft text of rules of international law on this subject. The rapporteur of the committee, Juraj Andrassy, has produced a preliminary report for submission to the committee, in which he upholds, as a matter of existing international law, the principle of mutual rights and duties between co-riparians of a system of international waters.<sup>15</sup>

## 2. *The Inter-American Bar Association*

At its conference in 1957 this Association gave consideration to principles of law governing systems of international waters and resolved in part:

I. That the following general principles, which form part of existing international law, are applicable to every water-course or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more states; such a system will be referred to hereinafter as a "system of international waters."

1. Every state having under its jurisdiction a part of a system of international waters, has the right to make use of the waters thereof insofar as such use does not affect adversely the equal right of the states having under their jurisdiction other parts of the system.

2. States having under their jurisdiction a part of a system of international waters are under a duty, in the application of the principle of equality of rights, to recognize the right of the other states having jurisdiction over a part of the system to share the benefits of the system taking as the basis the right of each state to the maintenance of the status of its existing beneficial uses and to enjoy, according to the relative needs of the respective states, the benefits of future developments. In cases where agreement cannot be reached the states should submit their differences to an international court or an arbitral commission.

3. States having under their jurisdiction part of a system of international waters are under a duty to refrain from making changes in the existing regime that might affect adversely the advantageous use by one or more other states having a part of the system under their jurisdiction except in accordance with: (i) an agreement with the

<sup>15</sup> Utilisation des Eaux Internationales Non Maritimes (en dehors de la Navigation) (1957).

state or states affected or (ii) a decision of an international court or arbitral commission.<sup>76</sup>

### 3. *The International Law Association*

At its conferences at Dubrovnik, 1956, and New York, 1958, the Association adopted resolutions on this subject, after having discussed committee reports.<sup>77</sup>

The 1956 resolution adopted a statement of general principles "as a sound basis upon which to study further the development of rules of international law." The 1958 resolution adopted a unanimous committee report containing four "Heads of Unanimous Agreement," four "Agreed Principles of International Law," and several recommendations.

The 1956 resolution was drafted in terms of an "international river" defined as "one which flows through or between the territories of two or more states." The 1958 committee report was drafted in terms of a "drainage basin" defined as "an area within the territories of two or more states in which all the streams of flowing surface water, both natural and artificial, drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea."

In 1956 the adoption of general principles was opposed by a committee member who submitted a report maintaining that, except in a few regions, there is no international legal restraint on what a state may do to an international river within its territory, whatever the effect in a co-riparian state.

<sup>76</sup> Principles of Law Governing the Uses of International Rivers and Lakes. Resolution Adopted by the Inter-American Bar Association at its Tenth Conference Held in November, 1957, at Buenos Aires, Argentina, together with Papers Submitted to the Association (Washington, D. C., 1958, Lib. of Cong. Cat. Card No. 58-12112. pp. 127).

<sup>77</sup> The report of the 1958 conference is not yet published. For the 1956 conference, see Rept. of 47th Conf., Dubrovnik (1956) 216-248; and papers prepared for the conference, above.

Between the two conferences several studies became available and were utilized by various members of the committee. The more readily available and comprehensive of these are:

1. Andrássy's preliminary report (1957), above.
2. Dr. H. Fortuin, "International River Law," *Netherlands International Law Review*, October, 1957.
3. Papers submitted to the Inter-American Bar Association, above.
4. Sen. Doc. 118 (1958), above.
5. U.N. Dept. of Economic and Social Affairs, "Integrated River Basin Development," Doc. E/8066 (1958).
6. Principles of Law and Recommendations on the Uses of International Rivers. Statement of Principles of Law and Recommendations with a Commentary and Supporting Authorities Submitted to the International Committee of the International Law Association by the Committee on the Uses of Waters of International Rivers of the American Branch (Washington, D. C., 1958, Lib. of Cong. Cat. Card No. 58-12111).
7. Bloomfield and Fitzgerald, *Boundary Waters Problems—Canada and the United States* (Toronto, Carswell Co., 1958).

The conference rejected this view, and adopted the following general principles:

- III While each state has sovereign control over the international rivers within its own boundaries, the state must exercise this control with due consideration for its effects upon other riparian states.
- IV A state is responsible, under international law, for public or private acts producing change in the existing regime of a river to the injury of another state, which it could have prevented by reasonable diligence.
- V In accordance with the general principle stated in No. III above, the states upon an international river should in reaching agreements, and states or tribunals in settling disputes, weigh the benefit to one state against the injury done to another through a particular use of the water. For this purpose, the following factors, among others, should be taken into consideration:
  - (a) The right of each to a reasonable use of the water.
  - (b) The extent of the dependence of each state upon the waters of that river.
  - (c) The comparative social and economic gains accruing to each and to the entire river community.
  - (d) Pre-existent agreements among the states concerned.
  - (e) Pre-existent appropriation of water by one state.

The 1958 report of the committee (including the member who had previously dissented) is in part as follows:

It is agreed that there are rules of conventional and customary international law governing the uses of waters of drainage basins that are within the territories of two or more states.

It is agreed that there may be issues not adequately covered by recognized rules of international law and also that there are rules as to which there exist differences as to their meaning.

#### AGREED PRINCIPLES OF INTERNATIONAL LAW

2. Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.

3. Co-riparian states are under a duty to respect the legal rights of each co-riparian state in the drainage basin.

4. The duty of a riparian state to respect the legal rights of a co-riparian state includes the duty to prevent others, for whose acts it is responsible under international law, from violating the legal rights of the other co-riparian states.

Both conferences also dealt with the international adjective law aspects of water uses. The 1956 resolution contained the following as a general principle:



- VI A state which proposes new works (construction, diversion, etc.) or change of previously existing use of water which might affect utilization of the water by another state must first consult with the other state. In case agreement is not reached through such consultation, the states concerned should seek the advice of a technical commission; and if this does not lead to agreement, resort should be had to arbitration.

However, the 1958 committee report dealt with this aspect only in the form of the following recommendation:

1. Co-riparian states should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian state in the drainage basin so long as such co-riparian state is willing to resolve differences as to their legal rights within a reasonable time by consultation. In the eventuality of a failure of these consultations to produce agreement within a reasonable time, the parties should seek a solution in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof.

Those who opposed the foregoing as a principle did so on the ground that it would give a co-riparian a veto over proposed projects. Others, while recognizing that there is no such right of veto in existing law, believed that the foregoing statement does not involve a veto and is existing law.<sup>78</sup>

Regarding pollution, the 1956 resolution stated:

- VII Preventable pollution of water in one state which does substantial injury to another state renders the former state responsible for the damage done.

But the 1958 committee report only recommended that:

8. Co-riparians should take immediate action to prevent further pollution and should study and put into effect all practicable means of reducing to a less harmful degree present uses which lead to pollution.

Finally, both conferences recognized the practical desirability of integrated basin development. The 1956 resolution had stated that:

- VIII So far as possible, riparian states should join with each other to make full utilization of the waters of a river, both from the viewpoint of the river basin as an integrated whole, and from the viewpoint of the widest variety of uses of the water, so as to assure the greatest benefit to all.

The 1958 report stated as an agreed principle of international law that:

1. A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piece-meal).

Comment: Until now international law has for the most part been concerned with surface waters although there are some precedents having to do with underground waters. It may be necessary to consider the interdependence of all hydrological and demographic features of a drainage basin.

<sup>78</sup> This point is discussed further below.

## VII. WHAT WATERS ARE INTERNATIONAL?

The historical concept of an international watercourse, originating with reference to navigation, is one which passes successively through the territory of more than one state (successive watercourse) or runs along the boundary of two states (contiguous watercourse).

But navigation and analogous uses<sup>79</sup> are the only ones which do not in some degree affect the flow in either quantity or quality. All other uses involve a change in the natural equilibrium of water flow, which necessarily produces a chain of reactions upstream, downstream, and on the banks.

The historical concept is of no utility in the context of uses the effects of which are spread internationally by means of the watercourse itself. Because of the fact of permanent natural physical interdependence between states whose territories lie within the same drainage basin, all inter-connecting waters of the basin are affected with an international interest—including tributaries entirely within a single state. However, this does not necessarily mean that rules of international law will always apply in the same way to all parts or to all uses of the water.

## VIII. THE APPLICABLE INTERNATIONAL LAW

The view that there are no rules of international law governing the use of inland waters affected with an international interest<sup>80</sup> has occasionally been modified by the view that, because of the diversity of factual situations to which such rules would apply, they exist, if at all, only with regard to some regions.<sup>81</sup>

The falsity of such views is demonstrated by the fact of international relations that sovereignty in this regard is restricted by principles accepted as customary international law. There is no known case in which such views have been sustained in fact. Comparison of the proceedings and results of the International Law Association conferences of 1956 and 1958 is of particular significance as indicating increasing recognition of the existence of rules of law on this subject.<sup>82</sup> Moreover, legal rules by nature must be couched in terms of generalities which will have differing application to differing situations.

It is submitted that, on the basis of the sources of international law as discussed above, there are principles of international law governing the use of waters of international drainage basins in the sense that, if issues with regard thereto were to be posed before an international tribunal, it would pronounce judgment in accordance therewith, and that such principles are along the following lines:<sup>83</sup>

1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each co-riparian.

<sup>79</sup> Such uses have not been considered in preparing this article.

<sup>80</sup> *E.g.*, the Harmon opinion, above.

<sup>81</sup> *E.g.*, Berber, *op. cit.* 114.

<sup>82</sup> See above.

<sup>83</sup> The numbered principles and most of the commentary are as in Sen. Doc. 118, pp. 89-91, but the comments on principle 3 have been expanded.

*Comment:* The doctrine of sovereignty is a fundamental tenet of the world community of states as it presently exists. Sovereignty exists and it is absolute in the sense that each state has exclusive jurisdiction and control over its territory. Each state possesses equal rights on either side of a boundary line. Thus riparians possess the right of exclusive jurisdiction and control over the part of a system of international waters in their territory, and these rights reciprocally restrict the freedom of action of the others.

2. (a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

(b) In determining what is just and reasonable account is to be taken of rights arising out of

- (1) agreements
- (2) judgments and awards, and
- (3) established lawful and beneficial uses; and of other considerations, such as
- (4) the development of the system that has already taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian,
- (5) the extent of the dependence of each riparian upon the waters in question, and
- (6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question.

*Comment:* The foregoing is an attempt to formulate the factors which would be considered in applying the doctrine of "equitable apportionment of benefits" because, whatever the situation—whether in negotiation or before a tribunal—more guidance is needed than is contained in that phrase. Other factors could doubtless be included.

Perhaps an additional factor would be that the order of priority of uses of a particular system would be the relative importance of the possible different uses to the international area served by the system. It is doubtful that a statement of priority among uses of water for all systems could be made as a matter of existing law. On some systems the navigational use is of paramount importance; on others irrigation would surely come next after drinking and domestic uses.

It is believed that existing law gives priority to factors 1-3 in the order named, but not to other factors. Even so, it may be difficult to balance the various factors because they would have different weights in different situations. For example, one riparian may have delayed developing uses of the part of a system in its territory much behind another riparian. On the one hand, the latter should not have its investment impaired by subsequent uses by the former; on the other hand, the former should not be deprived of the opportunity for its own development. In such a situation the benefits accruing to the latter under the priority factors would be taken into account in determining the just and reasonable apportionment of the

total possible uses and benefits of the system. The balancing of rights with the obtention of maximum benefits to all riparians in most situations can probably only be done by joint planning and/or construction with agreed distribution of benefits, *e.g.*, irrigation and power.

3. (a) A riparian which proposes to make, or allow, a change in the existing regime of a system of international waters which could interfere with the realization by a co-riparian of its rights to share on a just and reasonable basis in the use and benefits of the system, is under a duty to give the co-riparian an opportunity to object.

(b) If the co-riparian, in good faith, objects and demonstrates its willingness to reach a prompt and just solution by the pacific means envisaged in Article 33 (1) of the Charter of the United Nations, a riparian is under a duty to refrain from making, or allowing, such change, pending agreement or other solution.

*Comment:* It seems clear there is no general principle of international law that a riparian must have the consent of co-riparians as a condition precedent to the use and development within its territory of the waters of an international basin. In other words, a co-riparian does not have what in effect would amount to a veto over proposed uses.

A riparian's proposed use necessarily may raise the question of its right to establish the use. Such a situation may be settled by agreement, or voluntary submission to third-party process, or remain unsettled. This situation is normal in international relations because, in a legal system based upon the doctrine of voluntary submission to third-party process, each state is in the first instance the judge of its own international legal obligations. But at this point there enters the general principle that ultimately no state is entitled to be judge in its own cause. Thus, no co-riparian is entitled to impose unilaterally its views of the parties' rights to a just and reasonable share in the beneficial uses of the waters of an international basin. The problem is how to square this principle with the admitted absence of a veto of a change in the basin.

A riparian has a duty to give notice of a proposed change. Beyond this point there must be distinguished three situations regarding the objection of a co-riparian as an operative fact:

(1) If the co-riparian remains silent, it follows from the lack of a veto that the riparian may legally proceed with its proposed change, subject to possible liability for the payment of damages under the law of state responsibility.

(2) If a co-riparian objects that the proposed change will violate its legal rights, the parties have a duty to consult. If the objecting party refuses to consult, the riparian has the legal power to proceed with its proposed change because there is no right of veto.

(3) If the objecting state demonstrates its willingness to negotiate a prompt and just solution or to submit the validity of its objection to impartial third-party process, it follows from the principle that no one can be judge in his own cause that the proposing riparian is under a duty temporarily to refrain from making a change pending such solution. This

is fair to both states because it insures that neither can have unilaterally imposed on it the views of the other as to its substantive rights, and yet the objection cannot act as a veto of the project.

Some contend that the law has not yet developed to the point that a riparian has a duty temporarily to refrain from a proposed change under the foregoing circumstances. This contention raises considerations which go to the heart of the remedial deficiencies of the international legal system.

Admittedly the existence of such a duty to refrain may not yet have been expressly judicially declared, but we are living in a time which is seeing an increase in the volume and variety of the control of international law over the behavior of states. The adherence of states to the United Nations Charter and other treaties has led to situations in which, on the basis of principal treaty obligations, new subsidiary obligations are imposed on states. The positivist description of sovereign consent as the source of international law cannot explain the involuntary nature of obligations assumed by states simply through membership in the international community.

Under the United Nations Charter, except for self-defense, a co-riparian must refrain from forceful self-help remedies inconsistent with the purposes of the United Nations. If a co-riparian is willing to negotiate or to submit to third-party process the validity of its objection, is it to have no legal protection in the interim? Its protection lies in the duty of the proposing riparian temporarily to refrain from its proposed change pending settlement of the matter.

Riparians are doubtlessly motivated to seek agreement because of recognition that under the international law of responsibility of states, a riparian which alters the character of the bed or flow of a system of international waters is responsible if injury is thereby caused to a co-riparian. The concept of injury in international law is very complex; and it is difficult to set an absolute limit beyond which the injury is sufficient to provide legitimate grounds for opposing action taken by a riparian. Moreover, responsibility means a duty to make reparation for an injury; and reparation may consist of pecuniary or specific restitution, specific performance, monetary damages, or some combination of these. It might be a vast responsibility to make pecuniary reparation or restore a *status quo*. Consequently, it is very important that riparians come to an agreement in advance, so that such responsibility would not arise. Their agreement upon the distribution of benefits is in effect an indemnification in advance.

The crux of the matter is that friendly states desirous of conducting their mutual relations in good faith under the rule of law do in fact "seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" as envisaged in Article 33 (1) of the United Nations Charter.

## ELECTION PROCEDURE IN THE UNITED NATIONS \*

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### I. IS THE MAJORITY RULE APPROPRIATE FOR MULTIPLE ELECTIONS?

It appears at first sight almost incredible that a secret ballot under the majority rule could result in more candidates mustering the required majority of votes than there are places to be filled. But this actually happened four times in the Security Council during the election of judges to the International Court of Justice,<sup>1</sup> and on several occasions in the General Assembly, one of them being in connection with electing judges of the United Nations Administrative Tribunal,<sup>2</sup> and three others related to electing the Vice Presidents of the General Assembly.<sup>3</sup> In 1935 the same thing occurred in the League of Nations Assembly.<sup>4</sup>

Before going into this paradoxical matter it might be useful to clarify some basic procedural matters. We speak indiscriminately about "voting" on draft resolutions as well as "voting" in elections. But there is an important difference. When voting concerns a draft resolution, an amendment, a procedural motion or, as it sometimes happens, a preliminary question of principle,<sup>5</sup> a concrete text has to be accepted or rejected, approved or disapproved, by the voting body. When one place or more has to be filled by election (if the number of eligible candidates is greater than the number of places open), the electors, strictly speaking, do not vote, but choose persons (or countries) for the vacant positions.<sup>6</sup> If there is no choice of candidates involved, as, for example, when there is only one candidate eligible for each place, the "election" turns into acceptance or

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<sup>1</sup> 567th Meeting, Dec. 6, 1951, and three times during the 681st Meeting, Oct. 7, 1954.

<sup>2</sup> (IX) 5th Committee, 444th Meeting, Oct. 22, 1954.

<sup>3</sup> (VII) 378th Plenary Meeting, Oct. 14, 1952; (VIII) 433rd Plenary Meeting, Sept. 16, 1953; and (XII) 679th Plenary Meeting, Sept. 18, 1957.

<sup>4</sup> Records of the 16th Ordinary Session of the Assembly, Plenary Meetings, 1935, p. 38.

<sup>5</sup> E.g., (IX) 5th Committee, 443rd Meeting, Oct. 22, 1954, a vote taken on the question: "Should an honorarium be paid for work performed between sessions of the Permanent Central Opium Board and Drug Supervisory Body?"

<sup>6</sup> There may be even a vote, for example, on the selection of one of two or more cities as meeting places for the General Assembly in Europe. That is also a clear case of an election and the best way to vote on it is to apply election rules in a simplified form.

rejection of one concrete solution and therefore performs the same function as regular voting.<sup>7</sup> But when there is at least a choice of two candidates for one place, the function of voting becomes selective. The method of deciding the issue is the same for voting on draft resolutions and in elections. A majority of votes cast must be achieved for a draft resolution to be accepted and for a candidate to be elected. But the function which the voting performs is different in each case. The difference is strikingly illustrated by the impossibility of using mechanical voting devices for elections.<sup>8</sup>

There is also another basic difference. Rejection of a proposal by voting, leaving things as they are, is a perfectly legitimate and commonplace result. But a negative result of elections, leaving the place or places vacant without incumbents, is inadmissible. It endangers the functioning of the organ concerned. Elections have to be repeated until the vacancy or vacancies are filled. A positive result is mandatory.

It is therefore only natural that rules of procedure of bodies performing both functions contain separate rules governing elections in addition to rules concerning voting (Rules 94-96 and 133, 31, 105, 140-152 of the Rules of Procedure of the General Assembly; Rules 40 and 61 of the Provisional Rules of Procedure of the Security Council; Rules 67-69 and 20 of the Rules of Procedure of the ECOSOC; Rules 41-43 of the Rules of Procedure of the Trusteeship Council).

### *More "Elected" than Places Open*

In connection with these basic differences a further arithmetical difficulty arises in elections to fill more than one place by majority vote if there are more candidates eligible than places open. Let us take a small body such as the Security Council, having only eleven members, and the simplest possible case. Two vacancies on the International Court of Justice are to be filled and there are only three nominations on the Secretary General's list under Article 7 of the Statute. Each member may vote for two candidates only, making the total number of votes 22. Six votes constitute the absolute majority. It is obvious that all *three* candidates can get six or slightly more votes—and the Security Council may be confronted by an *embarras des richesses*. Elementary arithmetic proves such a possibility for all elections to fill more than one place by majority votes from among candidates larger in number than the number of places vacant. Nevertheless the rules of procedure of the League of Nations and of the

<sup>7</sup> A good example is the appointment of a Credentials Committee at the opening of each regular session of the General Assembly (Rule 28 of the Rules of Procedure of the General Assembly). It consists of nine members proposed by the President of the General Assembly (actually the Temporary President). The Temporary President asks for objections; if there are none the General Assembly "approves" the list proposed without a formal vote. Soviet-type "elections" are another well-known example.

<sup>8</sup> "An electrical voting system would offer the possibility of a recorded vote equivalent to a roll call, or an unrecorded vote equivalent to a show of hands. Elections which differ greatly in character would continue to be held by secret ballot." (Correction of votes in the General Assembly and Committees, Report of Secretary General, A/2977 (X), Annexes, Agenda Item 51, par. 63.)

United Nations are consistently silent on such a possibility, apparently assuming that it will never occur.<sup>9</sup> It really cannot occur in elections to fill one place only, irrespective of the number of eligible candidates. To take the Security Council again as an example: Eleven votes are cast (each member voting for only one candidate) and six votes are necessary for election. It is impossible for more than one candidate to assemble six votes.

#### BASIC REMEDIES

The paradoxical result of an election resulting in "electing" more persons than there are places open for them naturally raises grave procedural problems, some basic, some technical. A basic doubt arises whether the majority voting system applied to multiple elections is sound if it creates such paradoxes. Something seems to be wrong with the system itself. There are only three possible basic remedies, each difficult to accept.

##### 1. *Accept Plurality Elections*

The first remedy is to renounce the majority principle for multiple elections and base them on plurality. That was the system adopted by the League of Nations Assembly after the first ballot failed to fill all the places (Rule 21 (3)). But election based on plurality, i.e., on support given by less than a majority of votes cast, is generally felt to be too weak and too narrow a foundation for an office of international trust, such as judge of the International Court of Justice, or, for that matter, also for other positions of trust in United Nations organs.

Furthermore this would introduce a different system of voting for filling one place (majority) and another one for filling two or more places (plurality), consequently giving one-place elections more moral and political backing and the elected person or country a stronger status than those elected by plurality vote.

##### 2. *Qualified Majority Elections*

The second remedy would consist in such a raising of the level of the required majority as to prevent the possibility of "electing" more than enough candidates. This would necessitate a special *ad hoc* figuring out

<sup>9</sup> The problem discussed here was brought to the attention of Subcommittee 3 of the 6th Committee during the Second Session of the General Assembly on Oct. 30, 1947, by a member of the delegation of Panama as an "interesting mathematical possibility." The Subcommittee's report (A/C.6/182) contains on pages 41-42 a clear and precise explanation demonstrating this possibility in the first ballot in case an election is governed by two-thirds majority as well as for simple majority elections. The Subcommittee "decided to bring these possibilities to the attention of Committee 6 since no specific proposals were advanced on the question" (p. 42). The 6th Committee and the Plenary simply ignored the matter, apparently convinced that such "mathematical possibilities" are purely academic and quite unlikely to occur in practice. After all, this had happened only once in the League Assembly, in 1935, and even that occurrence was probably unknown to members of the 6th Committee.



of the *level* of required majority in each case of multiple elections—a serious inconvenience in itself. But even more important, the level of required majority would have to be raised so high as to approach almost unanimity and thus make an election infinitely more difficult and often impossible. Let us demonstrate this by our example of the Security Council. There is the usual election of five judges every three years (Article 13 (1) of the Statute). Let us assume a list of nominations containing only ten names. Each of the eleven members of the Security Council votes for five names, making the total of votes 55. The “absolute” majority of six votes permits not five but *nine* candidates to get the required number of votes! Therefore all but one nominee could be elected! To make this impossible, the level of majority would have to be raised to *ten* votes, making the election of each judge almost unanimous in an eleven-member Council. The remedy is clearly worse than the disease.

### 3. *Elect One Man at a Time*

There is a third simple possibility, namely to split each multiple election into a series of one-man elections, each delegation voting only for one from among all eligible candidates. That would remove, as we have seen, any possibility of an *embarras des richesses*. But there are still inconveniences involved. Apart from the obvious and considerable waste of time, the result of the elections might be affected by such a splitting. It has to be borne in mind that elections are the result not only of a solitary and secret choice made by each elector alone, but are at the same time preceded by consultations, negotiations, bargaining, vote canvassing and more or less informal deals, promises and arrangements arrived at between the members of the electing body. That, together with a genuine appraisal of differences in qualification of candidates for the position to which they aspire, explains why the arithmetically so probable paradoxical result of more men elected than needed happens rather seldom. As a result most of the elected candidates usually receive many more votes than are needed for their election and the rest of the votes are in most cases scattered widely among a number of unsuccessful contestants, each of them receiving a vote well below the level of required majority. A sequence of five separate one-man elections instead of one five-man election would strain substantially the trust needed for election deals. The other side might be less interested to keep the bargain in further ballots after their own candidate has safely arrived. Anyhow, splitting of multiple ballots may be the least objectionable basic remedy and is worth considering.

#### TECHNICAL REMEDIES

The technical difficulties created by such a result of a multiple election by majority vote may be best illustrated by practical examples in the Security Council and in the General Assembly.

### 1. *Repeat the Ballot*

On December 6, 1951, during the 567th Meeting of the Security Council in Paris, the President (Quevedo, Ecuador), in explaining the procedure of electing five judges of the International Court of Justice, before the secret ballot casually remarked: "If more than five candidates obtain an absolute majority the President will decide on the procedure to be followed."<sup>10</sup> And it happened immediately. Six candidates obtained over six votes: Messrs. Hackworth (U. S.) 11, Golunsky (U.S.S.R.) 9, Klaestad (Norway) 8, Rau (India) 7, Ugon (Uruguay) 7, and De Visser (Belgium) 7<sup>11</sup>—a total of 49 votes, some members apparently availing themselves of the right to vote for less than five names. The result was doubly embarrassing. Not only were six "elected" instead of the needed five, but the bottom three received an equal number of votes. The President, instead of making the anticipated decision, enumerated with admirable instantaneous procedural ingenuity a number of possibilities for dealing with the situation. The first consisted in simply communicating to the General Assembly the names of all six persons who had obtained more than six votes. But he rejected it by a Presidential ruling shortly after mentioning it.<sup>12</sup>

In view of Articles 8 and 13 of the Statute since the Security Council is responsible for electing five judges of the Court, it would appear incompatible with the Statute that the Security Council should submit to the General Assembly the names of six candidates which it has chosen.<sup>13</sup>

This ruling was not appealed by anybody in the Security Council<sup>14</sup> and seems quite sound as far as it goes.

Another possibility mentioned by the President was "to consider as elected those candidates who obtained the highest number of votes at this first voting," i.e., Hackworth, Golunsky, Klaestad, and "that another vote be taken between" the remaining three who received seven votes each.<sup>15</sup> A modification of this method of procedure was also suggested by the President, namely, instead of having a ballot restricted to the bottom three names, to take another vote for two places still vacant from all the names on the list minus the elected three top men.<sup>16</sup> This procedure of considering the three top men as elected was strongly endorsed by the Soviet delegate, who evidently was afraid to submit the Soviet candidate to another ballot. The French delegate expressed initially the same view,<sup>17</sup> but voted afterwards for the third possibility.<sup>18</sup>

This third possibility, voiced by the President, consisted in repeating the voting entirely, disregarding completely the paradoxical results of the

<sup>10</sup> Security Council, Official Records, 567th Meeting, Dec. 6, 1951, par. 23.

<sup>11</sup> *Ibid.* par. 25.

<sup>12</sup> *Ibid.* par. 52.

<sup>13</sup> *Ibid.* par. 26.

<sup>14</sup> *Ibid.* par. 43.

<sup>15</sup> *Ibid.* paras. 26, 52, 53, 59.

<sup>16</sup> *Ibid.* par. 59.

<sup>17</sup> *Ibid.* par. 27.

<sup>18</sup> *Ibid.* par. 114.

first ballot.<sup>19</sup> The Dutch delegate, supporting this solution, said: "My legal conscience is pained . . . because we should then [by having a second ballot restricted to the bottom three] be making distinctions among several people, all of whom have obtained the required majority of six."<sup>20</sup> The Turkish delegate drew attention to the logical consequence of the Soviet proposal, "that candidates who had obtained the fewest votes would be automatically eliminated."<sup>21</sup> The U. S. delegate (Gross) expressed the view that

there does seem to be some logical difficulty in the way of attempting to distinguish between the sizes of the majorities. The question is whether there is a majority or no majority, and the size of the majority, at first sight at least, does not seem to be relevant. It certainly does not seem to be decisive.<sup>22</sup>

He formally proposed a new ballot to be taken on all candidates.<sup>23</sup> Over very strong and repeated Soviet opposition the United States' proposal was adopted by nine votes to one (U.S.S.R.), with India abstaining.<sup>24</sup> A second ballot yielded the desired result. Only five candidates received more than six votes: Hackworth 9, Kjaestad 9, Ugon 9, Rau 8, Golunsky 7. They were elected.<sup>25</sup>

It is highly probable that the position taken by the Security Council that, if more persons are elected than there are places vacant, the election has to be resumed all over again as if nothing had happened, was in part at least due to the additional complicating factor that three at the bottom of the six had received an equal number of votes. The legal difficulty of differentiating between those who had received the required number of votes—stressed during the debate—would militate for accepting all of them and not for rejecting them all. And there is nothing terrifying in the logical consequence stressed by the Turkish delegate, "that candidates who obtained the fewest votes would be automatically eliminated."<sup>26</sup> That frequently happens as a matter of course in majority and plurality elections. There were two troubles in that special case: (1) one too many candidates elected and (2) the impossibility of determining *prima facie* who was the supernumerary man because of a tie vote. The elimination of the *youngest* of the three seven-vote candidates in the spirit of Articles 10 (3) and 12 (4) of the Statute apparently did not occur to anybody. The device to vote all over again seemed the best under the circumstances. The League of Nations tradition to avoid restricted ballots in elections to the International Court of Justice may have been a contributing factor. This tradition was broken during the same day in the General Assembly (see Part II, section 5, below, p. 108).

The same technique was more or less blindly followed on October 7, 1954, during the 681st meeting of the Security Council, when the next regular

<sup>19</sup> *Ibid.* par. 28.

<sup>21</sup> *Ibid.* par. 81.

<sup>23</sup> *Ibid.* par. 100.

<sup>25</sup> *Ibid.* paras. 115-117.

<sup>20</sup> *Ibid.* par. 67.

<sup>22</sup> *Ibid.* par. 83.

<sup>24</sup> *Ibid.* par. 114.

<sup>26</sup> *Ibid.* par. 81.

election of five judges of the International Court of Justice took place. This time the President (Borberg, Denmark) announced at the beginning, when explaining procedure: "If more than five candidates obtain the required majority the Chair will consult the Council as to the procedure to be followed."<sup>27</sup> The necessity arose immediately. Again six persons received the required absolute majority of six or more votes: Messrs. Basdevant (France) 10, Lauterpacht (U.K.) 9, Córdova (Mexico) 8, Guerrero (San Salvador) 7, Moreno-Quintana (Argentina) 7, and De Visscher (Belgium) 6.<sup>28</sup> This time the application of the subsidiary plurality principle to the paradoxical result, and consequently the declaration of the five persons with the largest number of votes as elected, was quite easy and the simplest and quickest way to break the deadlock. But the President, acting against his own announcement, did not consult the Council, but ordered a second vote for all candidates on the Secretary General's list.<sup>29</sup> Evidently he was guided by the decision taken at the 567th meeting on December 6, 1951, in Paris, disregarding the special circumstances of the previous case.

This time, however, a second ballot did not work. The result was basically the same. Again the same six persons were elected, with the additional complication, like that in Paris, that the last two (Moreno-Quintana and De Visscher) received seven votes each.<sup>30</sup> A third ballot was ordered by the President. Again, for the third successive time, the same six received an absolute majority and again, as in the first ballot, a clear descending number of votes was present, this time with Mr. Guerrero at the bottom with six votes.<sup>31</sup> The President ordered a new (fourth) ballot, again repeating as before the same reason for a new ballot, i.e., the fact that only five vacancies were to be filled. The result was: four persons elected (Basdevant, Córdova, Lauterpacht and Moreno-Quintana), the remaining two (Guerrero and De Visscher) having received only five votes each.<sup>32</sup> The one remaining vacancy was filled by the election of Mr. Guerrero in a further (fifth) ballot. He received seven votes, while De Visscher received only four.<sup>33</sup>

The Colombian delegate voiced doubts about the correctness of the procedure followed during this election. Stressing the point that election of a judge takes place only if and when he is elected by both the Security Council and the General Assembly, he considered it quite in order for the Security Council to communicate the paradoxical result of electing six instead of five to the General Assembly. The election of five out of the six as judges of the International Court of Justice would take place only if and when they obtained a majority in the Assembly.<sup>34</sup> That was exactly contrary to the uncontested ruling of the President on December 6, 1951 (567th meeting), of which the Colombian delegate obviously was unaware.

<sup>27</sup> Security Council, Official Records, 681st Meeting, Oct. 7, 1954, par. 16.

<sup>28</sup> *Ibid.* par. 16.

<sup>29</sup> *Ibid.* par. 17.

<sup>30</sup> *Ibid.* par. 18.

<sup>31</sup> *Ibid.* par. 19.

<sup>32</sup> *Ibid.* par. 20.

<sup>33</sup> *Ibid.* par. 35.

<sup>34</sup> *Ibid.* par. 30.

He suggested an exchange of letters between the Presidents of the General Assembly and the Security Council after each ballot in each body.<sup>35</sup> That again was contrary to a decision taken by the Security Council on December 6, 1951 (567th meeting), in rejecting an Indian proposal to "await the receipt of the result of the ballot in the General Assembly before taking a new vote again [in the Security Council] on this matter."<sup>36</sup> The requirement of the two bodies proceeding "independently of one another" (Article 8 of the Statute) would be jeopardized by such an exchange.

The President voiced the opinion: "In my view we have to vote in the Security Council until we have elected five candidates with the necessary majority of six votes."<sup>37</sup> He added that "The balloting we had previously was necessary because there were six candidates elected, which is one too many," and invoked Article 8 of the Statute.<sup>38</sup> The French delegate put it even stronger:

At the time when six candidates had obtained an absolute majority in the Security Council, none of them could be elected because, since the number of seats to be filled was five, only five or fewer candidates could be elected. Consequently at that time, when six candidates had received an absolute majority here, neither five nor six persons had been elected and there could therefore have been no concordance between our vote and any vote which might have taken place in the Assembly.<sup>39</sup>

In other words, if more are elected than needed, nobody is elected. The Security Council persevered in this course with clear consistency bordering on stubbornness. But this solution is not the only way, and probably not the best way, to overcome a deadlock resulting from such a consequence of a multiple election.

## 2. *Pick the Top Men*

Another much simpler and almost common-sense way to break such a deadlock is to declare the required number of persons or countries which achieved the greatest number of votes as elected and to drop the remaining candidates with the lesser number of votes, even if they have technically gathered more than the required majority. In other words, to apply to a paradoxical result of multiple majority elections, as a subsidiary expedient, the plurality principle and to elect the top men only, without repeating the ballot. This has been done once in the Assembly of the League of Nations and on at least four occasions in the General Assembly of the United Nations.

On September 9, 1935 (2nd Plenary Meeting), the League Assembly proceeded to the usual election of six Vice Presidents of the Assembly for the first time with the U.S.S.R. as a Member of the League and a permanent member of the Council. The secret ballot produced the fol-

<sup>35</sup> *Ibid.* par. 32.

<sup>36</sup> Security Council, Official Records, 567th Meeting, Dec. 6, 1951, para. 63, 70.

<sup>37</sup> *Ibid.*, 681st Meeting, Oct. 7, 1954, par. 27.

<sup>38</sup> *Ibid.* par. 26.

<sup>39</sup> *Ibid.* par. 28.

lowing result: out of 53 states voting, three cast blank ballots. Therefore the absolute majority of 50 valid voting papers was 26. (It is easy to show that 50 electors voting for 6 states each could by simple majority of 26 "elect" not six but eleven Vice Presidents.) The actual distribution of votes was:

1. France	46
2. United Kingdom	41
3. Italy	41
4. Spain	31
5. Belgium	30
6. Mexico	30
7. U.S.S.R.	29

Seven countries received the absolute majority required. The President (Beneš, Czechoslovakia) announced simply: "As there are only six seats to be filled the first delegates of the following countries have been elected: France, U.K., Italy, Spain, Belgium, Mexico. In accordance with the rules of procedure therefore I have the honor to declare these delegates elected Vice Presidents of the Assembly."<sup>40</sup>

The Soviet Union was not mentioned at all and was silently dropped because it received the smallest number of votes. But the matter did not rest there. At the next (3rd) Plenary Meeting the President read a communication to the Assembly from the General Committee which contained the following passages:

[The General Committee] Considers that account should be taken of the special circumstances which accompanied the election of the Vice-Presidents of the Assembly, as a result of which the first delegate of the USSR obtained an absolute majority of votes;

Notes that the effect of this election will to be to deprive the General Committee of the collaboration of the first delegate of the USSR;

Considers that means should be found to remedy this situation, more particularly in view of the custom whereby the representatives of States permanent members of the Council are invited to sit as Vice-Presidents in the General Committee of the Assembly;

Decides, with a view to facilitating the work of the Assembly, to invite the first delegate of the USSR to sit as one of the Vice-Presidents of the Assembly, and asks the President to take steps to obtain the approval of the Assembly for this decision.

That approval was promptly given by the Assembly.<sup>41</sup> It must be stressed that the invitation was based on Rule 7 (1) of the Rules of Procedure of the Assembly providing that "the Assembly may decide to add to the General Committee . . . in exceptional cases other members."<sup>42</sup> Such a possibility does not legally exist under the present rules in the United Nations General Assembly.

On October 14, 1952, during the 378th Plenary Meeting, a routine elec-

<sup>40</sup> Records of the 16th Ordinary Session of the Assembly, Plenary Meetings, 1935, p. 38.

<sup>41</sup> *Ibid.* 40.

<sup>42</sup> Rules of Procedure of the Assembly, rev. ed., C. 144. M. 92. 1937, p. 7.

tion took place for seven Vice Presidents of the General Assembly under Rule 31 of the Rules of Procedure of the General Assembly "on the basis of ensuring the representative character of the General Committee." Such election requires a simple majority only of those present and voting and takes place, according to Rule 94, by secret ballot without nominations. In explaining procedure the President (Pearson, Canada) remarked: "Members of the Assembly receiving a majority of the votes cast [another expression for the phrase 'members present and voting'] will be declared elected."<sup>43</sup>

This casual and routine announcement became very difficult to comply with a short while later, because eight countries instead of the required seven received the necessary majority of 31 votes out of 60 ballots cast, with no abstentions and no invalid ballots; namely:

1. U.K.	58
2. U.S.A.	58
3. France	57
4. U.S.S.R.	53
5. Honduras	48
6. China	45
7. Egypt	34
8. Israel	33

India received 10, Poland 6, and Syria 3 votes, and five other countries one vote each. With 60 countries voting each for seven candidates, the possible total of votes cast would have been 420. The addition of votes cast gives the actual total of 410. Evidently some delegations voted for less than seven candidates, as they have the right to do without invalidating their ballots.

It is interesting to note that out of a possible total of 420 votes, not merely eight but arithmetically thirteen candidates could achieve the required majority of 31 votes, *i.e.*, almost double the number of required Vice Presidents. The same is true for the actual 410 votes cast. If this election could have been governed by a two-thirds majority, *i.e.*, 40 votes required, a theoretical possibility still would have remained of "electing" not seven but ten countries. A further comment of some interest: The seventh and eighth countries, Egypt and Israel, received 34 and 33 votes respectively, making a total of 67 votes. Thus some countries must have voted for both of them. A tie, *i.e.*, an equal number of votes, was avoided by a narrow margin of one vote. Otherwise it would have made matters much more difficult.

The General Assembly declared simply the seven countries with the greatest number of votes elected to Vice Presidency of the Assembly, and Israel was dropped without discussion.<sup>44</sup> It is probably no accident that

<sup>43</sup> General Assembly, 7th Sess., Official Records, 378th Plenary Meeting, Oct. 14, 1952, par. 33.

<sup>44</sup> No verbatim record and no sound record exists covering the announcement of the result of the ballot by the President.

Israel was elected next year to the Vice Presidency of the General Assembly.<sup>46</sup>

Strange as it is, the *embarras des richesses* repeated itself during the election of seven Vice Presidents at the next (8th) session of the General Assembly. All 59 ballots were valid. Therefore the required simple majority was 30. Not seven, but eight countries achieved it:

1. U.S.A.	57
2. U.K.	55
3. France	54
4. U.S.S.R.	48
5. China	46
6. Mexico	43
7. Israel	37
8. Pakistan	30

Furthermore, Greece received 9, Burma 2, Egypt 2 and Thailand 2 votes,<sup>46</sup> and "a number of other delegations" received one vote each.<sup>47</sup> The total of votes cast was over 385 instead of the possible total of 413. But even the total of 385 makes possible the election of not seven but twelve candidates by a majority of 30 votes. The President (Mrs. Pandit, India) announced simply: "On the basis of this ballot the first seven Members are elected."<sup>48</sup> That was not entirely consistent with her own remark a while before when, in explaining procedure, she said: "Those Members with a majority of the votes cast will be elected."<sup>49</sup> She did not consult the Assembly, but made a Presidential decision under Rule 35, which by clear implication authorizes the President to appraise the result of the vote and to announce the decision taken ("shall have complete control of proceedings at any meeting, shall rule on points of order, shall . . . put questions and announce decisions"). The decision was not challenged by any representative and no discussion of this point took place.

The record of the meeting contains an obviously misleading statement in italics: "The representatives of the following countries, having received the required simple majority of the Members present and voting, were elected Vice-Presidents"; however, the statement enumerates only seven countries, omitting Pakistan.<sup>50</sup> The plurality rule was applied as in the preceding year to the paradoxical result of the ballot, this time as a matter of course. No new ballot was even considered.

Quite an analogous situation arose during the election of eight Vice Presidents at the 12th Session on September 18, 1957 (679th Plenary Meeting). The number of Vice Presidents had in the meantime been raised from seven to eight<sup>51</sup> in view of the massive increase in membership through the "package deal" of December 14, 1955 (10th Session, 555th

<sup>46</sup> General Assembly, 8th Sess., Official Records, 443rd Plenary Meeting, Sept. 16, 1953.

<sup>46</sup> *Ibid.* par. 3.

<sup>47</sup> *Ibid.* par. 4.

<sup>48</sup> *Ibid.* par. 4.

<sup>49</sup> *Ibid.* par. 3.

<sup>50</sup> *Ibid.* par. 3.

<sup>51</sup> Decision of the 577th Plenary Meeting, Nov. 15, 1956, and Res. 1104(XI), 623rd Plenary Meeting, Dec. 18, 1956.



Plenary Meeting), and subsequent individual admissions, but such an increase proved to be insufficient. After the President announced that the secret ballot would take place, the representative of the Philippines rose to a point of order and, speaking as chairman of the African-Asian group, moved a thirty-minute recess to enable the various regional groups to agree on a new formula for regional distribution of seats in the General Committee. The President granted a twenty-minute recess, which actually lasted twice as long. When the meeting was resumed and a secret ballot taken, the results were far from indicating that an agreement had been reached. Out of 81 ballots, 80 were valid and the required (simple) majority stood at 41. Instead of eight countries, nine received this majority:

1. Ceylon	74
2. Paraguay	74
3. U.S.A.	74
4. U.K.	71
5. France	71
6. U.S.S.R.	71
7. China	61
8. Tunisia	45
9. Spain	41

Liberia received three votes, and five other countries one vote each. By the same inaccurate formula used in the records of the 8th Session, Spain's majority was simply ignored and the election of the eight states with the greatest number of votes was announced. It should be noted that, out of the total number of 640 possible votes, not eight but 15 candidates could have received the simple majority, and out of the actual number of 590 votes cast, 14 states instead of eight could have been "elected." Due to this awkward result of the balloting and in order to give some satisfaction, Spain was elected on October 8, 1957, during the 704th Plenary Meeting, to serve on an *ad hoc* basis as a ninth Vice President of the 12th Session.<sup>52</sup>

A similar ballot occurred on October 22, 1954, in the Fifth Committee of the General Assembly during the Committee's 444th meeting. Elections took place to fill two vacancies in the United Nations Administrative Tribunal. Three candidates were proposed.<sup>53</sup> All three obtained the re-

<sup>52</sup> The legality of this election, which took place without a previous decision to create a ninth vice presidency on an *ad hoc* basis for the 12th Session, as had been recommended by the General Committee, is open to most serious doubts (General Assembly, 12th Sess., Official Records, 702nd Plenary Meeting, Oct. 7, 1957, pars. 120-169, Doc. A/3687 and Add. 1, Third Report of the General Committee, A/3689 (XII), Annexes, Agenda Item 8, p. 11, (XII) 114th Meeting of the General Committee, Oct. 4, 1957).

The thorny problem of a new distribution of seats in the General Committee was finally resolved by Res. 1192 (XII), Dec. 12, 1957, by increasing the number of Vice Presidents to thirteen and fixing in a special annex the number of places apportioned to each regional bloc, thus changing a gentlemen's agreement and usage into almost a legal obligation and statutory law.

<sup>53</sup> A/C.5/L.280, (IX), Annexes, Agenda Item 39. Technically the 5th Committee recommends candidates elected by secret ballot for appointment by the General Assembly.

quired majority of 29 votes out of 56 voting members, with no abstentions and no invalid ballots: Mr. Perez Perozo (Venezuela) 37, Mr. Petren (Sweden) 35, and Mr. Mendez (Philippines) 30 votes.<sup>54</sup> Two votes were cast for Mr. Lafronte (Ecuador), the retiring incumbent. Out of the possible total of 112 votes only 104 were cast, but both numbers could accommodate easily the required majority of 29 votes, not twice but three times.

The Vice Chairman (Botha, South Africa), acting for the absent Chairman, after having announced that three candidates had obtained the required majority of votes while there were only two vacancies, submitted to the Committee two possible ways of coping with the situation: (1) the Committee should recommend to the General Assembly the appointment of the two candidates who had received the most votes—and he clearly favored this solution; or (2) the Committee should vote all over again.<sup>55</sup> The Norwegian delegate vigorously attacked “the obsolete system of voting followed by United Nations bodies,” but after British and Lebanese delegates spoke in support of picking the top men, he offered no formal objection, nor did anybody else, when the Chairman asked for objections to the adoption of his first “suggestion.”<sup>56</sup>

The device of declaring elected the candidates who have received the highest number of votes has obvious advantages. It obviates the necessity of repeating the secret ballot, always a time-consuming performance. As we have seen in the case of the Security Council (681st Meeting, October 7, 1954) the mere repetition of balloting does not guarantee by itself a better result, since the balloting may reproduce the same paradox of more candidates elected than there are vacancies to be filled. The elimination of those with the least votes is a familiar device accepted and practiced in all democratic countries during elections.

It must be noted in this connection that the Statute of the International Law Commission (Resolution 174 (II), November 21, 1947) contains a provision which in a skillful manner expresses the solution recommended here. Article 9 of the Statute reads:

The fifteen [now twenty-one] candidates who obtain the *greatest number of votes and not less than a majority* of the votes of Members present and voting shall be elected.<sup>57</sup>

<sup>54</sup> General Assembly, 9th Sess., Official Records, 5th Committee, 444th Meeting, Oct. 22, 1954, para. 6, 11.

<sup>55</sup> *Ibid.* par. 7. The summary record, (IX) 5th Committee, 444th Meeting, Oct. 22, 1954, does not contain the second proposal. Only the sound recording does.

<sup>56</sup> *Ibid.* par. 11.

<sup>57</sup> Emphasis added. It is strange that the records of the 6th Committee (58th Meeting, Nov. 20, 1947) and of the discussion in plenary (123rd Plenary Meeting, Nov. 21, 1947), and even the report of Subcommittee 2 of the 6th Committee, dated Nov. 18, 1947 (A/C.6/193, Annex 1, g, General Assembly, 2nd Sess., Official Records, 6th Committee, pp. 188-204), containing the draft Statute of the International Law Commission are completely silent on this ingenious voting formula which couples simple majority with plurality. If there was any discussion of the formula at all, it must have been in the privacy of Subcommittee 2. Even that is doubtful, because its report summarizing the debate stresses only the choice between election by simple majority of those

This language fully maintains the majority requirement for election and at the same time adopts as a subsidiary measure the plurality device to eliminate the paradoxical possibility of electing more persons than there are vacancies to be filled.

There may occur a complication making the application of this method of resolving the deadlock more difficult. In the case of an equal number of votes cast for two or more candidates who have barely received the required majority of votes (i.e., a tie vote), an additional device may be needed to break the tie. Drawing lots by the President may be one such device (Rule 95 of the Rules of Procedure of the General Assembly), even though it is foreseen only for elections to fill one place.<sup>58</sup> If, to break the tie, a new ballot is taken, restricted to those who received an equal number of votes (analogy of Rule 96), the advantages of our second device are reduced to some degree. But a restricted ballot is more likely to break the tie than an unrestricted one.

### 3. *Make Supernumeraries Deputies*

There is a third device theoretically possible. If more than the requisite number of candidates have obtained the required majority of votes, the vacant positions could be filled by the top men, and the remaining supernumeraries, having also achieved the required majority, could be declared their deputies to step into their places without additional election should a vacancy occur during the period for which the top men were chosen. Such a solution could satisfy the legal point that all of them have been technically "elected" because each of them has obtained the required number of votes, and would seem to be a practical step to take. But there is a rather important objection. The election was not intended to produce deputies. They may not be foreseen at all in the institution to which the election takes place, such as the International Court of Justice, the United Nations Administrative Tribunal, or the General Committee of the General Assembly. Thus it seems that we are confined after all to only two devices, either declaring the top men elected or taking a new secret ballot.

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present and voting, by two-thirds majority of those present and voting, and by absolute majority of the total membership of the United Nations (par. 7), erroneously alleging that the last choice governs elections to the International Court of Justice (see Part II of this paper).

Before proceeding to the ballot in the last elections of five judges of the International Court of Justice on Oct. 1, 1957 (12th Sess., 695th Plenary Meeting), the President announced: "Candidates up to the number of five who obtain 43 or more votes in the Assembly will be considered elected in the Assembly" (par. 9, emphasis added), thus betraying awareness of our problem.

<sup>58</sup> Drawing lots cannot be applied when electing judges to the International Court of Justice; instead, elimination of the *youngest* candidate (or candidates) for judge seems to be in accordance with the spirit of the Statute of the International Court of Justice (Arts. 10 (3) and 12 (4)) (see p. 86 above). The same privilege for the elder candidates has been adopted in the Statute of the International Law Commission (Art. 9, par. 2) in case "of more than one national of the same State obtaining a sufficient number of votes for election."

### *A Suggested Amendment to the Rules of Procedure*

It seems advisable to consider an amendment to the rules of procedure of the General Assembly covering our problem. Rule 96, dealing with elections "when two or more elective places are to be filled at one time under the same conditions," foresees only the contingency that "the number of candidates obtaining the required majority is *less* than the number of persons or Members to be elected." As we have seen, it happens that the number is *more* than needed. The complete silence of the rules of procedure has brought about two different ways of overcoming the difficulty when it arises: one in the Security Council, a new ballot unrestricted as to candidates, and another in the General Assembly, the election of the top men. The present writer is inclined to recommend the adoption of the election of the top men as a general rule, and the resort to a new but restricted ballot only as a means to break a tie at the bottom of the list of those who achieved the required majority. An appropriate amendment to the rules of procedure should not be difficult for the General Assembly to adopt in view of the rather technical nature of the problem.

The following suggestion, which is based in part on the above-mentioned Article 9, paragraph 1, of the Statute of the International Law Commission, seems adequate. Rule 96 of the Rules of Procedure of the General Assembly should read:

When two or more elective places are to be filled at one time under the same conditions *those candidates, equal in number to the places to be filled, obtaining in the first ballot the greatest number of votes and not less than the majority required* shall be elected. If the number of candidates thus elected is less than the number of persons or Members to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the *unsuccessful* candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after the third inconclusive ballot, votes may be cast for any eligible person or Member. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the *unsuccessful* candidates who obtained the greatest number of votes in the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all places have been filled. *The same succession of restricted and unrestricted ballots shall take place if two or more candidates who obtained the smallest number of votes but not less than the required majority have received an equal number of votes, the voting being restricted to those candidates only.* These provisions shall not prejudice the application of rules 144, 145, 147 and 149.<sup>50</sup>

## II. SOME PROBLEMS CONCERNING THE ELECTION OF JUDGES OF THE INTERNATIONAL COURT OF JUSTICE

The problem of the composition of an international court of justice and the closely connected question of the procedure governing elections of

<sup>50</sup> The language to be introduced in Rule 96 is italicized.

judges of an international tribunal were the main stumbling block preventing for many years (from 1907 until 1920) the creation of such a court. As is well known, the big Powers insisted on securing for their nationals a safe place on an international judicial bench, and the small and middle Powers were unwilling to accept anything less than full equality in the composition of the court and in the procedure of electing international judges. It was for this reason that the Second Peace Conference at The Hague in 1907 was unable to create a Permanent Court of Arbitral Justice,<sup>60</sup> and further efforts in this direction were fruitless until the end of World War I.

The procedure devised in the Statute of the Permanent Court of International Justice of 1920 represented a major achievement. It consisted in a compromise between the two seemingly irreconcilable positions. Concurrent but independent elections of judges by two organs of the League of Nations: the Council on the one hand, on which the big Powers had permanent seats, and the Assembly on the other hand, which comprised all Members of the League, big, medium and small, made it possible for both sides to safeguard their interests and remain true to their principles. The procedure as laid down in the Statute certainly looked cumbersome and there existed some misgivings that it might prove to be unworkable. But it worked unexpectedly smoothly in the practice of the League and was taken over basically unchanged by the United Nations during the San Francisco Conference.

The new Statute of the International Court of Justice is described in the Charter (Article 92) as "based upon the Statute of the Permanent Court of International Justice." That is rather an understatement, especially as far as elections are concerned. The new Statute represents a slightly revised edition of the old one, retaining even the same numbering of articles. A comparison of the new Statute with the old one, as revised by the Revision Protocol of September 14, 1929, reveals that the provisions concerning elections of members of the Court have been taken over almost unchanged. Only three additions have been made: (1) Paragraph 2 of Article 10 has been added, assuring that no veto power applies to such elections in the Security Council. (2) A clarification of the voting in the joint conference to break a deadlock between the Security Council and the General Assembly stipulates that the joint conference shall choose by the vote of an absolute majority (Article 12, paragraph 1). (3) Special provisions have been introduced to ensure the continuity of the membership of the Court through the retirement of five judges every three years (Article 13, paragraphs 1 and 2). Thus, general elections of five judges take place in the United Nations every three years, whereas in the League of Nations all fifteen judges were elected every nine years.<sup>61</sup>

<sup>60</sup> Manley O. Hudson, *The Permanent Court of International Justice* 82 (New York, 1943); Philip C. Jessup, "The International Court of Justice of the United Nations," 21 *Foreign Policy Reports* 155 (No. 11, 1945); *idem*, *A Modern Law of Nations* 29 (1948).

<sup>61</sup> Philip C. Jessup, "The International Court of Justice of the United Nations," *loc. cit.* 161-162; Manley O. Hudson, "The 24th Year of the World Court," 40 *A.J.I.L.* 1-52 (1946); Goodrich-Hambro, *Charter of the United Nations* 30-31 (2d ed., 1949).

The Preparatory Commission of the United Nations adopted in its provisional rules of procedure of the General Assembly Rule 90, simply stating that "The elections of the members of the International Court of Justice shall take place in accordance with the Statute of the Court" (Rule 151 of the present rules of the General Assembly). An analogous expression is to be found in provisional Rule 19 of the Security Council (present Rule 49 of the Security Council) concerning voting: "Voting in the Security Council shall be in accordance with the relevant Articles of the Charter and of the Statute of the International Court of Justice." Therefore a Memorandum by the Secretariat of Section 1 of the United Nations Preparatory Commission on League of Nations Assembly Procedure on the election of judges to the Permanent Court of International Justice<sup>62</sup> expressed the view that "a balloting procedure similar to that decided upon by the 2nd Assembly of the League of Nations will be followed in the future [by the United Nations]." However, the following review of United Nations practice reveals that, despite the above expectation, the General Assembly is often not aware of the League procedure for electing judges.

### 1. What is a "Meeting?"

The best-known example of such a lack of continuity with the League was the question of the meaning of the term "meeting" in Article 11 of the Statute which complicated the first elections to the International Court of Justice on February 6, 1946. The President of the General Assembly (Spaak of Belgium) gave his interpretation to the effect that at each meeting there should be one ballot only, and disregarded the opinion of Dr. Gustavo Guerrero (El Salvador), a former President of the Permanent Court of International Justice, who recalled the League of Nations practice of having a series of ballots during an election meeting until all vacant seats were filled. The President put his interpretation to the vote and the General Assembly upheld it by 24 votes to 11, with 3 abstentions.<sup>63</sup> Spaak stressed that the United Nations was not bound to follow League of Nations precedents. Bound or not, the United Nations had taken over League of Nations procedure in this field, and it was easy to ascertain that the League Assembly, during both general elections of judges in 1921 and in 1930, had gone through a series of ballots during one meeting (5 ballots in 1921 and 5 and 6 ballots during the morning and afternoon meetings in 1930).<sup>64</sup> What Spaak intended was to save time and arrange a joint conference of six representatives of the General Assembly and the Security Council (three of each body) as soon as possible (Article 12 of the Statute). For this purpose he tried to introduce a comparison of lists of elected candidates after each ballot in the Assembly and the Council irrespective of whether all or only some vacant places were filled as a result of the one ballot taken.

<sup>62</sup> Doc. PC/GA/1/Rev. 1, Nov. 22, 1945.

<sup>63</sup> General Assembly, 1st Sess., Pt. I, Plenary Meetings, Jan. 10-Feb. 14, 1946, pp. 840, 844-845.

<sup>64</sup> Records of 2nd Assembly, Plenary Meetings, 1921, pp. 235-249; Records of 11th Ordinary Session of the Assembly, Plenary Meetings, 1930, pp. 134-136, 137-138.

However, consistent League practice was to compare only full lists of elected candidates, *i.e.*, lists containing a number of candidates elected equal to the number of places to be filled. Incomplete lists of elected candidates were never compared.<sup>65</sup> A joint conference was arranged only once. In 1921 complete lists of candidates for four deputy judges elected by the Assembly and Council were compared three times, still leaving one seat free. Only then did the Assembly decide to set up a conference.<sup>66</sup> Only then could it be assumed that no concurring vote by two organs had taken place.

The controversy raised by Spaak's attempt to introduce a new procedure resulted in the adoption during the second part of the First Session of the General Assembly of a special rule of procedure (present Rule 152 of the General Assembly) stating that

Any meeting of the General Assembly held in pursuance of the Statute of the International Court of Justice for the purpose of the election of members of the Court shall continue until as many candidates as are required for all seats to be filled have obtained in one or more ballots an absolute majority of votes. (Resolution 88 (I/2), 49th Plenary Meeting, November 19, 1946.)

On June 4, 1947, the Security Council adopted unanimously an identical rule of procedure for its own part in the election (Rule 61 of the provisional rules of procedure of the Security Council). Mr. Spaak's ruling was thus abandoned rather quickly.

## 2. "Absolute Majority"

Another seemingly overlooked mistake of United Nations practice consists in a wrong interpretation of the requirement of an "absolute majority" for the election of judges of the International Court of Justice. The expression can be found in the Statute in Articles 10 and 12(1). In the latter article it relates to the joint conference and was added to the text of the old Statute in San Francisco.<sup>67</sup> That seems to have been done in order to prevent a possible interpretation based on the following paragraph (Article 12(2)) that the conference should act only by unanimous agreement. The crucial provision of Article 10(1) providing for "an absolute majority of votes in the General Assembly and in the Security Council" simply reproduces the text of the old Statute.<sup>68</sup>

What is the meaning of the term "absolute majority"? The Statute being legally "an integral part of the . . . Charter" (Article 92), it has to be construed in conjunction with the Charter proper. The Charter speaks often of a "majority," whether a two-thirds majority of the members

<sup>65</sup> Records of 2nd Assembly, Plenary Meetings, 1921, pp. 249, 252-255; Records of 11th Ordinary Session of the Assembly, Plenary Meetings, 1930, pp. 136, 139, 140; and Manley O. Hudson, *The Permanent Court of International Justice 1920-1942*, pp. 247-248, 249-250, 252-253, 253-256 (New York, 1943).

<sup>66</sup> Records of 2nd Assembly, Plenary Meetings, 1921, pp. 252-255, 256-257.

<sup>67</sup> The report of the United Nations Committee of Jurists to the San Francisco Conference does not contain this addition. UNCIO Doc. XIV, pp. 821 ff.

<sup>68</sup> Manley O. Hudson, "The 24th Year of the World Court," *loc. cit.* 19.

present and voting (Article 18(2)), or a (simple) majority of the members present and voting in the General Assembly (Article 18(3)), or again of such a majority of the members present and voting in the Economic and Social Council and Trusteeship Council (Articles 67 and 89), or of a majority vote of the *members* of the General Assembly (Article 109(3)), or of a vote of two-thirds of the *members* of the General Assembly (Articles 108 and 109(1)). The Statute itself says in Article 55 that "all questions shall be decided by a majority of the judges present." The term "absolute majority" has not been repeated in any other place in the Charter or in the Statute. That must have misled many into thinking that it means a majority of legal electors, *i.e.*, of the legal membership of the General Assembly and of the Security Council plus (in case of the General Assembly) states parties to the Statute of the Court but not Members of the United Nations (Article 4(3) of the Statute); in other words, that it is similar to the requirement for calling a review conference under Article 109(3). Such an eminent jurist as Hans Kelsen seems to incline toward this view, but he also presents arguments against it.<sup>69</sup> The emergence of such a conviction is difficult to understand in view of the fact that Article 10 speaks specifically of "an absolute majority of *votes* in the General Assembly and in the Security Council" and not of an absolute majority of *members* of the General Assembly (Article 109(3)).

#### *United Nations Practice*

The General Assembly has consistently from its first session proceeded on the assumption that for the election of judges of the International Court of Justice a majority of the total legal membership of the United Nations is necessary, not just a majority of those present and voting. Thus, during the first election of judges on February 6, 1946 (23rd, 24th and 26th Plenary Meetings), the required majority was fixed at 26 votes out of a total of 51 Members. The characteristic trait of such a majority requirement is that it is independent of the question of how many votes have actually been cast in a given ballot and how many of them are valid and how many represent abstentions. Therefore it can be fixed *in advance* of the actual voting, being based solely on the number of potential electors, and remains unchanged during all the ballots. A majority of those present and voting obviously is changeable from ballot to ballot, depending on the number of those present and voting in each of them.

This erroneous practice was continued during the 3rd Session on October 22, 1948 (152nd Plenary Meeting). The detailed specifications of votes cast reveal, *e.g.*, during the first ballot the number of 56, *i.e.*, less than the contemporaneous membership of 58, plus Switzerland as a party to the Statute entitled to vote under its Article 4(3). The number of votes cast during the fourth ballot was 58, *i.e.*, one short of the total of electors, and in the fifth and sixth ballots it dropped to 52 and 51, respectively. But

<sup>69</sup> Hans Kelsen, *The Law of the United Nations* 188-189 (New York, 1950).



the majority requirement of 30 votes was consistently maintained during all the ballots taken.

In 1951 the absolute majority requirement was 32 (Liechtenstein and Switzerland, parties to the Statute, took part and United Nations membership was sixty at that time). The same was true in 1953. In 1954 Japan joined Switzerland and Liechtenstein. San Marino, also a party to the Statute, did not show up but was counted nonetheless. The President (van Kleffens) declared that under Article 10 of the Statute the provision [of the Rules of Procedure] that abstentions are not counted does not apply, adding, "This is a very important point."<sup>70</sup> He did not stress that according to this interpretation absences also count. The required majority was fixed at 33 in all ballots (60 Members of the United Nations plus four parties to the Statute). In December, 1956, and January, 1957, the required majority stood at 42 (80 Members of the United Nations plus three parties to the Statute, Japan having in the meantime become a United Nations Member). The Secretary General submitted a memorandum on the election procedure in which for the first time he came explicitly forward with the following definition:

An absolute majority in the General Assembly consists of more than half of the total number of *possible* electors whether or not they are actually present and voting.<sup>71</sup>

An unusually large number of ballots (19 ballots during four meetings) was necessary, not only because the General Assembly three times elected Mr. Kuriyama of Japan while the Security Council consistently elected Mr. Wellington Koo of the Republic of China, but also because of the mistaken construction of the required majority. Under the correct procedure the same result would have been achieved on the 7th ballot after three short meetings.

The same can easily be proven in the last election which took place October 1, 1957 (12th Session, 695th Plenary Meeting). The President stated that candidates who obtained at least 43 votes in the General Assembly would be considered as elected by the Assembly (82 Members of the United Nations plus Switzerland, Liechtenstein and San Marino). Mr. Spiropoulos was elected after five ballots during the second meeting. But under the present-and-voting rule, at least one ballot (the third) would have been superfluous.<sup>72</sup>

<sup>70</sup> General Assembly, 9th Sess., Official Records, 493rd Plenary Meeting, Oct. 7, 1954, par. 7.

<sup>71</sup> U.N. Doc. A/3208, General Assembly, 11th Sess., Official Records, Annexes, Agenda Item 17, Pt. II, par. 7. Emphasis added.

<sup>72</sup> It is interesting to note that the Secretary General's memorandum of Sept. 24, 1957, on the procedure of the election, does not repeat the dogmatic definition of absolute majority quoted above, but contains a more cautious factual statement: "The *consistent practice* of the United Nations has been to *interpret* the words 'absolute majority' as meaning a majority of all the qualified electors whether or not they vote." (A/2678/S/8891, Sept. 24, 1957, Election of five members of the International Court of Justice, Memorandum by the Secretary General, par. 9.) (Emphasis added.)

*League of Nations Interpretation and Practice*

What was the interpretation and practice in the League of Nations concerning the term "*majorité absolue des voix*" appearing in the Statute of the Permanent Court of International Justice<sup>73</sup> drafted in 1920 by the Committee of Jurists? The Root-Phillimore plan suggested requiring "the votes of a majority of the members present and voting in each body."<sup>74</sup> The question whether "absolute majority" meant "majority of the members present" was again raised in the subcommittee of the 3rd Committee of the First Assembly by Mr. Adatei (Japan) and "it was pointed out that this question had already been decided in the affirmative by the Covenant of the League."<sup>75</sup> As is well known, the Covenant required unanimity or majority "of the Members of the League *represented at the meeting*" (Article 5, paragraphs 1 and 2). Accordingly the provisional rules of the Assembly adopted in 1920 contained in Rule 20 the provision that "a majority decision requires the affirmative votes of more than half of the members of the League represented at the meeting." The Rules of Procedure of the Assembly had introduced in 1920 an additional provision stating that representatives who abstain from voting shall be considered as not present (Rule 19(5)).<sup>76</sup> That rule made it possible to disregard abstentions when counting whether a majority had been obtained.

The meaning of the term "absolute majority" was perfectly clear to everybody during the League of Nations period. For example, in the note which was approved by the General Committee of the 16th Assembly in 1935 and accepted by the plenary meeting, and which set out the rules applicable to election of judges of the Permanent Court of International Justice, the following definition is stressed:

. . . successive ballots will be held until a candidate has obtained the majority necessary under Article 10 of the Court's Statute—i.e. an absolute majority (*one-half plus one*) of the votes cast.<sup>77</sup>

These rules were consistently applied by the League Assembly to the election of judges. During the first general elections in 1921 the required majority changed during the balloting. It dropped from 22 to 21 and 20, and afterwards rose to 22 on the fifth ballot.<sup>78</sup> The results of the ballot were presented during this 2nd Assembly, based on "the number of voters" and during later years were consistently presented in the following form: "Number of States voting."<sup>79</sup> Both expressions clearly indicate that only those states which actually cast (valid) votes came into

<sup>73</sup> P.C.I.J., Series D, No. 1, 1926, p. 10.

<sup>74</sup> Manley O. Hudson, *The Permanent Court of International Justice* 158 (New York, 1943).

<sup>75</sup> Records of the 1st Assembly, Committee I, p. 342, quoted by Hudson, *op. cit.* 158.

<sup>76</sup> Records of the 1st Assembly, Plenary Meetings, 1920, p. 240.

<sup>77</sup> Records of the 16th Ordinary Session of the Assembly, Plenary Meetings, 1935, p. 41 (emphasis added).

<sup>78</sup> Records of the 2nd Assembly, Plenary Meetings, pp. 236, 246, 248, 11th Plenary Meeting, Sept. 14, 1921.

<sup>79</sup> *E.g.*, Records of the 11th Assembly, Plenary Meetings, pp. 134–136.

consideration when the required majority was being calculated. During the second general elections in 1930 the required majority dropped from 27 on the first ballot to 25 on the fourth ballot and to 23 on the fifth ballot.<sup>80</sup>

### *Natural Meaning of Words*

What does the expression "absolute majority" mean in Continental languages, especially in French, and what does it mean in English? Even a hasty consultation of authoritative dictionaries indicates that there are different meanings. In French and in other Continental languages the term is used in contradistinction to the so-called relative majority (*majorité relative*), which in the English-speaking world goes by the name of plurality.<sup>81</sup> "Absolute majority" and "simple majority" mean, at least in Continental usage, exactly the same thing, *i.e.*, half of votes plus one. The only shade of difference consists in the fact that "simple majority" is used to distinguish it from any or all kinds of qualified majority (two-thirds, three-fourths, et cetera), *i.e.*, from cases where more than half plus one is needed, while "absolute majority" is used when it is necessary to stress that plurality (relative majority, *i.e.*, less than half) is not sufficient.<sup>82</sup>

According to Funk and Wagnalls, in American usage "absolute majority" means "a majority that includes in its computation all the voting and *non-voting* members of a body."<sup>83</sup> British usage, in good old British tradition, represents a compromise. Absolute majority means "A number of votes received by one candidate which is more than half the total number polled, *or* than half the number of electors";<sup>84</sup> or, in a concise form, "more than half of electors *or* actual voters."<sup>85</sup> Thus the British usage accepts both meanings of the expression and thus does not contradict the French usage of the term.<sup>86</sup>

<sup>80</sup> *Ibid.*, pp. 134, 135, 15th Plenary Meeting, Sept. 25, 1930.

<sup>81</sup> See, *e.g.*, Dictionnaire de l'Académie Française (81ème éd.), Vol. II, H-Z (Librairie Hachette, 1935), p. 147; under Majorité, Nouveau petit Larousse illustré (Paris, 1952), p. 604; Der Sprach-Brockhaus (Leipzig, 1935), p. 403.

<sup>82</sup> It is perhaps not superfluous to note that the term "majority," strictly speaking, is used in two different meanings:

(1) denoting *superiority in number* of one set over another (plurality), *i.e.*, either (a) only the excess in number, as in the sentence: "He was elected by a narrow majority of 31 votes," or (b) the set itself which has numerical superiority, as in the saying: "Mr. X voted with the majority to elect him." The point is that two or more sets are being compared numerically.

(2) The *greater part of one set*, as in the sentence: "A majority of deputies voted for the resolution." The Continental term "relative majority" uses sense (1), while the terms "absolute," "simple," or "qualified majority" are meant in sense (2).

See also Philip C. Jessup, *The United States and the World Court* 18 (658) (Boston, 1929).

<sup>83</sup> Funk and Wagnalls, *New "Standard" Dictionary of the English Language* 1495 (1947). Emphasis added.

<sup>84</sup> The Oxford English Dictionary, Vol. VI, L-M, p. 59 (Oxford, 1933). Emphasis added.

<sup>85</sup> The Concise Oxford Dictionary 721 (4th ed., 1952). Emphasis added.

<sup>86</sup> See Mavrommatis Case, P.C.I.J., Series A, No. 2, pp. 19-20.

### *French Text Prevails*

It must be emphasized in this connection that the French text of the old Statute, as all French texts in the League of Nations, played in practice a more important rôle than the English, in spite of the technicality that both were legally authentic. French was mentioned first and both were equal, but French was more equal than English. This fact was clearly expressed in the report of the United Nations Committee of Jurists, dated Washington, April 18, 1945, submitting a draft of the Statute of the International Court of Justice to the San Francisco Conference. When speaking of Articles 7-12 dealing with election of judges, the Committee remarked that

articles concerning the procedure of the elections have undergone only the changes in form rendered necessary by references to the organs of the United Nations or, in the English text of Arts. 7, 9 and 12, to insure a more exact *agreement with the French text*.<sup>87</sup>

The relation of the languages has been reversed in the United Nations.

### *Absolute Majority to Prevent Plurality Elections*

The real meaning of Article 10 of the Statute can be found by comparing it with the Rules of Procedure adopted by the First Assembly of the League of Nations in 1920. Rule 21 concerning elections provides that "when a number of elective places of the same nature are to be filled at one time, those persons who obtain an *absolute* majority at the first ballot shall be elected."<sup>88</sup> If all places have not been filled, a second ballot takes place and "those candidates . . . who receive the greatest number of votes . . . shall be declared elected."<sup>89</sup> Here clearly election is possible by plurality (so-called relative majority) on the second ballot and therefore "absolute majority" (in the French sense of the word) is stressed for the first ballot. The same meaning was maintained during the whole League of Nations period, as is evident from the text of Rule 22 adopted in 1922 as part of special Rules of Procedure for the election of the non-permanent members of the Council. "Absolute majority" is required during the first and second ballots, but on the third ballot "the greatest number of votes" (plurality) is sufficient.<sup>90</sup> It follows clearly that the insertion of the requirement of "absolute majority" into Article 10 of the Statute was necessary to prevent the election of judges in the Assembly by less than half of the votes cast.

### *Absolute Majority of What?*

And finally and most important of all, the text of Article 10 does not use the term "absolute majority" *in abstracto*, but clearly indicates the kind of elements of which such a majority should consist. The text reads:

<sup>87</sup> Jurist 61, G49 UNCIO Doc. XIV, p. 591. Emphasis added.

<sup>88</sup> Emphasis added.

<sup>89</sup> Records of the 1st Assembly, Plenary Meetings, 1920, p. 241.

<sup>90</sup> Records of 3rd Assembly, Plenary Meetings, Vol. I, p. 349. Same text in Rules of Procedure of the Assembly, rev. ed., Nov. 1, 1938, C. 144. M.82. 1937, pp. 15-16.

Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected [la majorité absolue des voix dans l'Assemblée Générale].<sup>91</sup>

The question "Majority of what?" has been unambiguously answered. Whenever a majority of *Members* is meant, the Charter and the Statute do not hesitate to say so plainly, as they do in relation to amendments of the Charter (Articles 108 and 109), amendments to the Statute of the Court (Article 69) and to ratifications of the Charter (Article 110). Should there still be hesitation, Article 10 speaks of "absolute majority of votes in the General Assembly and in the Security Council"—and not of such a majority of the General Assembly or of the Security Council,<sup>92</sup> which again excludes any suggestion that all Members of the General Assembly have to be counted. Therefore, whatever is meant by the adjective "absolute," only votes, not electors, must constitute the majority for the election of judges to the International Court of Justice.

#### *A Difficult Procedure Made More Difficult*

This procedure of elections is rather a difficult and complicated one. It requires "independent" and simultaneous ballots by both the Security Council and the General Assembly. To be elected, a candidate must obtain an "absolute majority" in *both* bodies. That often makes things very difficult, especially when a vacancy has to be filled or one place remains open during general elections and the General Assembly favors one candidate and the Security Council another. The question then boils down to the touchy problem of who shall give way. The completely unfounded practice adopted by the General Assembly of requiring a majority of legal electors introduces an additional obstacle increasing the required number of votes needed for election, contrary to the clear letter of Article 10 of the Statute, contrary to the "natural" meaning of words constituting the text, and in direct contradiction with the practice of the League of Nations.

#### *Voting Procedure for Decisions under Extraneous Instrument*

The arguments adduced above make it unnecessary to rely on the principle established by the Permanent Court of International Justice in the advisory opinion of November 21, 1925, concerning Interpretation of the Treaty of Lausanne,<sup>93</sup> and reasserted in the advisory opinion of the International Court of Justice of June 7, 1955, concerning Voting Procedure on Questions concerning South West Africa.<sup>94</sup> The principle as formulated by Judge Lauterpacht is that "a political body entrusted with a decision by virtue of an extraneous instrument can proceed in the matter only in accordance with its own procedure of voting."<sup>95</sup> The Statute of the Court

<sup>91</sup> Emphasis added.

<sup>92</sup> Kelsen rightly draws attention to this point. Hans Kelsen, *The Law of the United Nations* 188-189 (1950).

<sup>93</sup> Frontier between Turkey and Iraq, P.C.I.J., Series B, No. 12.

<sup>94</sup> [1955] I.C.J. Rep. 67.

<sup>95</sup> *Ibid.* 109.

is after all not a completely extraneous instrument, being an annex to the Charter and an "integral part" of it (Article 92). But if that is so, the application of the Assembly's voting procedure becomes almost a matter of course.

Equally unnecessary for us is the reliance on the related argument that provisions concerning the voting system (of the General Assembly) cannot be considered as purely procedural in the strict sense of the word, but that they represent an essential characteristic of an international body, its distinguishing feature, and that they form part of its constitution and as such cannot be changed except by way of amendment of the Charter.<sup>96</sup>

There is, however, some force in our case in the argument based, *mutatis mutandis*, on a similar one used by Judge Lauterpacht, that the General Assembly, by introducing, contrary to law, additional requirements into the voting system, is "depriving some, as yet undetermined, members of the General Assembly of the right, safeguarded by the Charter" and the Statute, to elections "determined" by an absolute majority of (valid) votes cast "in which they participate."<sup>97</sup> As pointed out above, the incorrect system of voting applied has already in the past affected the result of the elections and most probably will do so again in the future.

### 3. *Are all Past Elections of Judges Null and Void?*

The question may be raised whether the incorrect and illegal procedure followed by the General Assembly invalidates the results of elections of judges of the International Court of Justice and thus nullifies the legal authority of international judges conferred upon the members of the Court jointly by both the General Assembly and the Security Council. In other words: Is the mistaken voting procedure merely incorrect or is the result null and void? If so, is the nullity *ipso iure* and to be merely declared and, if so, who is authorized to do it, or is it merely voidable and, if so, upon whose complaint and to whom addressed? It is deeply disturbing even to contemplate theoretically that the International Court of Justice may have been elected in an illegal manner and thus be founded on a legally defective basis.

What is involved here is *error iuris*, an error as to the meaning of applicable law. The error seems to have been unconscious because no controversy as to the required majority has been recorded. The error undoubtedly has increased the margin of votes needed for election. The basic question is whether such error, if proven, makes the result of the elections null and void. The answer is no.

There are two reasons for it, one involving a basic consideration, the second, of a rather technical, more formalistic nature.

1. Voting requirements in constitutions and rules of procedure stipulate *minimum* conditions which must be fulfilled in order to enable the corporate body to take a decision. The minimum conditions necessary for making

<sup>96</sup> *Ibid.* 75; separate opinion of Judge Basdevant, pp. 81-82; separate opinion of Judge Lauterpacht, p. 108.

<sup>97</sup> *Ibid.* 108.

a decision of the corporate body are at the same time *sufficient* conditions for the same purpose. Legally a decision taken by 36 against 35 votes, if a simple majority applies, is equally valid and binding as one adopted unanimously. Insistence on *more* votes than sufficient for decision is contrary to the constitution of the corporate body, but a decision taken by a two-thirds majority or more, when a simple majority is sufficient, is obviously not void. A similar argument leads straight to the conclusion that an election effected by more votes than sufficient, based on the mistaken assumption that more votes are required, is not void for that reason alone. An election effected by less votes than legally required would *prima facie* seem null and void or at least voidable on complaint of any elector.

2. Here we encounter the second point, consisting in a systematic reluctance of parliamentary bodies to retract decisions once the votes have been counted and the result officially announced. Once the President of the General Assembly has publicly announced the candidate elected by both the General Assembly and the Security Council, the election is completed and effective. Formal acceptance by the elected candidate makes it definitive, but with retroactive effectiveness as from the time of the President's announcement.<sup>98</sup> If the seat is vacant, the term of office of a judge begins also on the date of his election.<sup>99</sup>

The question of error affecting voting procedure was discussed in a report in 1955 by the Secretary General on correction of votes.<sup>100</sup> It distinguished between errors in counting or recording votes (clerical errors), which usually may be corrected before or after the results of the vote have been announced, and requests for correction of votes made by representatives based on their own error when voting. The practice of the General Assembly is to accept such corrections when requested before the results have been announced and to modify the results accordingly. But if such request is made after the results have been announced, the practice of the General Assembly and of other deliberative bodies is that only in a few of them are corrections permitted and even then they cannot affect the results. The Consultative Assembly of the Council of Europe even adopted on December 4, 1951, a motion stating "it is contrary to the tradition and practice of all parliaments to upset a decision announced as the result of a vote." This was done after the Secretariat noted that, due to an error in counting votes, a decision announced as adopted by the required two-thirds majority actually was one vote short of this majority.<sup>101</sup> The argument was raised that when a delegate misinterpreted his instructions in voting, no true consent was given and therefore, if the erroneous vote tipped the scales, the decision should be reversed.<sup>102</sup> That would place decisions of the General Assembly on a contractual basis, making them voidable by

<sup>98</sup> Manley O. Hudson, *The Permanent Court of International Justice 1920-1942*, p. 245 (New York, 1943).

<sup>99</sup> Art. 1 of the Rules of Court adopted May 6, 1946, I.C.J., Series D, No. 1 (1946), p. 54.

<sup>100</sup> U.N. Doc. A/2977, (X) 1955, Annexes, Agenda Item 51, pp. 1-10.

<sup>101</sup> Correction of Votes, Report of the Secretary General, A/2977, par. 80, footnote 53.

<sup>102</sup> El Salvador (X), 6th Committee, 455th Meeting, Nov. 8, 1955, par. 21.

action of voting members claiming to have acted in error. There are good practical reasons for avoiding such a solution. As stressed by representatives of Canada, China, India and the United Kingdom, any allowance made in the rules for errors committed by representatives in voting could lead to serious abuses.<sup>103</sup>

Here we are not dealing with an error in counting or recording or with an error by delegates, but with an error as to the law shared by all concerned: the President, the tellers, members of the Secretariat assisting the President, and the delegates voting. The count is correct, no objection as to a lack of true consent can be raised. On the contrary, there is a higher amount of consent than legally needed. Therefore the rule, emphasized in the Secretary General's report and supported by several delegations (the U.S.S.R. included), that the results of voting as announced by the Chair should be final and conclusive,<sup>104</sup> has to be applied to the result of elections of judges of the International Court of Justice without any hesitation. No nullity of elections held so far is involved. But the procedure followed is still clearly contrary to law and, in addition, from the purely pragmatic point of view, multiplies the difficulties of an already difficult procedure. The present practice should be changed without much ado in the next elections to the Court.

#### 4. *Do Abstentions and Invalid Votes Count?*

Having established that all that is required for electing judges to the International Court of Justice is a simple (*i.e.*, "absolute") majority of votes cast in the General Assembly, there remains to be considered whether invalid votes and abstentions should be disregarded when figuring out the required majority. That is the established practice of the General Assembly in all other elections and, as far as abstentions are concerned, is clearly provided for in Rule 88. The President of the 9th Session of the General Assembly (van Kleffens) expressed the opinion that abstentions have to be counted under Article 10 of the Statute,<sup>105</sup> probably in view of the requirement of an "absolute" majority as opposed to a "majority" under Article 18 of the Charter. It was apparently assumed that the difference in language must entail some consequences. Such a reasoning loses much of its persuasiveness once we accept the view expounded here that "absolute majority" means exactly the same as "majority." The question nevertheless remains whether Rule 88 and other relevant rules of the General Assembly apply to elections of judges or whether the elections are governed *solely* by the Statute of the Court. Rule 151 says only that "elections . . . shall take place in accordance with the Statute of the Court." That may mean a "*renvoi*," *i.e.*, we are being referred to the Statute as the *only* instrument applicable; in other words, the Rules of Procedure of the Gen-

<sup>103</sup> *Ibid.*, pars. 6, 7, 34, 36; and 457th Meeting, Nov. 10, 1955, par. 1.

<sup>104</sup> (X), 6th Committee, 455th Meeting, Nov. 8, 1955, par. 12; 456th Meeting, Nov. 9, 1955, pars. 3, 23. See also F. A. Vallat, "Voting in the General Assembly of the United Nations," 31 *British Year Book of International Law* 296-297 (1954).

<sup>105</sup> (IX), Plenary Meetings, 493rd Plenary Meeting, Oct. 7, 1954, par. 7.



eral Assembly become inapplicable. The other possibility, more consonant with the language used in Rule 151, would be that that Statute is the *main* instrument governing the elections, and the Rules of Procedure of the General Assembly may be applied whenever they do not conflict with the Statute. Such a view enjoys additional support from the fact that, under Article 92 of the Charter, the Statute is not an extraneous instrument but "forms an integral part of the present Charter." The rule concerning abstentions applies to all elections taking place in the General Assembly and can hardly be considered as conflicting with Article 10 of the Statute, which, as well as Article 18 of the Charter, is completely silent on abstentions. Non-participation in the vote must be treated in the same manner as abstentions.

The same may be said of the practice established in the General Assembly after some initial hesitations and deviations, that only *valid* votes are counted as the basis for a majority required in elections. Invalid votes have to be deducted.

The practice in the General Assembly is to distribute ballot papers carrying the names of candidates for the given election included in the list, prepared under Article 7 of the Statute by the Secretary General, based on nominations by national groups. The delegations vote by placing a cross against the names of a number of candidates equal to the number of places to be filled in the Court. Abstention consists in casting a ballot without placing any cross on it. Being present and not casting any ballot represents non-participation in the vote. A ballot with more crosses than places to be filled is invalid. If less crosses are marked than there are places vacant, the ballot is valid.<sup>106</sup>

##### 5. *Is a Restricted Ballot Admissible?*

Another questionable practice has been introduced in the General Assembly in the election of judges of the International Court of Justice. During the 6th Session the Acting President (Jebb, U.K.) raised the question whether Rule 96 applies to additional ballots and in particular whether, during such additional ballots, voting should be restricted to the candidates obtaining the greatest number of votes in the previous ballot up to a number not more than twice the places remaining to be filled. He said:

I understand that in previous instances this rule [Rule 96] has not been applied to the election of members of the International Court of Justice. I do not know why . . . I think it would be common sense for us now to apply that rule and have a further ballot which would be restricted in vote to Mr. Klaestad and Mr. De Visscher. I . . . ask whether the Assembly or any member thereof has any objection to my proceeding in that way?<sup>107</sup>

There were no objections and Mr. Klaestad of Norway was elected.<sup>108</sup>

<sup>106</sup> Decision by General Assembly, 3rd Plenary Meeting, Jan. 11, 1946 (I/1), Plenary Meetings, pp. 81-82.

<sup>107</sup> 6th Sess., Plenary Meetings, 350th Plenary Meeting, Dec. 6, 1951, par. 27.

<sup>108</sup> *Ibid.* par. 28.

future, the President should rule it inadmissible as clearly contrary to the principle of representation embodied in Article 9. The natural assumption is that as a result of such a restricted ballot either France or South Asia would be deprived of representation on the Court.

Equally inadmissible would be drawing of lots by the President between two candidates who obtained an equal number of votes in the second (restricted) ballot under Rule 95 when only one place is to be filled, open through a vacancy (Article 14 of the Statute). The Statute insists on a majority of votes for election of judges.

The rules of procedure are applicable to elections of judges of the International Court of Justice only if and when they are compatible with the Statute of the Court. The latter instrument is paramount (Rule 151). It must be stressed in this connection that "equitable geographical distribution" is only one of the considerations to be considered during elections to the Security Council. Article 23 (1) emphasizes "in the first instance" the contribution of Members to the maintenance of peace and security and to the other purposes of the organization and, only additionally, equitable geographical distribution. In contradistinction, Article 9 of the Statute underlines the principle of representation alone.

#### *Practical Reasons*

There are obviously very weighty practical considerations strongly militating for restricted ballots. Such ballots certainly save time, a commodity in short supply in plenary meetings, and facilitate a quicker election than a series of unrestricted ballots where the votes may be dispersed widely. Such a series of unrestricted ballots requires much more unofficial behind-the-scenes negotiation, persuasion, and vote-canvassing than an equal number of restricted ballots.

It must always be kept in mind that the procedure governing elections of judges of the International Court of Justice is quite a peculiar thing designed to achieve a composition of the Court guaranteeing high integrity, legal competence and impartiality as well as the representative character of the Court as a whole. As long as restricted ballots do not endanger these objectives they can be accepted.

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## EDITORIAL COMMENT

### UNITED STATES INTERVENTION IN THE LEBANON

In a message to Congress on July 15, 1958, President Eisenhower said:

About 2 months ago a violent insurrection broke out in Lebanon, particularly along the border with Syria which, with Egypt, forms the United Arab Republic. This revolt was encouraged and strongly backed by the official Cairo, Damascus and Soviet radios which broadcast to Lebanon in the Arabic language. The insurrection was further supported by sizable amounts of arms, ammunition, and money and by personnel infiltrated from Syria to fight against the lawful authorities. The avowed purpose of these activities was to overthrow the legally constituted Government of Lebanon and to install by violence a government which would subordinate the independence of Lebanon to the policies of the United Arab Republic.<sup>1</sup>

(The President then referred to the appeal by Lebanon to the Security Council on June 6, to the resolution passed unanimously on July 10, with Soviet abstention,<sup>2</sup> authorizing United Nations observers to visit Lebanon; to the Secretary General's trip to that country; to his hope that the situation had been tranquilized;<sup>3</sup> and to the "radical change" after the outbreak in Baghdad on July 14 resulting in the assassination of the King and Prime Minister and indicating the "ruthlessness of the aggressor's purposes.") In this situation, and in view of his responsibility toward 2500 American citizens in Lebanon, the President considered that the United Nations' action was not enough, and on the urgent plea of President Chamoun of Lebanon, he had sent contingents "to protect American lives and by their presence to assist the Government of Lebanon to preserve its territorial integrity and political independence." This action, he said,

<sup>1</sup> 39 Dept. of State Bulletin 182 (1958). On June 17, 1958, in a press conference, Secretary of State Dulles had expressed "very considerable anxiety" over the Lebanon situation, had referred to the Eisenhower Doctrine, and had said the situation "assumes in part, at least, the character of a civil disturbance" but might involve "indirect aggression" referred to in a United Nations resolution in 1949. *Ibid.* 8. On June 27, the Department of State announced the shipment of 60,000 tons of wheat to Lebanon. *Ibid.* 68.

<sup>2</sup> *Ibid.* 90. Ambassador Lodge, in supporting the resolution, which was introduced by the Swedish representative, said the situation in Beirut is "increasingly critical" and that two major battles were in progress.

<sup>3</sup> In a press conference on July 1, 1958, Secretary Dulles referred to the Secretary General's feeling that the United Nations action was slowing down infiltration, but much military material had already gone in. He said "the normal way to deal with such a situation was through the United Nations, but we do not think that the words 'armed attack' preclude treating as such an armed revolt, in which is fomented from abroad, aided and assisted from abroad." The sending of foreign troops would, therefore, be justified by international law, but it would be better if Lebanon itself to settle the matter. There was no analogy to the Lebanese situation because the Government of Lebanon was calling for assistance. *Ibid.* 105.

(The legal problem is to determine the relative merits of these contentions, in the light of the facts.) There undoubtedly were propaganda and perhaps military assistance from the outside, but the problem is to determine, as in the Manchurian case in 1931, and the Chinese case of 1949, whether the movement was predominantly a domestic revolt or predominantly an external intervention. In order to justify its intervention before the United Nations it would seem incumbent on the United States to prove the latter. Pertinent evidence would include: (1) instances of propaganda, arms shipments and infiltrations of armed personnel into the Lebanon from outside;<sup>40</sup> (2) determination of the relative importance of this external aid compared with forces of internal origin; (3) history of the origin and course of the movement opposed to the Chamoun Government in the Lebanon; (4) analysis of opinion in the Lebanon behind the rebels, manifested by statements of the leaders of parliament and various religious communities and editorials in the press, in relation to the popular support behind the Government; (5) the amount of territory actually controlled respectively by the rebels and by the Government at the time of intervention; and (6) the manifestations of resistance or of acquiescence on the part of the Lebanese people following the intervention.<sup>41</sup>

This editorial has dealt with some of the subjects of the question. From the political point of view, the question is given, as it undoubtedly was, to the probable consequences, near and remote, of the intervention and to the desirability of the consequences compared with the consequences of non-intervention. In the United Nations, or of other alternatives. In such cases the effects of intervention upon the stability of the area, upon the stability of international law, upon the reputation of the United States elsewhere, upon the integrity of the United States, upon international law, upon the principle of national self-determination, upon the security of Israel, upon the security of oil companies and upon Communist influence will be significant factors. It was to be expected that there would result in great differences of opinion. That was indicated by editorial and other comments in the United States, India and other parts of the world. The advantage of international behavior by international law is that policy thereby rests from past experience and from standards of value which command a larger measure of consensus than do calculations of expediency from particular points of view. Applying the test of international law, in order to justify its intervention in Lebanon, the United States would have to prove that the troubles in that country inducing President Chamoun to request that intervention were primarily due to "subversive intervention" from outside. The change in the Lebanese Government which took place during the intervention, resulting in a military government including several opponents of the Chamoun regime, suggests that this would be difficult to prove.)

QUINCY WRIGHT

<sup>40</sup> Under Secretary Horter presented much such evidence in a memorandum.

<sup>41</sup> There was little resistance.

## THE AMERICAN POSITION ON OUTER SPACE AND ANTARCTICA

Until very recently, learned discussions of the emergent law of outer space have been of necessity conducted in a vacuum of state practice and of publicly uttered official opinion. The advent of artificial earth satellites has given rise to speculation concerning the legal significance of their passage above the territories of many states without express permission and without protest. Does such passage signify that space above a certain height is, like the high seas, not subject to state sovereignty? Or is the absence of protest to be attributed to implied consent possibly based on the arrangements for the International Geophysical Year?

The sphinxlike silence of the governments of the world on these and other questions relative to rights in outer space has now been broken. In May, 1958, Mr. Loftus E. Becker, the Legal Adviser of the Department of State, made statements before a number of Congressional committees which may be regarded as official indications of the United States position on the status of outer space.<sup>1</sup> In drawing a parallel between outer space and Antarctica, moreover, he shed some light on the current United States position with respect to the latter.

Mr. Becker's statements were tentative and imprecise. They are intended to safeguard American freedom of action.<sup>2</sup> The legal position indicated in them appears to be designed to preserve for the United States the greatest possible latitude in any future negotiations on outer space; it cannot be taken as an expression of settled national policy or as a reliable indication of the attitude that the United States may take in any specific case. Any official statement of the position of the United States which is noncommittal in intent, unavoidably serves to emphasize the uncertainty with which the nation's rights and duties can be defined. It is liable to lead to inferences which conceivably may be drawn by other States. The value of a legal position as an indication of national policy is not unrelated to its intrinsic merit. Mr. Becker's statements deserve careful analysis and appraisal.

<sup>1</sup> See *Astronautics and Space Exploration*, Hearings before the Subcommittee on Astronautics and Space Exploration, House of Representatives, 85th Cong., 2d Sess., H.R. 11881, April 15-May 12, 1958, pp. 1269 *et seq.*; *National Aeronautics and Space Act*, Hearings before the Special Committee on Space and Astronautics, U. S. Senate, 85th Cong., 2d Sess., on S. 3609, May 6-15, 1958, pp. 515 *et seq.* (reprinted in part in 38 Department of State Bulletin 962 (June 9, 1958)); *Relative to the Establishment of Plans for the Peaceful Exploration of Outer Space*, Hearing before the Subcommittee on National Security and Scientific Developments Affecting Foreign Policy of the Committee on Foreign Affairs, House of Representatives, 85th Cong., 2d Sess., on H. Con. Res. 326, May 20, 1958, pp. 23 *et seq.* See, further, Becker, "The Control of Space," 39 Department of State Bulletin 416 (1958).

<sup>2</sup> "I do not think we should be in a hurry to delimit or restrict the sovereignty of the United States unless we know that we are on the right road. . . . It is only after we have a great deal more knowledge that I feel we want to make a final decision that the boundary of the United States goes this far and no farther. Because once that decision is made, it is a permanent decision." Testimony of Mr. Becker, *Astronautics and Space Exploration*, Hearings, *loc. cit.* note 1 above, p. 1292.

The principal points made by the Legal Adviser may be summarized<sup>3</sup> as follows:

(1) It is incorrect to say that there is no law with respect to outer space, since the right of self-defense, as reserved in Article 51 of the United Nations Charter, may be exercised against armed attacks launched from or through outer space.

(2) Although the arrangements for the International Geophysical Year were made "between scientific bodies in a private capacity" and not on an intergovernmental basis, "there is an implied agreement that, for the period of the International Geophysical Year, it is permissible to put into orbit satellites designed for scientific purposes. Once the year is over, rights in this field will have to be determined by whatever agreement may be reached with respect to such objects."

(3) "The United States Government has not recognized any top or upper limit to its sovereignty." The State Department has never officially taken, and is not now taking, a "definitive position" on how the term "airspace," as used in the Chicago Convention of 1944, should be defined, but it is "important to note" that "one of the suggestions that have been made . . . is that the airspace should be defined to include" the space "in which there is any atmosphere," and that "astronomically the earth's atmosphere" might be said to extend "10,000 miles above its surface." Consequently, "it would be perfectly rational" . . . to maintain that under the Chicago Convention the sovereignty of the United States extends 10,000 miles from the surface of the earth, an area which would comprehend the area in which all of the satellites up to this point have entered." Such a definition "would afford us enough elbowroom for discussion."<sup>4</sup>

(4) Although the United States "has plainly asserted its complete and exclusive sovereignty over the airspace above its territory," it has at no time conceded that it has no rights in the higher regions of space." One reason for this position has been that "the United States had no need to assert its sovereignty until such time as mankind had demonstrated a capability of existing outside the atmosphere." "Even after such a capability is demonstrated, there will be no imperative requirement in international law that the United States make any claims of sovereignty in order to protect its rights." An apt analogy "is afforded by the Antarctic," where for many years "the United States has been engaged in activities which, under international law, without any question whatsoever, created

<sup>3</sup> Except as otherwise indicated, this summary is based on the prepared statement read by Mr. Becker on May 14, 1958, before the Special Committee on Space and Astronautics, U. S. Senate, National Aeronautics and Space Act, Hearings, *loc. cit.* note 1 above, reprinted in 38 Department of State Bulletin 962 (1958).

<sup>4</sup> In reply to questions, Mr. Becker added: "I may say that aside from this rather extreme 10,000 miles, there was an article the other day indicating that some responsible scientist said that there were indications of atmosphere up to 40,000 or even 200,000 miles from the surface of the earth. . . . I would say 10,000 miles could well be taken as an outside limit, although we have never taken any exact position on the point." National Aeronautics and Space Act, Hearings, *loc. cit.* note 1 above, pp. 333-334.

rights upon which the United States would be justified in asserting territorial claims, that is to say, claims to sovereignty over one or more areas of the Antarctic." Nevertheless, "the United States has not asserted any claim of sovereignty over any portion of Antarctica," although "it did not recognize any such claims made by other states." Yet, "the fact that the United States has not based a claim of sovereignty over one or more areas of Antarctica, upon the basis of the activities it has engaged in there, in no way derogates from the rights that were established by its activities." Similarly,

in outer space the United States has already engaged in activities which, it could be asserted, have given to it certain rights as distinguished from those states who have not engaged in such activities. Up to this time the United States has made no claims of sovereignty based upon such activities.

But, as with respect to Antarctica,

this should not be interpreted as any concession of any kind whatsoever on the part of the United States that its activities have not given it certain rights in space which, in turn, could be relied upon as the basis of a claim of sovereignty.

(5) It is premature to attempt to codify the law of space or to apply in space the principles of the law of the sea until much more is known about space. In law, "the soundest way to progress . . . is by means of specific decisions on specific questions presented by specific fact situations."

Basically, it is the position of our Government that the law of space should be based upon the facts of space and that there is very much more that we have to learn about the conditions existing in space before we shall be in a position to say what shall be the legal principles applicable thereto.

Mr. Becker also made it plain that he did not see "that it is imperative that at the earliest possible moment we should have an internationally agreed upon definition of airspace," and suggested that consideration be given to the possibility that "the performance of a particular space vehicle is sufficiently distinguishable so as to justify applying to it a set of rules which are different and distinct from those we apply to other space vehicles having different operating characteristics," whether the operation takes place within the atmosphere or without.<sup>5</sup> Yet he went on to stress repeatedly the complete and exclusive sovereignty of the United States over the airspace above its territory and the consequent right of the United States to keep out of its airspace aircraft, satellites, missiles and other vehicles of all kinds, manned or unmanned, and to confiscate any such vehicles entering its airspace without permission.<sup>6</sup> He made no attempt to

<sup>5</sup> *Astronautics and Space Exploration, Hearings, loc. cit. note 1 above, pp. 1273-1274, 1316; National Aeronautics and Space Act, Hearings, loc. cit. note 1 above, p. 334.*

<sup>6</sup> *Astronautics and Space Exploration, Hearings, loc. cit. note 1 above, pp. 1275, 1303, 1316-1317.* He further expressed the opinion that the state sending such vehicles would be "a guarantor with respect to any damage resulting from its unjustified activity." *Ibid.*

explain why the exercise of this right, in the absence of a generally accepted definition of airspace, should not be expected to produce international friction.

Several of the points made by Mr. Becker call for little comment. It is certainly true that the right of self-defense applies in space as elsewhere; and the warning against attempts to freeze the law of space by premature codification or the wholesale importation of analogies from the law of the sea is sound. In making plain the position of the United States that the toleration of the passage of the satellites during the International Geophysical Year is not to serve as a precedent, Mr. Becker must have been fully aware of the possibility that this position will be used against the interests of the United States.

Other points contain implications which invite further analysis and criticism. One striking feature of Mr. Becker's statements is that they lend no support to the suggestions that outer space is *res communis* which, like the high seas, is incapable of being appropriated by any state. They contain, on the other hand, little indication, beyond the general statement that the United States has recognized no upper limit to its sovereignty, that national sovereignty extends *ipso jure* into outer space as distinct from the atmosphere. There is, rather, a strong implication that outer space is *res nullius* over which national sovereignty may be established by the performance of certain acts followed by the assertion of certain claims. The suggestion that the United States has already engaged in activities in "outer space" which might serve as the foundation for a claim of sovereignty is not consistent with the suggestion that the airspace (as distinct from "outer space") subject to the sovereignty of the United States may extend 10,000 miles upward; for, as Mr. Becker recognized, all of the satellites up to the time of his remarks had been orbiting below this altitude, and there is no information to indicate that the United States had engaged in any "activities" in the space above 10,000 miles.<sup>7</sup> The two suggestions, therefore, must be regarded as presenting two alternatives. Even if the view that the United States has already engaged in activities which entitle it to claim sovereignty in outer space is accepted, there remains the question of the extent of the space which may be claimed on the basis of such activities. Must the claim be limited to the space above the United States? Or to the orbits of the Explorers? Or what? If the Soviet Union should also make a claim of sovereignty on the basis of similar activities, where should the boundary between the two sovereignties be drawn?<sup>8</sup> By implicitly raising

<sup>7</sup> In October, 1958, however, a rocket fired by the United States reached an altitude of some 79,000 miles.

<sup>8</sup> Since the United States and the Soviet Union are the only states that have so far engaged in activities in what may be regarded as "outer space," Mr. Becker's remarks may conceivably be interpreted as suggesting that the universe beyond the earth's atmosphere be divided between these two Powers. This interpretation finds some support in other parts of Mr. Becker's testimony: "Let me say two nations have a capability of getting to outer space, and it was now agreed that outer space would be devoted exclusively to peaceful purposes, and they asserted the right to police outer space to see that it was preserved for peaceful purposes. Under those circumstances



these questions, Mr. Becker may have unwittingly helped to demonstrate the absurdity of claims of national sovereignty in outer space.

Also of interest are Mr. Becker's remarks concerning Antarctica. He has asserted the right of the United States to claim sovereignty there on the basis of the activities in which it has already engaged in that area. Yet he has also reiterated the refusal of the United States to recognize the claims of sovereignty in Antarctica made by other states which have also engaged in certain activities there. Are the two positions consistent? Since it is hardly conceivable that the United States is claiming greater rights under general international law than it is willing to concede to other independent nations, two explanations suggest themselves. Either the United States asserts, in effect, that its activities have been so different in kind or in degree from those of any other state in Antarctica as to give it a superior right to sovereignty there; or else it maintains that the validity of claims to territorial sovereignty rests not on any objective test but solely on recognition of such claims by other states. The first explanation is not borne out by any information available to the public. In fact, the principal known difference between the activities of the United States in Antarctica and those of certain other states already claiming sovereignty there (*e.g.*, the United Kingdom and New Zealand) is that the United States has so far confined its activities to exploration and has not attempted to establish or exercise jurisdiction and control over any area.<sup>9</sup> This is certainly not a difference that gives the United States a superior right to sovereignty. The other explanation is that the United States is under no duty to recognize the territorial claims of other states, even though they rest on substantially the same kind of activities as those which the United States regards as a sufficient basis for its own claim. By the same token, any other state, *e.g.*, the Soviet Union, would be entitled to refuse to recognize any claim that the United States may choose to make. This position is not entirely without support in the realities of international politics, but it appears to deny the existence of any objective norm of international law governing the acquisition of territory and thereby renders illusory any "rights" reserved by the United States. The implied substitution of unfettered political discretion for a generally binding rule, moreover, can hardly be called a step toward the rule of law in world affairs.

Is mere exploration, however extensive, a sufficient foundation for a claim of territorial sovereignty? The traditional view, once shared by the United States, has been that territory not previously belonging to any state could be acquired only by the exercise of effective control coupled with manifested

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I can see some benefit in those two nations preventing another nation from going into outer space in order to put a military object into outer space." Relative to the Establishment of Plans for the Peaceful Exploration of Outer Space, Hearing, *loc. cit.* note 1 above, p. 30. Mr. Becker, it may be noted, apparently did not concede that the United States would be bound by a decision of a majority of the nations of the world or of the United Nations. Astronautics and Space Exploration, Hearings, *loc. cit.* note 1 above, pp. 1287, 1309; but *cf. ibid.*, p. 1282.

<sup>9</sup> See, *e.g.*, Hayton, "The 'American' Antarctic," 50 A.J.I.L. 583 (1956), and sources there cited.

intention to establish sovereignty. Mere discovery is not enough.<sup>10</sup> This view appears to rest on sound policy as well as practice, since the general interest requires that the claimant of sovereignty should assume the responsibilities of a sovereign and be able to carry them out. Nevertheless, Mr. Becker's remarks indicate that with respect to Antarctica greater significance than formerly may come to be attached to exploration unaccompanied by exercise of territorial jurisdiction or formal manifestation of the intent to establish sovereignty. The interests of the Soviet Union may coincide in this matter with those of the United States, since both Powers have engaged in exploratory activities in Antarctica without exercising territorial jurisdiction or making formal claims of sovereignty.<sup>11</sup>

The analogy drawn by Mr. Becker between Antarctica and outer space is not altogether convincing. In Antarctica, certain American explorers have made territorial claims on behalf of the United States which, though unauthorized and so far unratified by the government, may conceivably serve to strengthen the position of the United States. No such claims have been made in outer space, which has not yet been visited by human beings. It is well to avoid semantic confusion; "exploration" by means of unmanned missiles need not have the same legal consequences as exploration by human beings. The physical differences between Antarctica and outer space are obvious. The difficulties of determining the extent of the portions of outer space over which sovereignty may be claimed, which have been suggested above, have no counterpart in Antarctica. There is as yet no agreement as to where "airspace" ends and "outer space" begins, while Antarctica is a fairly well-defined and known area on the surface of the earth. There is no assurance that anything comparable to "effective control" over a part of terrestrial surface can be established in outer space. Most important, however, is the difference in the probable uses of Antarctica and outer space. This difference makes it unlikely that the legal status of outer space will in the future resemble that of Antarctica.

Nevertheless, some of the considerations which apply to Mr. Becker's remarks on Antarctica apply also to his statements concerning the "rights" which the United States may have acquired by its activities in outer space. These "rights," whatever their nature, are illusory if the United States does not admit a duty to recognize similar rights which may be claimed by other states on the basis of similar activities; and, in any event, the activities in question (*i.e.*, primarily the orbiting of the Explorers and the firing of certain rockets), even if regarded as having taken place beyond the atmosphere, provide a rather dubious basis for a claim of sovereignty.

Despite the confident tone of Mr. Becker's remarks concerning the policy of the United States in Antarctica, the fruits of this policy remain to be seen. It is somewhat premature, therefore, to cite it in support of the United States policy with respect to outer space, whatever may be the merits of the latter.

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<sup>10</sup> See, *e.g.*, 1 Hackworth, Digest of International Law 393-401.

<sup>11</sup> See, in this connection, Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic," 50 A.J.I.L. 611 (1956).

THE 1956 DRAFT RULES OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS  
AT THE NEW DELHI CONFERENCE

The world-wide International Red Cross (IRC)<sup>1</sup> consists today of the National Red Cross Societies, the League of National Red Cross Societies, founded in 1919 on American initiative, with the Board of Governors as its deliberative organ, and the International Committee of the Red Cross (ICRC), founded by Henry Dunant at Geneva in 1863. About every four years the International Conferences of the Red Cross are held. The National Societies, as well as the League, are private organizations, created under municipal law. The International Committee of the Red Cross, too, although strictly international in character, is legally a juridical person under Swiss municipal law and consists entirely of Swiss citizens; but it exercises functions recognized by or conferred upon it by international treaty law. It negotiates with governments, sends appeals directly to them, concludes agreements and fits out vessels. It acts independently, without the authority of any state, and on its own initiative sends delegates and even supervises the actions of states. It is recognized by the United Nations as one of the non-governmental international organizations with which the United Nations may consult. The violation of its distinctive sign is an illegal act under international law; its delegates have inviolability. The International Conferences of the Red Cross are mixed conferences, attended by unofficial Red Cross delegates and by official delegates of the states. The international position of the International Committee of the Red Cross, already previously recognized by international law, has been greatly strengthened by the new Geneva Conventions of August 12, 1949. That is why Werner and Schätzel ask whether, in spite of its creation under municipal law and its composition, the time has not come to recognize it as a person in international law. Guggenheim and Verdross see in it already a particular subject of international law.

The fundamental principles of the International Committee of the Red Cross, as strongly restated in 1949 by its former President, Judge Max Huber, are its non-political character, political independence and absolute neutrality, world-wide universality and humanitarianism. Wherever men suffer through fighting, the ICRC seeks to help. No distinction is made between guilty and non-guilty states; it matters not whether a state or government is or is not recognized, or whether a fighting group is not a state at all; it matters not whether the fighting is "war" reprisals, measures of United Nations execution or even civil war. The ICRC tried to help both sides in the armed conflict in Korea; it has sent observers to Algeria. At the International Conferences of the Red Cross, delegates of

<sup>1</sup> See R. Werner, *La Croix Rouge et les Conventions de Genève* (1943); Max Huber, in 1 *Annuaire Suisse de Droit International* 11-57 (1944); Pictet, "Les Nouvelles Conventions de Genève et la Croix Rouge," *Revue Internationale de la Croix Rouge*, 1949, pp. 655 *et seq.*; P. Guggenheim, *Traité de Droit International Public*, Vol. I, pp. 288-289 (1953); Vol. II, pp. 337-344 (1954); A. Verdross, *Völkerrecht* 110-111 (3rd ed., Vienna, 1955); W. Schätzel, "La Croix Rouge et les Nations Unies," *Annuaire de l'Association des Auditeurs et Anciens Auditeurs de l'Académie de Droit International de La Haye*, 1958, No. 28, pp. 166-176.

all states are admitted. It is exactly this universal and non-political character, only moved by humanitarian considerations, which gives to the International Red Cross its unique status and makes it the voice of the public conscience of the world.

Of particular importance is the rôle of the ICRC in the making of new international treaty law, dealing with what is called the "Geneva" laws of war or the "humanitarian" laws of war, as distinguished from the "Hague" laws of war, dealing with norms concerning the actual conduct of war. Within the "Geneva" laws of war, the rôle of the International Committee of the Red Cross always was to take the initiative, to direct appeals to the states, to make legal studies, to prepare drafts, to convoke commissions of experts, to have these drafts approved by the International Conferences of the Red Cross, to submit these approved drafts to the states and to urge them to have these drafts become rules of international law: for this purpose the Swiss Government convokes a diplomatic conference, producing on the basis of these drafts, international conventions, to be ratified by the states. Thus, the Red Cross Conventions of 1864, 1906 and 1907 came into being. Even during the long period after 1920, when the laws of war were neglected by governments and scholars with disastrous consequences, the ICRC took the initiative which led to the two Geneva Conventions of 1929. Since that time the ICRC has been working continuously for better protection of the civilian population in time of war.<sup>2</sup>

After the second World War, the National Red Cross Societies held a preliminary conference at Geneva in 1946, followed by a meeting of governmental experts at Geneva in 1947. A draft, prepared by the ICRC, had been sent to the National Red Cross Societies and governments. The four new draft conventions were approved at the XVIIth International Conference of the Red Cross (Stockholm, 1948). Then followed the Geneva Diplomatic Conference of 1949, convoked by the Swiss Government. This conference produced the four Geneva Conventions of 1949.<sup>3</sup>

The fourth Geneva Convention of 1949 creates new international law and constitutes important progress, but is not complete.<sup>4</sup> That is why

<sup>2</sup> The Geneva Conference of 1929 had previously recommended unanimously that a careful study be made in preparation for a convention concerning the protection of the civilian population. The idea of "security zones" appeared in 1929 and 1931. On Dec. 22, 1931, the ICRC sent its Circular No. 300, concerning the legal protection of the civilian population from the dangers of aerial and chemical warfare, to all the National Red Cross Societies. The so-called "Tokyo Draft" on the same subject was submitted to the 15th International Conference of the Red Cross. A revised draft of the 1929 Conventions was considered by the 16th Conference (London, 1938). All these studies were submitted to the Swiss Government which had intended to convoke a diplomatic conference at Geneva in 1940.

<sup>3</sup> See Josef L. Kunz, "The Geneva Conventions of August 12, 1949," in Lipsky (ed.), *Law and Politics in the World Community* 279-316, 368-373 (University of California Press, 1953).

<sup>4</sup> Arts. 35-46 apply only to protected civilian persons in the territory of a party to the conflict; Arts. 47-78 apply only to protected civilian persons in occupied territories; the "general protection" of the civilian population found no expression in rules of law.

the ICRC in April, 1950, sent an appeal concerning atomic weapons and non-directed missiles to the signatories of the Geneva Conventions of 1949. Resolution XXIV of the Stockholm Conference (1948) had

earnestly requested the Powers solemnly to undertake to prohibit absolutely all recourse to such weapons (which cannot be aimed with precision or which devastate large areas indiscriminately) and to the use of atomic energy for purposes of warfare.

The Board of Governors of the League, at its XXIIIrd Session (Oslo, May, 1954), requested the ICRC "to make a thorough examination and propose at the next International Conference of the Red Cross the necessary additions to the Conventions in force in order to protect civilian populations from the dangers of atomic, chemical and bacteriological warfare."

The ICRC had in 1952 resumed the studies started before 1939. It convoked a commission of non-governmental experts which met at Geneva from April 6 to 15, 1954. It worked out the "Draft Rules 1955,"<sup>5</sup> which were designed to "reaffirm permanent principles in close conformity with present-day facts."<sup>6</sup> The Draft Rules, 1955, were sent in July, 1955, to all the National Red Cross Societies. As in the opinion of some societies there was the risk of going beyond the bounds of the IRC and encroaching upon the province of governments, whereas others urged a joint study prior to the New Delhi Conference, the ICRC invited them to appoint private experts to an Advisory Working Party which met at Geneva, May 14-19, 1956.<sup>7</sup> On that basis, the ICRC prepared a new draft: The Draft Rules, 1956, for the limitation of the dangers incurred by the civilian population in time of war.<sup>8</sup> They are not a draft convention, but a code of fundamental rules and principles; the text is somewhat different, and perhaps less far-reaching, than the Draft Rules, 1955. The Draft Rules, 1956, consist of a preamble and six chapters in twenty articles. The Draft Rules, 1956, were sent in October, 1956, to all the National Red Cross Societies and to the governments and were before the XIXth International Conference of the Red Cross which took place at New Delhi, India, October 16-November 7, 1957.<sup>9</sup>

This Conference dealt with the Draft Rules, 1956, in its "International Humanitarian Law Commission."<sup>10</sup> Its Chairman was Mr. John Mac-

<sup>5</sup> Draft rules for the protection of the civilian population from the dangers of indiscriminate warfare. With commentary (ICRC, Geneva, June, 1955, mimeographed, 115 pp.).

<sup>6</sup> On the Draft Rules, 1955, see Josef L. Kunz, "The Laws of War," 50 A.J.I.L. 313-337, at 323-325 (1956).

<sup>7</sup> The report on this meeting was published by the ICRC as Doc. No. 347b.

<sup>8</sup> Published with commentary by the ICRC (Geneva, September, 1956, 168 pp.).

<sup>9</sup> 19th International Conference of the Red Cross, New Delhi, October-November, 1957. Final Record concerning the Draft Rules for the limitation of dangers incurred by the civilian population in time of war (ICRC, Geneva, April, 1958, mimeographed, 184 pp.). Further quoted as Final Record.

<sup>10</sup> We have already referred to the dividing line: "Geneva" and "Hague" laws of war. This writer has in his study (cited in note 6) pointed out the reasons why such a complete division is hardly possible. The Geneva Diplomatic Conference of 1949 continuously emphasized its lack of competence within the realm of the "Hague"

Aulay, Vice President of the Canadian Red Cross; Mr. Henrik Beer, Secretary General of the Swedish Red Cross, was *rapporteur*. As always, the New Delhi Conference was a mixed conference;<sup>11</sup> all types of countries were represented.<sup>12</sup> The Draft Rules, 1956, were discussed in five meetings of the above-named Commission and in two Plenary Sessions. Sixty-two delegates from forty-seven countries spoke on the Draft Rules, some several times and in great detail.

A careful study of the verbatim record reveals strong differences of opinion on procedural and substantive questions which, in spite of all banning of political considerations, often clearly reflected the split between the "two worlds." The ICRC had, at the beginning, submitted a draft resolution for the Conference. The draft suggests that (1) "a set of rules revising and extending those previously accepted is desirable"; (2) "deems that the underlying principles of the draft are in conformity with Red Cross ideals and the requirements of humanity"; (3) "requests the ICRC to continue its efforts and prepare the ground for an international agreement"; and (4) "resolves that the record of the discussions and the text of the proposals shall be appended to the Draft Rules." M. Siordet, Vice President of the ICRC, took the position that no discussion, article by article, should take place, but only a discussion leading to general approval; he insisted that only governments and their specialists can draw up international conventions in their ultimate form, that the Draft Rules, 1956, are not a draft convention. The Chairman, who conducted the discussions with a firm hand, had ruled that the ICRC draft resolution and amendments to it were before the Commission; and if the resolution was adopted, resolutions dealing with particular articles would not be discussed. But he had also to rule that each speaker was free to discuss particular rules and to propose amendments thereto. It is certainly not a mere accident that the delegates of the Communist countries<sup>13</sup> preferred article-by-article debate, whereas the delegates of the free world<sup>14</sup> insisted on a more general

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laws of war; yet it is clear that such rules as the prohibition of reprisals, prohibition of taking hostages, prisoner-of-war status, under certain conditions, of members of resistance movements, even in occupied territories, profoundly influence the rules concerning the actual conduct of warfare. In 1955 the ICRC itself had stated that it had to go beyond the "Geneva" into the "Hague" laws of war, that the field covered by the 1956 Draft Rules is rather different from that covered by the Geneva Conventions. But the 1956 Draft Rules try to restrict themselves to the "Geneva" laws of war: hence the title of the corresponding Commission at the New Delhi Conference. The dividing line between "Geneva" and "Hague" laws of war was one of the arguments in the discussions.

<sup>11</sup> Some countries were represented only by Red Cross, others only by governmental delegates; some had two different delegates; in some cases the same person acted in a dual capacity, as representative of the Red Cross and of the government.

<sup>12</sup> All Communist countries were represented; there were also delegates of the Federal Republic of Germany and of the "Democratic Republic of Germany," of the Republic of Korea and of the "Democratic Republic of Korea" and of North Viet-Nam.

<sup>13</sup> U.S.S.R., Bulgaria, Hungary, Poland, North Korea, Rumania.

<sup>14</sup> Argentina, Brazil, Belgium, Denmark, Ireland, Sweden. Uruguay proposed to hold a general debate first, followed by a discussion article by article. Chile proposed a general debate, followed by a discussion only of such articles on which there was no general agreement.

debate. In fact, amendments to the preamble and to each of the twenty articles were proposed.<sup>15</sup> It is interesting to note that the amendment to Article 19, proposed by Japan, was based on the conviction "that there must be war criminals also in the victor countries and that it is truly an injustice that war criminals are found only among the vanquished countries."<sup>16</sup>

But the greatest split of opinion, in a matter of substance, concerned Article 14, dealing with atomic and other weapons of mass destruction. All the Communist delegates<sup>17</sup> stood in strongest terms for total and absolute prohibition without any conditions, and mostly also for a total ban of nuclear tests; the delegates of the free world were opposed. This matter was held inopportune<sup>18</sup> and strictly political,<sup>19</sup> forming a part of the problem of disarmament and belonging to the competence of the United Nations.<sup>20</sup> The keynote was given by the delegate of the Government of the Philippines,<sup>21</sup> who not only stressed the political character of the problem and the competence of the United Nations, but referred to the antagonism between the "two schools." He insisted that everything depended on the conditions attached to the proposal of banning nuclear weapons, and that his government demanded the right to use nuclear weapons for self-defense. He urged adequate and effective safeguards, including full inspection and control. The same ideas were voiced, in a very restrained form, by General A. M. Gruenther,<sup>22</sup> speaking in his capacity as President of the American National Red Cross, by the delegate of the Government of the United Kingdom,<sup>23</sup> and by the delegates of the French Red Cross<sup>24</sup> and of the French Government.<sup>25</sup> The delegates of the French Red Cross openly spoke of the danger that an absolute and unconditional prohibition of atomic weapons would create by weakening some countries and strengthening others, which have great superiority in so-called "conventional" weapons, but do not possess such superiority in nuclear weapons. The strongest warning, the greatest urge for a "realistic approach" came from General J. D. Shepers, speaking on behalf of the Netherlands Red Cross.<sup>26</sup>

<sup>15</sup> See List of Proposals and Amendments concerning the Draft Rules, Final Record 175-184.

<sup>16</sup> Final Record 33-34.

<sup>17</sup> Albania, China, Czechoslovakia, German Democratic Republic, Hungary, North Viet-Nam, Poland, Rumania, U.S.S.R. The Yugoslav Delegation always took a completely independent stand. Burma and Syria took the same position as that taken by the Communist delegates.

<sup>18</sup> Brazil, Final Record 20.

<sup>19</sup> Peru, *ibid.* 25.

<sup>20</sup> Austria, *ibid.* 43; Belgium, *ibid.* 34-35; Canada, *ibid.* 67-68; El Salvador, *ibid.* 77-78; Mexico, *ibid.* 40; Pakistan, *ibid.* 83-84.

<sup>21</sup> *Ibid.* 21-22.

<sup>22</sup> *Ibid.* 37-38. He also stated: "I personally wish that atomic weapons had never been invented."

<sup>23</sup> *Ibid.* 44-45.

<sup>24</sup> *Ibid.* 47-48.

<sup>25</sup> *Ibid.* 56-57.

<sup>26</sup> *Ibid.* 29-37, 62-66. "Do you believe that governments which possess atomic weapons are convinced that the use of those weapons is a moral sin, a proof of wicked men? So far, I have seen no signs in this direction." (p. 65.) "Can you believe that if a conflict should break out, and people's vital interests were at stake, that governments would hesitate, on moral grounds, to make use of such weapons? No." (p. 66.)

As to the draft resolution submitted by the ICRC, Judge Sandström (Swedish Red Cross),<sup>27</sup> stressing the lack of competence of the IRC, proposed an amendment deleting the paragraph asking the ICRC to continue its efforts, and replacing the last paragraph by a simple request to transmit the draft rules to the governments for their consideration. This amendment was strongly endorsed by many delegations. On the other hand, the Netherlands delegate proposed an amendment to the amendment, according to which the ICRC should continue its efforts, and that was also accepted by many delegations. After the Chairman had appointed special drafting committees, a final resolution was proposed to the last meeting of the Commission. First, a U.S.S.R. amendment, asking the ICRC to prepare a more complete draft within the shortest time possible, was rejected by vote of 24 in favor, 51 against, and 8 abstentions. Then the resolution in its final form was adopted by 115 votes in favor, none against, and 2 abstentions. At the Plenary Session the resolution was unanimously adopted with no abstentions. This resolution, as adopted, retains the first two paragraphs of the draft resolution and, further, "urges the ICRC to continue its efforts"; and "requests the ICRC to transmit the Draft Rules, the record of the discussions, the text of the proposals, and the submitted amendments, to the governments for their consideration." In carrying out this mandate, the ICRC published the verbatim record and sent it, together with a memorandum, to the governments, emphasizing that it now remains with the governments to draft the rules recommended by the New Delhi Conference, states its intention of continuing to seek, and possibly to propose, the means for developing the progress of these legal studies in order to reach an international agreement, which is the logical conclusion of this work.

If we look at the unanimous adoption of the resolution, the New Delhi Conference appears *prima facie* to have been successful. And yet, looking deeper into the matter, doubts as to this success arise. There were good reasons behind the statement of the Yugoslav delegate,<sup>28</sup> who said that

we did not find a satisfactory common language; we did not progress, but have virtually let the thing go out of the hands of the IRC. What have we done? We are returning again these rules to the governments, to which they were sent before; we do not foresee what other action is to be taken.

Much stronger criticism was voiced by the delegate of the Swiss Government, who, during the discussions, called the proposed resolution "not a step forward, but rather two steps backward," and asked that a basis be provided for the work of the ICRC "with a view to setting up an international instrument, binding upon states, whether it is based on 'Hague' law or on 'Geneva' law."<sup>29</sup> And again, at the Plenary Session, he urged that "all steps should be taken to enable these rules to become in due course an instrument of international law."<sup>30</sup>

<sup>27</sup> *Ibid.* 36-37.

<sup>29</sup> *Ibid.* 70-71.

<sup>28</sup> *Ibid.* 112-113.

<sup>30</sup> *Ibid.* 113-115.



## NOTES AND COMMENTS

### DUAL NATIONALS AND THE DOCTRINE OF DOMINANT NATIONALITY\*

Dual nationality is a status encountered among citizens of all countries, but quite frequently among nationals of the United States. During the 19th and 20th centuries numerous immigrants from European and other countries became citizens of the United States by naturalization; however, their native countries did not release such immigrants automatically from their original nationality. Hence, such persons had been considered citizens of both countries until they obtained specific release from their native governments. Under the principle of "*jus sanguinis*" even the children of such immigrants have been considered by the foreign governments as citizens of their father's native country, regardless of whether they were born in the United States. The governments of these countries frequently were unwilling to delete such persons and their children from their own citizens' rosters, primarily because the male children were subject to military service. In addition, the status of dual nationality has often occurred as a result of the marriage of an alien woman to a citizen of the United States, or of an American woman to a foreigner, because under the laws of the two countries involved such women may have acquired a new nationality without losing their former citizenship.

Conflicts arising from the status of dual nationality have been a common occurrence in international law. In the first place, immigrants who became citizens of their adopted country by naturalization, and their sons, naturalized or born in the adopted country, have been inducted into military service when visiting the country of their origin. Secondly, passports issued by the adopted country have been seized by foreign governments from visitors and not returned to their owners, in order to prevent the departure of such dual citizens from the countries claiming jurisdiction over such persons. Finally, personal injury and property claims, otherwise justified, have been rejected by the country against whom such claims were asserted, because the claimant also happened to be a national of the respondent country.

In the past, conflicts of this nature often embarrassed the governments involved, and quite frequently the Government of the United States. Beginning in 1868, the United States tried to prevent the imposition of obligations of military service and other military obligations on persons having dual nationality by concluding agreements with numerous foreign countries. Most of the agreements entered into with European countries (Austria-Hungary, Belgium, Bulgaria, Denmark, Finland, Germany, Great Britain, Norway, Portugal, Sweden and Switzerland) and with Latin American states (Brazil, Costa Rica, Haiti, Honduras, Nicaragua, Peru,

\* The views expressed by the author are not necessarily those of the Foreign Claims Settlement Commission of the United States.

El Salvador and Uruguay) included the recognition of the principle that the immigrants from these countries were entitled to voluntarily expatriate themselves upon their naturalization as United States citizens.<sup>1</sup> The treaties secured the right of a naturalized citizen of the United States to return to his country of origin without being subject to punishment for failure, prior to naturalization, to respond to calls for military service. However, in some treaties, military deserters were excluded from this privilege, and persons acquiring residence in the United States otherwise than in good faith generally were not covered by the treaties.<sup>2</sup>

With respect to personal injury and property claims asserted against foreign countries by the claimants' governments on behalf of dual nationals who also were considered citizens of the respondent state, the governing theory of international law, in the beginning, was based on the case of *James Louis Drummond*, decided in 1834.<sup>3</sup> Drummond was a dual national, a citizen of both France and Great Britain. His property was seized by the French Government in 1792. The Treaty of Paris of 1814 provided for the settlement of claims of British subjects against the French Government for seizures of British property in France. The final determination on claims of this type was made by the British Privy Council, which denied the Drummond claim for the reason

that the property was seized in consequence of a French decree against emigrants, and not against British subjects. Drummond was technically a British subject, but in substance, a French subject, domiciled (at the time of seizure) in France, with all the marks and attributes of French character. . . . The act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects.

This was the first case in international law in which the doctrine of dominant or effective nationality was invoked. The essence of the doctrine is that where there is a conflict between two governments regarding the nationality of a claimant, who is a dual national, the nationality of claimant's habitual residence should prevail over his other nationality. In other words, if both the claimant and the respondent states assert that the claimant is their national, such claimant should be considered, for the purposes of the claim, to be a citizen of the country in which he had his habitual residence at the time the claim arose.

Another doctrine was invoked in 1872 by the American-British Claims Commission under the Treaty of 1871 in the claim of the *Executors of R.S.C.A. Alexander*.<sup>4</sup> Alexander had dual—British and United States—nationality. His executor claimed compensation for property damage against the United States. As stated in the opinion of Commissioner Frazer, the claim was denied on the ground that under international law a state may not espouse a claim on behalf of one of its nationals who is

<sup>1</sup> 3 Hackworth, *Digest of International Law* 377 (1942).

<sup>2</sup> *Ibid.* 378, 404, 414.

<sup>3</sup> 2 Knapp, *P. C. Rep.* 295, 12 *Eng. Rep.* 492.

<sup>4</sup> 3 Moore, *International Arbitrations* 2529 (1898).

or was also a national of the respondent state. This rule is called the doctrine of non-responsibility of states for claims of dual nationals.

During the second part of the 19th century and in the first half of the 20th century, the rules of dominant nationality and of non-responsibility of states for dual national claims were applied interchangeably by international claims commissions, but more and more emphasis was given to the latter doctrine. The theory of non-responsibility of the respondent state is described in Professor Edwin M. Borchard's treatise, *The Diplomatic Protection of Citizens Abroad*, published in 1915. There (on p. 588) it is stated that the principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance, a defendant before an international tribunal. The Harvard Draft Convention on Responsibility of States<sup>5</sup> repeated this principle as follows: "A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national."

In the *Oldenbourg* (1929) and *Honey* (1931) cases before the British-Mexican Claims Commission under the Convention of 1926,<sup>6</sup> the Commissioners stated:

. . . the principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. A person cannot sue his own government in an international court nor can any other government claim on his behalf . . . It is an accepted rule of international law that such a person (a dual national) cannot make one of the countries to which he owes allegiance a defendant before an international tribunal.

The Permanent Court of Arbitration of The Hague in the case of *Rafael Canavaro*, decided in 1912, determined that the claimant, being a national of both Peru and Italy, was not entitled to claim through the Italian Government against Peru; no special doctrine was recited, but the denial was based primarily on the fact that the claimant acted consistently as a Peruvian national, having been prominent in Peruvian local politics.<sup>7</sup>

C. C. Hyde, in his treatise on international law,<sup>8</sup> states:

It may be acknowledged that a State should not interpose a claim in behalf of a national as against a foreign State of which the same individual is to be regarded as a national by virtue of a principle in relation to the acquisition or retention of nationality which the law of nations respects, as in a situation where an arbitral tribunal might well deem the doctrine of dual nationality to be applicable.

The *Alexander* case and other more recent cases are recited by Hyde in support of this view.

<sup>5</sup> Art. 16. 23 A.J.I.L. Spec. Supp. 22 (1929).

<sup>6</sup> Decisions and Opinions of the Commissioners, October 5, 1929, to February 15, 1930, p. 97; and Further Decisions and Opinions of the Commissioners, subsequent to February 15, 1930, p. 13.

<sup>7</sup> Scott, Hague Court Reports 284.

<sup>8</sup> 2 Hyde International Law, Chiefly as Interpreted and Applied by the United States 898 (1945).

The International Court of Justice, in its Advisory Opinion of April 11, 1949, refers to "the ordinary practice whereby a State does not exercise protection on behalf of its national against a State which regards him as its own national."<sup>9</sup>

The same Court, however, in the more recent decision of *Liechtenstein v. Guatemala* (Nottebohm case)<sup>10</sup> stated the problem in a different way. The Court said:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States when nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next; the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

This decision was made public on April 6, 1955, and clearly shows the trend in modern international law. Even more recently, on June 10, 1955, the Italian-United States Conciliation Commission, set up under the provisions of Article 83 of the Peace Treaty with Italy of February 10, 1947, determined a case which might be of decisive importance for future application by the Government of the United States to the problem regarding dual nationals. In the claim of *Florence Strunsky Mergé*<sup>11</sup> the Commission unanimously rejected a claim on the ground that the claimant, a dual United States and Italian national, was dominantly a national of Italy because "the family (of the claimant) did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in travelling to Japan from Italy in 1937 and she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokio, and it does not appear that she was ever interned as a national of a country enemy to Japan." In the same decision, the Conciliation Commission handed down the following general rules to serve as guidance for the proceedings before the Commission:

(a) United States nationality shall be prevalent in cases of children born in the United States of an Italian father who have habitually lived there;

(b) United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law, as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy;

<sup>9</sup> [1949] I.C.J. Rep. 186.

<sup>10</sup> [1955] *ibid.* 22. The case is also reported in 49 A.J.I.L. 396 (1955).

<sup>11</sup> Briefly reported as Case No. 3 in 50 A.J.I.L. 164 (1956).

(c) With respect to cases of dual nationality involving American women married to Italian nationals, United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the personal professional life of the head of the family were established in the United States;

(d) In cases of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated; case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

Thus it appears that the older doctrine of dominant nationality might again prevail in the future. The doctrine of non-responsibility of states in claims of dual nationals, more frequently used in the first half of this century, might gradually fall into disuse. The practical result in this country might be that in the future the Government of the United States will afford protection to its citizens and espouse their personal injury or property damage claims against foreign governments, notwithstanding the fact that the claimants also appear to be citizens of the respondent country.

This trend of somewhat broadening protection to citizens residing in this country is not based on purely theoretical opinions and views. At the present time, most of the claims of citizens of the United States are directed against countries behind the Iron Curtain: the Soviet Union, the satellite states and China. Many of the claimants are dual citizens because the nationality laws of the Communist countries are generally based on the principle of "*jus sanguinis*" and almost always interpreted by the governments of these countries in the most unfavorable way to the interests of claimants residing in the Free World. The principle of non-responsibility of states for claims of dual nationals was originally introduced in international law under the sound assumption that a dual national should not enjoy the protection of two countries: his original and his adopted country. If an individual was injured by the action of his original country, he generally was able to seek redress as a citizen of that country. Such a doctrine was justified in the 19th and in the beginning of the 20th century, when social conditions in most of the civilized countries were stabilized, and denial of justice was an exception rather than the rule. The situation is quite different today. Communist governments do not even pretend to give protection to claimants who seek compensation for injuries inflicted to their persons or property by deliberate actions of persecution, socialization, confiscation, et cetera. To a minor degree, this situation is similar in countries which formerly were dominated by colonial Powers. Under these circumstances, the return to the theory of dominant nationality appears quite justified.

In the above cases the principle of non-responsibility of the respondent state for claims of dual nationals becomes meaningless because citizens of Western countries who are also citizens of a Communist country are left without any protection whatsoever, if the governments of the adopted countries do not espouse their claims. It is obvious that the theory of dominant nationality has nothing to do with the application of nationality

questions under municipal law. Wherever a question of nationality arises within the domestic jurisdiction of a country, the statutes and general principles of law governing nationality will prevail and no discrimination of any kind will be sustained by dual nationals, who are also foreign nationals under foreign law. In the United States, the relevant statutes are the so-called expatriation laws of 1907, 1940 and 1952.<sup>12</sup> They are the only sources under which a determination of loss of nationality can be made. As a result, in the future the United States will probably afford protection to claimants whose claims are otherwise eligible under specific international agreements, or under general principles of international law, even though the claimant is a dual national and the respondent country is the country of his other nationality. However, the approval of such claim before an international tribunal might depend on and be influenced by the revived doctrine of dominant nationality, which has recently been considerably strengthened by the International Court of Justice and by the unanimous decision of the United States-Italian Conciliation Commission in the above-cited *Mergé* case.

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THE RULE OF THE NATIONALITY OF CLAIMANT, DUE PROCESS OF LAW  
AND THE UNITED STATES CONGRESS

On August 8, 1958, the President of the United States signed Bill S. 3557 which thus became Public Law 85-604, 85th Congress, S. 3557. This law is known as "An Act to amend the International Claims Settlement Act of 1949, as amended," and contains in its most important part Title IV, Sections 401-417, called "Claims against Czechoslovakia." However, to this main part of the Act, Section 2 has been added which amends Title III, Section 304, of the International Claims Settlement Act of 1949, as amended, contained in Public Law 285, 84th Congress, and which relates to the payment of certain claims against the Italian Government pursuant to the so-called Lombardo Agreement concluded between the United States and Italy on August 14, 1947. It is this addition to Public Law 85-604, denominated as Section 2, that deserves the attention of any lawyer interested in international legal problems.

The amended Section 304 of Title III of the International Claims Settlement Act of 1949, as amended, now reads as follows:

The Commission shall receive and determine, in accordance with the Memorandum of Understanding and applicable substantive law, including international law, the validity and amount of claims of nationals of the United States against the Government of Italy arising out of the war in which Italy was engaged from June 10, 1940, to September 15, 1947, and with respect to which provision was not made in the treaty of peace with Italy. *Upon payment of the principal amounts (without interest) of all awards from the Italian Claims Fund*

<sup>12</sup> 34 Stat. 1228; 54 Stat. 1137; 66 Stat. 163.

*created pursuant to section 302 of this Act, the Commission shall determine the validity and amount of any claim under this section by any natural person who was a citizen of the United States on the date of enactment of this title and shall, in event an award is issued pursuant to such claim, certify the same to the Secretary of the Treasury for payment out of remaining balances in the Italian Claims Fund in accordance with the provisions of section 310 of this Act, notwithstanding that the period of time prescribed in section 316 of this Act for the settlement of all claims under this section may have expired.*<sup>1</sup>

In simple language this means that, to be qualified as a claimant against the Italian Government, United States nationality as of the time when the claim arose is no longer required; it is sufficient that the claimant became a national of the United States at any time prior to the enactment of Title III of the Act, on August 9, 1955, hence, almost eight years after Italy was released from international responsibility for the damages committed against United States nationals by acts of war.

Obviously, Section 304, as amended, of Title III of the Act is in contradiction with the rule of the continuity of nationality of claimant, one of the best-established principles of international law, which until now has been rigidly observed and consistently applied by the United States Government in its international relations.<sup>2</sup> The essence of this rule is that no claimant is entitled to the protection of the state whose assistance is invoked unless he was a national of that state at the time when the claim arose and continually thereafter until the claim is presented. Yet, if the amended section is taken independently and interpreted literally, it would appear that this long-established rule of international law has now been broken by the Congress and that the United States Government no longer adheres strictly to the principle of the continuity of nationality of claimant. However, such a clear-cut conclusion would not be correct. The real meaning of this amendment can be understood only if the whole background of this provision, including its legislative history, is carefully examined.

The pertinent clause of the above-mentioned Lombardo Agreement reads as follows:

The Government of Italy agrees to pay and deposit with the Government of the United States of America on or before December 31, 1947 the sum of \$5,000,000 (five million dollars) in currency of the United States of America, this sum to be utilized, in such manner as the Government of the United States of America may deem appropriate, in application to the claims of United States nationals arising out of the war with Italy and not otherwise provided for.<sup>3</sup>

<sup>1</sup> Report No. 2227, 85th Cong., 2nd Sess., House of Representatives, The Czechoslovakian Claims Fund, July 18, 1958, p. 14. The amended text is in italics.

<sup>2</sup> See 5 Hackworth, Digest of International Law 802 ff.; also 2 Hyde, International Law 893 ff. (2nd ed., 1945); 1 Whiteman, Damages in International Law 94 ff. For an opposite opinion see Wormser, Collection of International War Damage Claims 38 ff. (1944). The principle of the nationality of claimant was also affirmed on two occasions by the International Court of Justice. See Panevezys-Saldutiskis Railway Case, Judgment of Feb. 28, 1939, Series A/B, No. 76, pp. 16 ff.; also Nottebohm Case, Judgment of April 6, 1955, [1955] I.C.J. Rep. 20-26.

<sup>3</sup> For a complete text of the Lombardo Agreement, see 42 A.J.I.L. Supp. 152 (1948).

This stipulation clearly indicates that the contracting parties had in mind only the claims of those individuals who were nationals of the United States at the moment when the claim arose, or, giving to it the most liberal interpretation, only the claims of those persons who were nationals of the United States at the moment when the Agreement was signed. It would, indeed, be difficult to interpret this stipulation as indicating that the parties have agreed to extend the time limit for the requirement of United States citizenship over an indefinite period to be determined unilaterally by the United States.<sup>4</sup>

When the legislation was prepared for the execution of the Lombardo Agreement establishing the procedure for the entertainment of the claims against the Italian Government before the Foreign Claims Settlement Commission of the United States, at no time was it envisaged either by the Administration or by the House Foreign Affairs Committee that the rule of the continuity of nationality of claimant should be eliminated as a requirement for a valid claim, in spite of the fact that certain efforts were made by representatives of various groups to admit as qualified claimants persons who were not United States nationals at the moment when their claims arose. The representatives of the Department of State, Mr. B. M. English and Mr. W. L. Griffin, reiterated the policy of the Department at the hearing of the Committee held on April 19, 1955, stating that "a claimant would not be entitled to share in these funds unless he was a citizen at the time when the claim arose," and adding that this "would be true with respect to claims against Italy for payment out of so-called Lombardo funds."<sup>5</sup>

In view of this determined position of the Department of State, Public Law 285, 84th Congress, Title III, made no changes in the rule under discussion, and demanded as a requirement for a valid claim proof of United States nationality at the moment when the claim arose. This was, of course, in line with the previously established policy in similar procedures, especially that applied in the program of Yugoslav claims carried out by the Foreign Claims Settlement Commission in 1951-1954.<sup>6</sup>

In the Italian claims program a certain number of claimants, though not formally qualified because of lack of citizenship at the material date, yet persistent or perhaps clairvoyant in asserting their claims, nevertheless filed their claims with the Commission within the time limit prescribed

<sup>4</sup> Such a broad interpretation to the Lombardo Agreement was given by Senator Long in the Senate debate. He said that "the Italian Government has been willing to make funds available not only to American citizens who, as of a particular date, had claims against Italy, but also to make available funds, over and above that amount, which might be due under other claims of this sort." Cong. Record, Senate, Vol. 104, No. 114, July 9, 1958, p. 12027.

<sup>5</sup> Foreign Claims Settlement Commission, Hearings before the Committee on Foreign Affairs, House of Representatives, on Draft Legislation to amend the International Claims Settlement Act of 1949, as amended, and for other purposes, pp. 109-110.

<sup>6</sup> Cf. Rode, "The International Claims Settlement Commission of the United States," 47 A.J.I.L. 615 ff. (1953), and also above, p. 139; Drucker, "Compensation for Nationalized Property: British Practice," 49 A.J.I.L. 477 ff. (1955).



by the law. Their claims were all rejected in the early stage of the program because the Commission found that they did not meet the legal requirements. However, this was not the end of the claims. On the other hand, when the claims of those who were qualified claimants began to be processed, it was discovered that the Lombardo Fund of five million dollars not only would be sufficient to cover fully the payment of all the anticipated awards but that a substantial remainder would be available. Since the Lombardo Agreement did not specify what should be done with a possible surplus, the question as to its use in the most appropriate manner remained open. It was this fact that induced the Congress to amend Section 304, Title III, of Public Law 285, 84th Congress, as cited above, by announcing the somewhat new principle, namely, that in cases where surplus funds remain, they could be made available to those United States citizens who acquired American citizenship subsequent to the date when their claim arose.

It would be wrong to assume, however, that this new principle was adopted by the Congress in such a definite form that its future consistent application may always be expected. First, the representatives of the Department of State did not take any position when this amendment was discussed before the House Foreign Affairs Committee. The letter written by the Assistant Secretary of State, Mr. W. M. Macomber, which was read by the Assistant Legal Adviser, Mr. S. D. Metzger, at the hearing of July 9, 1958, concerning the Bill in question, fails to disclose any reference, either favorable or unfavorable, to this amendment.<sup>7</sup> It could therefore be presumed that the Department of State, in principle, did not change its views concerning the rule of the nationality of claimants. The attitude of the representative of the Foreign Claims Settlement Commission, Chairman Gilliland, towards this amendment was rather neutral and noncommittal. He stressed only that he had some doubts as to whether the Lombardo Agreement could be interpreted in such a broad manner as implied by the amendment, and that

the Senate Committee itself called attention to the fact that the new Amendment does not conform to the usual nationality rule.<sup>8</sup>

Second, and this is perhaps more important, the Congress itself was reluctant to proclaim this new interpretation of international law as being applicable in all other existing or possible future programs involving the payment of international claims. The discussion in the Senate clearly indicates this trend.<sup>9</sup> Senator Javits, advocating the universal adoption of this new principle, has urged it because, as he said, "it might have a very material effect upon the scrutiny of claims which are given priority," and because "the administering authorities would know that if a surplus were created, it would go to other deserving American citizens who are

<sup>7</sup> Czechoslovakian Claims Fund, Hearing before the Subcommittee on Foreign Economic Policy of the Committee on Foreign Affairs, House of Representatives, on H.R. 11840, S. 3557 and S. 979, pp. 30-31.

<sup>8</sup> *Ibid.* 10.

<sup>9</sup> Cong. Record, cited note 4 above, pp. 12027-12030.

standing in line with deserving claims right now.”<sup>10</sup> Senator Long, reporting the Bill with the amendment, expressed himself against a universal acceptance of this new principle. He refused to apply it to other existing foreign claims programs and was willing to accept it only in those future situations where a surplus originating in the fund created by a foreign government would actually be available. He called the Italian claims settlement “unique in many respects,” but, speaking of future settlements of claims, he warned that at this moment “the administration, and perhaps the committee as a whole, would be reluctant to extend any assurance that there would be a settlement of claims of those who were not citizens at the time their property was seized.”<sup>11</sup>

In summing up the debate in the Senate it is safe to conclude that the principle of continuity of nationality of claimants, as such, was not abrogated but only made more flexible in certain specific situations. These situations, in turn, require the existence of a surplus in the fund supplied by a foreign government for the payment of particular types of claims. Whether such surplus is available can be determined only when the program of the settlement of claims is actually put into operation. However, at no time can it be expected that the claims of those who originally were not qualified claimants will be paid at the expense of those who were genuinely qualified or at the expense of American taxpayers. Efforts should be made by the Administration to see that in any future settlements of international claims sufficient funds are obtained from foreign governments to make this principle applicable.<sup>12</sup>

In the present case of the Italian claims, in which for the first time this new interpretation of international law is applied, not all of the ideas proclaimed by the Senate were actually kept. Senator Long, explaining the amendment to Section 304, Title III, said that the payment of the newly qualified claimants in the Italian program is proposed to be done in such a way “as not to require those who previously had valid claims *to reduce the amount of their recovery.*”<sup>13</sup> (Emphasis added.) The Report accompanying the Bill states also that the purpose of the Amendment is

to permit natural persons, who were not American citizens at the time of their loss, to be compensated on claims against Italy . . . if, *after all payments of all awards* on claims by those who were American citizens when their claims arose, there is enough money left over in the Italian Claims Fund to satisfy any such additional awards.<sup>14</sup> (Emphasis added.)

However, the amendment, as enacted, reads: “. . . Upon payment of the principal amounts (without interest) of all awards from the Italian Claims Fund. . . .” In practice this means that all those who were originally qualified claimants and who received their awards, including interest, were by this amendment deprived of a portion of their awards and that consequently the amount of their recovery has been reduced.

<sup>10</sup> *Ibid.* 12028.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* 12028-12029.

<sup>13</sup> *Ibid.* 12029.

<sup>14</sup> Report No. 2227, cited note 1 above, p. 10.

In many other situations the cancellation of the payment of interest in the settlement of international claims would have had little or no practical meaning. All the funds created after the war for the purpose of payment of these claims were, as a rule, insufficient to pay even the total amount of principal, and thus the interest, if recognized, was *ipso facto* omitted from recovery. But the Italian claims settlement is entirely different. Here the Fund has been sufficient to pay in full the total award consisting of principal and interest thereon. Moreover, the Commission decided in its Final Decision of July 11, 1957, IT-10,173, Dec. No IT-198, in the claim of *Peter Lucas*, that

under international law, customs and precedents, and in the absence of express statutory language to the contrary, the Commission further concludes that the claimant is entitled to interest with respect to his losses.<sup>15</sup>

The Commission made the decision to pay interest in this test case only after an oral hearing at which the arguments were presented in favor of such a decision. Counsel for the claimant stressed in particular that the Lombardo Agreement left to the United States the distribution of the awards among the qualified claimants "as the Government of the United States may deem appropriate," and that consequently the payment of interest was left to be made at the discretion of the United States in conformity with the recognized principles of international law and the practice followed in the past. The Commission, in accepting this view, ruled that interest was to be recognized in the amount of 6 per centum per annum from the date when the damage was inflicted or the loss occurred until the date of the payment by the Government of Italy of \$5,000,000.00, which was on April 23, 1948. Since a great number of the Italian claims relate to the damages caused by the Italian armed forces in the early stage of the war, in 1940 and 1941, in most instances the aggregate sum of interest amounts to 40 or more percent of the principal and thus constitutes a large portion of the award. Moreover, it can be assumed that the Commission, in scrutinizing the claims, was inclined to satisfy the claimants, especially those with small claims, by giving them an award in which the principal was rather small but which, increased by interest, formed the actual sum of damages appraised by the Commission as being a fair value of the total loss. All awards thus issued were certified to the Department of the Treasury for payment. The latter notified the claimants and indicated that the award is to be considered as one award consisting of principal and interest and not as two awards, the one consisting of principal and the other of interest. Since there was never any doubt that these consolidated awards would be paid in full, the claimants had a legal right to expect

<sup>15</sup> The Commission based its decision on the following authorities: 3 Whiteman, *Damages in International Law* 1924 (1943); Borchard, *The Diplomatic Protection of Citizens Abroad* 428 (1928); 5 Hackworth, *Digest of International Law* 735 (1943); 6 Moore, *Digest of International Law* 1028; Wormser, *Collection of International War Damage Claims* 216 (1944); and Mixed Claims Commission, United States and Germany, Administrative Decision No. III, pp. 66-67.

and to receive the payments of their awards in their total amounts. These awards became thus assets owned by the claimants, and any taking of this property, either in whole or in part, would certainly require some hearing or other action comprised in due process of law. Instead, we see that the amendment to Section 304, Title III, does not provide for any such hearing, but simply orders a substantial reduction of the awards belonging to the originally qualified claimants, which from every legal aspect must be considered as the property of these individuals.

Another idea, which was expressed in the Senate when the amendment in question was under discussion, was that while the originally qualified claimants in any program must be satisfied first, *all other claimants* made eligible by such an amendment have the right "to stand in line" and to wait for their share in the distribution of the remainder. In the present case this principle was not upheld. The Commission, undoubtedly interpreting correctly the language of the amendment, is willing to consider only the claims of those claimants who were made eligible by the amendment and who actually submitted their claims within the period prescribed by law, *i.e.*, up to September 30, 1956. In other words, all those who became United States citizens within the time limit provided by the amendment, that is, prior to August 9, 1955, and thus were made qualified claimants but failed to submit their claims to the Commission prior to September 30, 1956 (assuming correctly that they were not eligible) are now barred from the distribution of the surplus, since the amendment does not permit the subsequent filing of their claims at this late date. It is unfortunate that this unnecessary discrimination within the same group of potential claimants has not been avoided.

In spite of the above-discussed deficiencies of the amendment to Section 304, Title III, of Public Law 285, 84th Congress, the principle contained in it is sound and should be welcomed. International law is not static but develops along with the changing conditions of international life. It is not international law which creates international relations but rather international relations which generate and change the principles of international law. The rules of international law are based, above all, on the ideas of equity which, according to a decision of the International Court of Arbitration, should be understood "in the traditional sense in which these words are used in Anglo-Saxon jurisprudence."<sup>18</sup> What could be a better application of the ideas of equity than that of the extension of legal protection to those United States citizens who, under the rigid interpretation of the existing rules of international law, would remain without such protection.

Although the rule of the continuity of nationality of claimant continues to be one of the basic principles of international law as recognized by the United States, this rule is no longer absolute. The Congress has broken, not the rule, but the rigidity with which it has heretofore been applied. Let us hope that in the future the principle expressed by this amendment will repeatedly be legalized by the Congress in order to give at least partial satisfaction to those citizens of the United States who, unfortu-

<sup>18</sup> Cf. 1 Hackworth, *op. cit.* 10.

nately, were not American nationals at the time when their claims arose. It should also be expected that in any future legislation of this kind the injustices committed by the present amendment will not be repeated.

BRANKO M. PESELJ

*Of the District of Columbia Bar*

#### 53RD ANNUAL MEETING OF THE SOCIETY

The American Society of International Law will hold its 53rd Annual Meeting from April 30 to May 2, 1959, at the Mayflower Hotel in Washington, D. C. The Committee on Annual Meeting, of which Dr. Charles E. Martin of the University of Washington is Chairman, is planning an interesting program having for its general subject "Diverse Systems of World Public Order Today." As it was arranged last year, the 1959 meeting will consist of panel discussions of different aspects of the subject.

The meeting will open on Thursday afternoon, April 30, at 2:30 p.m. with a discussion of "Representative Systems of World Public Order Today." Panel I will consider "Universality in Perspective" and "The Russian System." Panel II will discuss "The Islamic System" and "The Latin American System."

On Thursday evening at 8:15 p.m. Professor Myres S. McDougal, the President of the Society, will deliver an address on "Perspectives for an International Law of Human Dignity." The guest speaker for that evening will be Lord McNair, who has been awarded the Society's Manley O. Hudson Medal, and will receive it at the annual meeting.

On Friday, May 1, 1959, at 9:30 a.m., two panels will consider "Security Problems among Diverse Systems of Public Order" and "Diverse Systems and Principles of Jurisdiction," respectively. At 2:30 p.m. the subjects of "Allocation of Resources in a World of Diverse Systems" and "Human Rights among Clashing World Orders" will be discussed in separate panels. Following the afternoon session there will be an informal reception for the members and their guests.

On the evening of Friday, May 1, "Economic Growth and Trade among Competitive Systems" will be the subject of one panel discussion, which will include such topics as "Varying Perspectives of Expropriation," "Conflicting Conceptions of Concession Agreements," and "The Accommodation of State Trading and Free Markets." A second panel will discuss "Diverse Systems and the Law of Treaties," and will consider varying policies with respect to the making, interpretation, and termination of agreements.

The business meeting of the Society will be held on Saturday morning, May 2, 1959.

The sessions will close with the annual dinner on Saturday evening at 7:00 o'clock p.m., at which several distinguished speakers will deliver addresses.

The Committee on Annual Meeting is planning a program of outstanding speakers, which will be announced later. An advance printed program will be sent to the members of the Society before the meeting.

ELEANOR H. FINCH

## ELEVENTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION

The Inter-American Bar Association will hold its Eleventh Conference in Miami, Florida, with the Dupont Tarleton Hotel as headquarters, from April 10 to 19, 1959. It is expected that around 800 lawyers from nearly all the nations of the Hemisphere will attend the Conference.

Under the general theme of "Legal Aspects of Economic Development in the Americas," committee reports will be presented on questions of public and private international law, municipal law, constitutional law, civil and commercial law, criminal and administrative law and procedure, fiscal, social and economic law, natural resources, interplanetary space, legal education, legal documentation and lawyers' activities.

Public international law reports will cover such subjects as the continental shelf, including oil and gas exploration and production, uses of international rivers, commercial treaties and inter-American trade and investment, interpretation and enforcement of status of forces agreements, diplomatic asylum, United Nations Charter revision, establishment of an Inter-American Institute of International Relations at Buenos Aires, juridical defense of Western democracy, extension of jurisdiction of the International Court of Justice to include disputes involving international trade.

In the field of private international law there will be presented reports on revision of the Bustamante Code, recognition and execution of foreign judgments, judicial assistance, uniform standards governing the conflict of laws with respect to international contracts, and the advisability of adopting an inter-American convention on the exercise of the liberal professions.

Arrangements for the conference are in charge of the Honorable Cody Fowler, President of the Association, assisted by other international officers of the Association, including William Roy Vallance, Secretary General, Charles R. Norberg, Assistant Treasurer, Carolyn R. Just, Reporter General, and a Miami committee under the chairmanship of Jonathan E. Ammerman, President of the Inter-American Legal Foundation. The host organizations, which are arranging an interesting social program, are the Florida Bar, the Dade County Bar and the University of Miami.

Additional information regarding the conference may be obtained from Mr. William Roy Vallance, Room 210, 1129 Vermont Avenue N.W., Washington 5, D. C., or Mr. Jonathan E. Ammerman, 232 Pan American Bank Building, Miami 32, Florida.

ELEANOR H. FINCH

## HAGUE ACADEMY OF INTERNATIONAL LAW

The 30th Session of the Hague Academy of International Law will be held from July 13 to 31, and August 3 to 21, 1959.

The program of lectures, which will be given every morning from Monday through Friday, with a few scheduled for the afternoon, is as follows.

*Historical Development of International Law:* "The Geneva Convention on Fisheries," by André Gros, Professor of the Faculties of Law, and Legal Adviser to the French Ministry of Foreign Affairs; "Interna-

tional Space Law," by Professor Roland Quadri of the University of Naples.

*Principles of Public International Law:* A general course of 15 lectures by Professor Quincy Wright of the University of Virginia; "Money in Public International Law," by Dr. F. A. Mann of London; "Human Rights and International Relations," by Ernest Hamburger, Dean of the Faculty of Law and Political Science of the Free School of High Studies of New York; "The Rights and Duties of States," by Dr. Ricardo J. Alfaro of the University of Panama; "General Principles of International Responsibility in Terms of Principle and Case Law," by Professor Hildebrando Accioly of the Catholic University of São Paulo.

*Private International Law:* A general course of 10 lectures by Professor H. Batiffol of the Law Faculty of Paris; "The Condition of Corporate Personality in Private International Law," by J. Loussouarn, Dean of the Faculty of Law of Rennes; "The Effects of a Foreign Nationalization," by Professor F. Munch of the University of Berlin; "Private International Law and the Scandinavian Conventions," by Professor Allan Philip of the University of Copenhagen; "The Legal Status of International Economic Organizations and the Municipal Law of States," by Professor Angelo Piero Sereni of the University of Bologna; "The Structure of the Rule of Conflict," by Professor Petros G. Vallindas of the University of Athens.

*International Organization:* "Legal Aspects of the International Bank's Operations," by Mr. A. Broches, Director, Legal Department, International Bank for Reconstruction and Development; "Evolution and Structure of International Society," by Professor A. Truyol y Serra of the University of Madrid; "The Competence of the General Assembly of the United Nations," by Mr. F. A. Vallat, C.M.C., Assistant Legal Adviser to the British Foreign Office.

The lectures will be given in English or French with a simultaneous translation into the alternate language.

Admission to the courses is obtained by presenting an admission card, which will be issued upon approval of the application for admission by the Administrative Council of the Academy. Application forms and further information about the session may be obtained from the Secretariat of the Academy, The Peace Palace, The Hague.

There are a number of scholarships available for the Academy courses, some of which are given by the Academy itself, others by governments and private institutions. Among the English-speaking organizations which have given scholarships or assistance to attend the courses are the following: The Judge Advocate General, Department of the Army, Washington, D. C.; the Canadian Institute of International Affairs; the Universities of Dublin and Pennsylvania; Corpus Christi College, Oxford, England; Wheeling College, West Virginia, U. S. A.; the Woodrow Wilson School of Public and International Affairs; and the London School of Economics.

The Center for Studies and Research in International Law and International Relations, which was opened in 1957, will hold its third session from August 25 to October 3, 1959. For this session, 30 participants will be

admitted, 15 to carry out research studies in the French-speaking section, the Director of which will be Professor Robert Charlier of the Faculty of Law of Paris, and 15 to carry out research in the English-speaking section, under the direction of Mr. Eli Lauterpacht, Lecturer, Trinity College, Cambridge, England.

Applications for admission to the Center, together with certified copies of all certificates and qualifying documents, should reach the Curatorium of the Academy, The Peace Palace, The Hague, not later than April 1, 1959.

ELEANOR H. FINCH

#### HARVARD SUMMER PROGRAM FOR LAWYERS

Three courses relating to international and comparative law will be included in the Program of Instruction for Lawyers to be given at the Law School of Harvard University from July 20 to 31, 1959. The program is open to all members of the Bar who are practicing lawyers.

The courses holding special interest to international and comparative lawyers are a basic course in "Taxation of International Trade and Investment," to be taught by Professor Stanley S. Surrey; a perspective course on "Comparison of American and Soviet Law," to be given by Professor Harold J. Berman; and a seminar for specialists on "Protection Under International Law of Americans and Their Property Abroad," to be conducted by Assistant Professor R. R. Baxter. The first two of these will be conducted as courses; the seminar to be led by Mr. Baxter is designed to bring together lawyers who have worked fairly extensively in this particular area of the law and to give them an opportunity to exchange ideas with respect to the problems presented by the discussion leader.

Other courses and seminars available within the Program of Instruction for Lawyers comprise Estate Planning, Income Taxation and Corporate Enterprise, Labor Law, the Drafting and Interpretation of Statutes, Interrelations of State and Federal Law, Jurisprudence—An Introduction to Legal Philosophy, Anti-Trust Problems in Mergers and Distribution, Current Problems in Securities Regulation, and Tax Aspects of Real Estate Transactions.

Copies of the catalogue for the Program and further information may be obtained from William L. Bruce, Associate Director, Program of Instruction for Lawyers, Harvard Law School, Cambridge 38, Massachusetts.

R. R. B.

#### DEPARTMENT OF STATE SENIOR OFFICER COURSE

On September 22, 1958, Secretary of State Dulles officially inaugurated a new advanced course for Senior Officers of the Department of State at the Foreign Service Institute, of which Mr. Harold B. Hoskins is Director.<sup>1</sup> The establishment of the course was another step in carrying out the recommendations made in 1954 by the Public Committee on State Department

<sup>1</sup> See Department of State Press Release No. 547, Sept. 22, 1958.



Personnel under the chairmanship of Dr. Henry M. Wriston. Its purpose is to prepare Department officers for the highest positions of responsibility in policy recommendation and execution, co-ordination, planning and administration in the Department, in diplomatic posts abroad, and in inter-agency and international organizations.

The course, which is under the supervision of Mr. Willard F. Barber, a career Foreign Service Officer, includes study of the following subjects: the bases for American foreign policy; domestic influences on that policy; review of recent United States diplomacy; foreign policy objectives of allied and neutral states and the Sino-Soviet bloc; and current foreign policy problems.

The Senior Officer Course is the most advanced program in the field of international relations and foreign policy offered by the Department of State. Participation in the current course was limited to a small number of carefully selected senior officers of the Foreign Service, with a few places for officers of equivalent rank from other agencies of the Government, both civilian and military, particularly involved in different aspects of American foreign policy. The course will continue through June, 1959.

E. H. F.

## JUDICIAL DECISIONS \*

BY BRUNSON MACCHESNEY

*Of the Board of Editors*

*Utilization of water wholly within territorial area of state but flowing towards neighboring state—interpretation of Treaty of Bayonne of May 26, 1866, and of Additional Act of the same date—rules for interpretation of international treaties—presumption of "good faith"—interpretation of diplomatic communication arising out of negotiations*

LAKE LANOUX CASE (FRANCE-SPAIN).<sup>1</sup>

Arbitral Tribunal,<sup>2</sup> Geneva, November 16, 1957.

The border between France and Spain had been settled by various treaties culminating in the Treaty of Bayonne of May 26, 1866, which dealt with the border extending from the Valley of Andorra to the Mediterranean. On the same day, by an Additional Act (*Acte Additionnel*) it was agreed to make special provisions "for the enjoyment of waters of common use, provisions which, due to their general character claim a special place . . ." Insofar as the Additional Act provided for "The Regime and Enjoyment of Waters of Common Usage Between the Two Countries," these provisions required consultations and agreement before any interference with the rights or interests of any of the High Contracting Parties could be contemplated, whilst the rights of both parties within their respective territorial limits were respected.<sup>3</sup>

\* The assistance of Egon Guttmann, Esq., LL.B., LL.M. [London], Ford Graduate Fellow, Northwestern University School of Law, with respect to the Lake Lanoux case and the British Commonwealth cases is gratefully acknowledged.

<sup>1</sup> 62 *Revue Générale de Droit International Public* 79-119 (1958). From a mimeographed copy of an unofficial translation of the decision prepared by Covington & Burling, Washington, D. C., and furnished to the editor through their courtesy.

<sup>2</sup> Sture Petréén, President (appointed by King of Sweden, to whom the parties, in the absence of agreement between them, delegated the power to appoint a President), Plinio Bolla, Paul Reuter, Fernand de Visscher and Antonio de Luna.

<sup>3</sup> The relevant articles of the Additional Act are Articles 8, 9, 11, 12 and 16.

*Article 8:* "All stagnant and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

"Flowing waters change jurisdiction at the moment when they pass from one Country to the Other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

*Article 9:* "For watercourses which flow from one Country to the Other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyments

In this border area lies Lake Lanoux, a lake of about 86 hectares surface area and storing approximately 17 million cubic meters of water. This lake, which is wholly in France, is fed by streams arising in and crossing only French territory. It is drained by the River Font-Vive, which is a source of the Carol River. The Carol River flows from France into Spain, where it joins the River Segre. On the French side of the border a canal takes off from the Carol River, which itself crosses the border at Puigcerda and irrigates agricultural projects in that area.

Since 1917 various schemes had been mooted for the utilization of the waters of Lake Lanoux. But, due to objections raised by Spain in the course of various diplomatic exchanges, these schemes never came to fruition. In February, 1949, the "International Commission for the Pyrenees"<sup>4</sup> met and agreed to set up a "Mixed Commission of Engineers" to study any proposals which might be made for the utilization of these waters. It was further agreed at this meeting not to alter the *status quo* until the two governments had decided to do so by common accord.

In 1950 *Electricité de France* requested a concession from the French Ministry of Industry to erect a barrier of 45 meters in height so as to raise the capacity of Lake Lanoux to 70 million cubic meters of water, to divert the waters of the lake to the River Ariège in order to take advantage

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for domestic uses currently existing in the other State, by virtue of concession, title or by prescription, with the reservation that only that volume of water necessary to satisfy the real needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that legitimate compensation is made."

*Article 11:* "When in one of the two States it is proposed to construct works or to grant new concessions which might change the regime or the volume of a watercourse whose lower or opposite part is being used by riparians of the other Country, prior notice will be given to the highest administrative authority of the Department or of the Province to which these riparians are subject, by the corresponding authority in the jurisdiction where such projects are proposed, so that, if they could threaten the rights of the riparians of the adjoining sovereignty, a timely complaint may be lodged with the competent authorities, and thereby all the interests that may be involved on both sides will be safeguarded. If the work and concessions are to be erected in a *Commune* contiguous to the border, the engineers of the other Country will have the option, upon proper notice given to them reasonably in advance, of inspecting the site together with those in charge of it."

*Article 12:* "The downstream lands are subject to receiving from the higher lands of the neighboring Country the waters which flow naturally from it together with what they carry, without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparians, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the lower lands."

*Article 16:* "The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to set up regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments."

<sup>4</sup> Created after an exchange of notes between the French and Spanish governments in 1875.

of a drop of 780 meters for the generating of electricity, and to return the waters back to the River Carol by means of a tunnel connecting the rivers Ariège and Carol. The French Government, being of the opinion that only the amount of water actually needed by the Spanish riparian users need be restored, in 1953 instructed the Prefect of the Eastern Pyrenees to inform the Governor of the Province of Gerone of this scheme and to request him to investigate any question of indemnity which might arise. In these communications the "Mixed Commission of Engineers" was by-passed. The Spanish Government requested recourse to this "Mixed Commission" and also an undertaking that no work would be begun before this Mixed Commission had reported. The French Government agreed to these requests.

Subsequently the French Government reviewed its opinion and agreed to the earlier proposals of the *Electricité de France* that the total volume of water abstracted be returned to the River Carol. The French Government informed the Spanish Government of this change in policy and pointed out that, since the new scheme did not entail any change of the regime of the water on the Spanish side of the border, the matter was wholly within the competence of France. The French Government agreed, however, to a meeting of the "Mixed Commission of Engineers," since the Spanish Government still considered its interests prejudiced by the proposed scheme. A meeting of this Commission was held on August 5, 1955, but led to no result. During subsequent meetings of the International Commission on the Pyrenees, and of a further Mixed Commission set up in 1955, the French Government offered to vary its scheme still further, so as to safeguard the interests of Spain, by including therein provisions for a "Mixed Commission of Supervision," and for a Spanish engineer who was to be granted the privileges of a Consul, to check the volume of water abstracted and to see that this amount was duly returned to the River Carol. The French Government also offered to guarantee that, whatever the inflow into Lake Lanoux, no less than 20 million cubic meters of water per year would be returned to the River Carol, and that the diversion of water to this river would take account of the needs of Spanish riparian users, in that the flow would be regulated in such a manner as to coincide with their needs, irrespective of the daily inflow into Lake Lanoux.

The Spanish Government submitted counter-proposals which would not have involved a diversion of the flow of water from Lake Lanoux, but which would have resulted in a reduction of the expected output of electricity by 10%. These proposals were rejected by the French Government. No agreement having been reached, the French Government informed the Spanish Government that it intended to act in accordance with an earlier communication of November 14, 1955, wherein the French Government had reserved its right to "resume their freedom of action within the limits of their rights" unless an agreement was forthcoming within three months of that date. Throughout, the main Spanish argument had been that

the execution of this project would be injurious to the interests and rights of Spain since, on the one hand, it alters the natural conditions

of the hydrographic basin of Lake Lanoux by diverting its waters to the Ariège and by thus making restitution of the waters to the Carol physically dependent upon human will, which would result in the *de facto* preponderance of one party only, rather than in the preservation of the equality of the two parties as provided for by the Treaty of Bayonne of 26 May 1866 and by the Additional Act of the same date; and that, on the other hand, such project has, by its nature, the scope of an affair affected with a general interest [*asunto de conveniencia general*] and as such dependent on Article 16 of the Additional Act and consequently requires the prior agreement of the two Governments for its execution, lacking which the State which proposes it does not have the freedom to undertake the works.

On the basis of an Arbitration Treaty of July 10, 1929, between France and Spain, by which the two countries agreed to settle by means of arbitration all disputes as to which the parties would reciprocally dispute a right, and which they could not resolve through diplomatic exchanges, a *Compromis* was signed in Madrid on November 19, 1956, by virtue of which the Arbitral Tribunal met in Geneva to resolve this conflict.

Finding as a fact that the totality of the work and most of its effects would be in France and would concern waters which the Additional Act submits to French territorial jurisdiction, the Tribunal considered Article 8 of the Additional Act and held:

This text itself imposes a reservation on the principle of territorial sovereignty ("except for the modifications agreed upon between the two Governments"); some provisions of the Treaty and of the Additional Act of 1866 contain the most important of these modifications; there can be others. It has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.

The question is therefore to determine the obligations of the French Government in this case. The Spanish Government has endeavored to define them; the problem should be examined beginning from the Spanish contention.

The argument of the Spanish Government is of a general character and calls for some preliminary remarks. The Spanish Government bases its contention first of all on the text of the Treaty and of the Additional Act of 1866. Its contention thus falls exactly within the jurisdiction of the Tribunal as it has been defined by the *Compromis* (Article 1). But in addition, the Spanish Government bases its contention on both the general and traditional features of the regime of the Pyrenean boundaries and on certain rules of customary international law (*droit international commun*) in order to proceed to the interpretation of the Treaty and the Additional Act of 1866.

In another connection, the French *Mémoire* (page 58) examines the question put to the Tribunal in the light of general international law (*droit de gens*). The French *Contre-Mémoire* (page 48) does the same thing; but with the following reservation: "Although the question submitted to the Tribunal is clearly confined by the *Compromis* to the interpretation in the case in question of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date." In the

oral pleadings the representative of the French Government said: "The *Compromis* does not request the Tribunal to find out whether there are general principles of international law applicable in this context" (third session, page 7), and: "A treaty is interpreted in the context of positive international law of the times when it may be applied" (seventh session, page 6).

In an analogous case, the Permanent Court of International Justice (withdrawal of waters from the Meuse, Permanent Court of International Justice, series A/B 70, page 16) declared:

"In the course of the debates, both written and oral, allusion has been made incidentally to the application of general rules of international river law. The Court notes that the litigated questions such as those presented by the Parties in the present case do not allow the Court to go beyond the framework of the Treaty of 1863."

Since the question presented by the *Compromis* relates solely to the Treaty and to the Additional Act of 1866, the Tribunal will apply the following rules for each particular point:

The clear provisions of treaty law do not require any interpretation; the text provides an objective rule which covers entirely the subject matter to which it applies; when the provisions call for interpretation this should be done according to international law; international law does not sanction any absolute and rigid method of interpretation; we may therefore bear in mind the spirit that guided the framing of the Pyrenean Treaties as well as the rules of customary international law.

The Tribunal may deviate from the rules of the Treaty and of the Additional Act of 1866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties.

The Tribunal then characterized the essential issues in dispute as involving two questions: (a) Does the French project constitute a violation of the Treaty of Bayonne and of the Additional Act? And if not, the further question arises: (b) Can such works be undertaken without the prior agreement between the two High Contracting Parties, especially having regard to the Treaty and the Additional Act, Article 11?

(a) Referring to the Additional Act, and in particular to Articles 9 and 10, which require that legality of user is conditional upon such use being necessary for the satisfaction of actual needs, so that any surplus remaining at low-water level can be divided between the parties at the point where the water crosses the border, the Tribunal held:

In effect, thanks to the restitution effected by the devices described above, none of the guaranteed users will be injured in his enjoyment of the waters (this is not the subject of any complaint founded on Article 9); at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, would at no time suffer a diminution; it may even be that by virtue of the minimum guarantee made by France it would benefit by an increase in volume assured by the waters of the Ariège which flow naturally to the Atlantic.

One might have attacked this conclusion in several different ways.

It could have been argued that the works would bring about a definitive pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain

could then have claimed that her rights had been impaired in violation of the Additional Act. Neither the *dossier* nor the debates of this case carry any trace of such an allegation.

It could also have been claimed that, by their technical character, the works envisaged by the French project could not in effect ensure the restitution of a volume of water corresponding to the natural contribution of the Lanoux to the Carol, either because of defects in measuring instruments, or in mechanical devices to be used in making restitution. The question was lightly touched upon in the Spanish *Contre-Mémoire* (page 86), which underlined "the extraordinary complexity" of procedures for control, their "very onerous" character, and the "risk of damage or of negligence, in the handling of the water-gates and of the obstruction system in the tunnel." But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are spread all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighborly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, the character of this accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9.

Finding, however, that the Spanish Government based its claim on the ground that the French project "alters the natural conditions of the hydrographic basin of Lake Lanoux" and makes the "restitution of the waters of the Carol physically dependent upon human will," neither of which can be done without the prior agreement of the other party, the Tribunal felt that there were two points involved in this argument: a prohibition, in the absence of agreement, of compensation between two basins, despite the equivalence between diversion and restitution, and a prohibition, in the absence of agreement, of any act which would create a *de facto* inequality with a physical possibility of a violation of rights. The Tribunal stated:

These two points must now be examined successively.

The prohibition of compensation between the two basins, in spite of the equality between the diversion and the restitution, unless the change is consented to by the other Party, would lead to the absolute blocking of a withdrawal from a watercourse belonging to River Basin A for the benefit of River Basin B, even if this withdrawal is compensated for by a strictly equivalent restitution effected from a watercourse of River Basin B for the benefit of River Basin A. The Tribunal does not overlook the reality of each river basin which, from the point of view of physical geography, constitutes, as the Spanish *Mémoire* (page 53) maintains, "a whole." But this observation does not authorize the absolute consequences that the Spanish thesis would like to draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organized in function of the requirements of social life.

The state of modern technology leads to more and more frequent

justifications of the fact that waters used for the production of electric energy should not be returned to their natural course. Water is captured higher and higher up and it is carried ever further, and in so doing it is sometimes deviated to another river basin in the same State or in another country, in the heart of the same federation, or even to a third State. Within federations, the judicial decisions have recognized the validity of this last practice (Wyoming v. Colorado, United States Reports; volume 259, Cases adjudged in the Supreme Court, p. 419, and the instances cited by Dr. J. E. Berber, *Die Rechtsquellen des internationalen Wassernutzungsrechts*, p. 180, and by M. Sauser-Hall, *L'Utilisation industrielle des fleuves internationaux*, Hague Academy, Vol. 83, page 544, 1953; for Switzerland, *Recueil des Arrêts du Tribunal Fédéral* 78, Vol. 1, page 14, *et seq.*).

✓ The Tribunal therefore believes that the diversion with restitution as envisaged in the French project and proposals is not contrary to the Treaty and to the Additional Act of 1866.

In another connection, the Spanish Government has contested the legitimacy of the works carried out on the territory of one of the signatory States of the Treaty and of the Additional Act, if the works are of such a nature as to permit that State, albeit in violation of its international pledges, to bring pressure to bear on the other signatory. This rule would derive from the fact that the Treaties concerned sanction the principle of equality between States. Concretely, Spain considers that France does not have the right to secure for herself, by works of public utility, the physical possibility of cutting off the flow of the waters of the Lanoux or the restitution of an equivalent quantity of water. The Tribunal's task is not to pronounce judgment on the motives or the experiences which may have led the Spanish Government to voice certain misgivings. But it is not alleged that the works in question have as their object, apart from satisfying French interests, the creation of a means to injure Spanish interests, at least should a proper occasion arise; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol, and since she would expose herself along the entire boundary to formidable reprisals.

On the other hand, the proposals of the French Government which form an integral part of its project carry "the assurance that in no case will it impair the regime thus established" (Annex 12 of the French *Mémoire*). The Tribunal must therefore reply to the question posed by the *Compromis* on the basis of this assurance. It cannot be alleged that, despite this pledge, Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the other's expense, a rule relative to the regime of the waters. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne have only established a legal equality and not an equality in fact. If it were otherwise, they would have had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a *de facto* preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting



the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we place ourselves solely on the ground of neighborly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed *supra*. In any case, we do not find either in the Treaty and the Additional Act of 26 May 1866, or in customary international law, any rule that prohibits one State, acting to safeguard its legitimate interests, to put itself in a situation that would permit it in effect, in violation of its international pledges, to injure a neighboring State even seriously.

(b) Having reached the conclusion that the French project does not constitute a violation of the Treaty of Bayonne and of the Additional Act, the Tribunal had to consider the second issue. The Spanish Government had argued that a state wishing to undertake the type of project envisaged by the French Government would be subject to two obligations. First of all, it would have to reach an agreement with the other state, and secondly, the project would have to comply with the rules laid down in Article 11 of the Additional Act, or such project could not be carried out. The Spanish Government based this argument on the regime of *faceries* which exist in the Pyrenean boundary areas, and on the rules of customary international law. The Spanish argument was that, if applied to the interpretation of the Treaty of Bayonne and of the Additional Act, these aids will show the existence of these restrictions on the French Government. In addition these facts will demonstrate the existence of a general unwritten rule of international law to this effect. The Tribunal continued:

Before proceeding to an examination of the Spanish argument, the Tribunal believes it will be useful to make some very general observations on the very nature of the obligations invoked against the French Government. To admit that jurisdiction in a certain field can no longer be exercised except on the condition of or by an agreement between two States is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted in the presence of clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (*indivision*, *co-imperium*, or *condominium*); likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of the States or in the name of the organizations. But these cases are exceptional and international judicial decisions do not willingly recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present litigation.

In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In this case, it must be admitted that the State which is normally competent has lost its right to act singly as a result of the unconditional and arbitrary opposition of another State. This is the same as admitting a "right of assent," a "right of veto," that paralyzes the exercise of territorial competence of one State at the discretion of another State.

That is why international practice prefers to resort to less extreme

solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of this agreement. Thus, mention has been made, although often in an improper manner, of the "obligation of negotiating an agreement." In reality, the pledges thus taken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and can be sanctioned, for example, in the case of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, more generally in cases of violation of the rules of good faith (the Tacna-Arica case, Collection of Arbitral Awards, Vol. 11, page 92, *et seq.*; the case of Railway Traffic between Lithuania and Poland, Permanent Court of International Justice, A/B 42, page 108, *et seq.*).

In the light of these general observations, and with regard to the present case, we will now examine successively whether a prior agreement is necessary and whether the other rules laid down by Article 11 of the Additional Act have been observed.

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The Spanish Government has endeavored to demonstrate that "the demarcation line at the Pyrenean boundary constitutes a zone organized in conformity with a special law, customary in nature, incorporated in international law by the Boundary Treaties which have recognized it, rather than being a limitation on the sovereign rights of bordering States" (Spanish *Mémoire*, page 55). The most characteristic manifestation of this customary law would be the existence of "co-pasturages" or *faceries* (Hearings, fourth session, page 16) which are themselves the remnant of a more extensive communal system which, in the Pyrenean valleys, was founded on the rule that matters of common interest must be regulated by agreements that have been freely debated.

In effect, the French project does not impair at all the rights of pasturage on French territory guaranteed by the treaties for the benefit of certain Spanish Communes. It appears in particular, according to the replies of the Parties to a question put by the Tribunal, that the pasturage rights that the Spanish Commune of Lllivia possesses on French territory in no way touch the waters of Lake Lanoux or of the Carol. The Spanish Government invokes also the regime of co-pasturages or rather that of the Pyrenean communal rights which have now disappeared, and of which the co-pasturages are the last trace, to retain essentially the spirit of this regime, based on understanding, on respect for common interests, and on a search for compromise by agreements which are freely negotiated and concluded. In this sense, it is in effect correct that the characteristics peculiar to the Pyrenean border induce the bordering States to be guided, more than for any other boundary, by a spirit of co-operation and of understanding indispensable to the solution of the difficulties which may be born of boundary relations, particularly in mountainous countries.

But one could not go any further; it is impossible to extend the regime of co-pasturages beyond the limits assigned to them by the treaties, or to deduce therefrom a notion of generalized "communal

rights" which would have a legal content of some sort. As for recourse to the notion of the "boundary zone," it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law.

Considering the argument of Spain that there is a rule of international custom, or a principle of international law, that states must negotiate before undertaking projects on waters wholly within their own territorial limits when such waters also flow into the territory of a neighboring state, the Tribunal felt that such negotiations may be desirable, but no more.

... the rule according to which States may utilize the hydraulic force of international watercourses only on condition of a *prior* agreement between the interested States cannot be established either as a custom, or even less as a general principle of law. The history of the formulation of the multilateral Convention of Geneva of 9 December 1923, relative to the utilization of hydraulic forces of interest to several States, is very characteristic in this connection. The initial project was based on the obligatory and prior character of the agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article 1) that "[The present Convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires"; there is only provided between the interested signatory States an obligation to join in a common study of a development program; the execution of this program is obligatory only for those States which have formally subscribed to it.

Customary international law, like the Pyrenean traditions, does not supply evidence of a kind to orient the interpretation of the Treaty and of the Additional Act of 1866 in the direction of favoring the necessity of prior agreement, and even less to permit us to conclude that there exists a general principle of law or a custom to this effect.

As between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourse can therefore result only from a Treaty. . . .

On the basis of the Treaty of Bayonne and of the Additional Act, the Spanish Government had argued that since the French project concerns the common and general interests of the two countries, there was a need for prior agreement. In order not to claim a regime of *indivision*, since such claim would be contradicted by the text of the Additional Act, Article 8, the Spanish Government had tried to draw a distinction between "communal rights of property" and "communal rights of usage," claiming the latter to be in existence by virtue of a heading in the Additional Act which referred to "The regime and enjoyment of waters of common usage between the two countries." The Tribunal held:

In the matter of flowing waters, it is difficult to make a very great distinction between a communal right of property and a communal right of usage, both of which are in perpetuity. But above all, the expressions used in a title cannot in themselves embrace consequences contrary to the principles formally established by the articles grouped under that title. Now, the regime of the waters which results from

the Additional Act is not in a general manner favorable to *indivision* or communal rights, even of usage; it sets out precise rules for a division of waters; few international watercourses are subjected to such detailed rules as those of the Pyrenees; the object of these provisions is to divide and confine the rights so as to avoid the difficulties of the regimes of *indivision*, difficulties which the Pyrenean Treaties openly call attention to in their preambles (Treaty of 14 April 1862) and even in their text (Article 13 of the Treaty of 2 December 1856).

A second argument to establish the necessity for a prior agreement could be drawn from the text of Article 11 of the Additional Act (Spanish *Mémoire*, page 48). If Article 11 explicitly sets forth only an obligation of information, "the necessity for prior agreement . . . results implicitly from this obligation to inform which was considered above; this obligation cannot disappear by itself since its object is the protection of the interests of the other Party." In the opinion of the Tribunal, this reasoning lacks a logical basis. If the contracting Parties had wished to establish the necessity for a prior agreement, they would not have confined themselves to mentioning in Article 11 only the obligation to give notice. The necessity for notice from State A to State B is implicit if A is unable to undertake the work envisaged without the agreement of B; it would then, therefore, not have been necessary to mention the obligation of notice to B, if the necessity for a prior agreement with B had been established. In any case, the obligation to give notice does not include the obligation, which is much more extensive, to obtain the agreement of the State that has been notified; the purpose of the notice may be completely different from that of agreeing to allow B to exercise the right of veto; it may be quite simply (and Article 11 of the Additional Act states this) to allow B to safeguard, on the one hand, at the proper time, the rights of its riparians to indemnities, and on the other hand, insofar as is possible, its general interests. This is so true that, incidentally, and without abandoning on that account its main thesis, the Spanish *Contre-Mémoire* (page 52) admits that according to Article 11 "these works or new concessions may not alter the regime or flow of a water-course except in the measure to which the conciliation of the interests compromised would be impossible."

The reasoning method apparent in the development of the Spanish thesis calls for a more general remark. The necessity for a prior agreement would derive from all the circumstances in which the two Governments are led to reach agreement; this would be the case in matters concerning the indemnities provided for by Article 9 of the Additional Act, and in the matter of the French proposals which, on account of the interplay of the guarantees which they provide, would presuppose an agreement with the Spanish Government. This reasoning is in contradiction with the most general principles of international law. It is up to each State to appreciate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in this case, a dispute arises which the Parties normally seek to resolve by negotiation or in the alternative by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights. The commencement of arbitral proceedings in the present

case illustrates perfectly these rules in function of the obligations subscribed to by Spain and France in the Arbitration Treaty of 10 July 1929.

Pushed to the extreme, the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction in the presence of a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences.

In final support of their contentions based upon the Treaty of Bayonne and the Additional Act, the Spanish Government claimed that Article 16 required such prior agreement. The Tribunal interpreted this article, however, as merely raising an obligation "to consult and to bring into harmony the respective actions of the two States when general interests are involved in matters of water utilization." It would also not be possible, according to the Tribunal, to invoke in aid of such argument for prior agreement the fact that the French Government had previously raised objections to a Spanish project which involved the diversion of certain waters without subsequent restitution of the waters so diverted. The Tribunal stated:

In a more general way, when a question gives rise to long controversies and to diplomatic negotiations which have been several times begun, suspended, and resumed at different times, it is appropriate, in order to interpret the meaning of diplomatic documents, to take into account the following principles.

As has been recognized by international judicial decisions, both by the Permanent Court of Arbitration, in the case of the North Atlantic Fisheries (1910), and by the International Court of Justice, in the Fisheries case (1951) and in the case regarding United States Nationals in Morocco (1952)—one must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they concern simultaneously rights—recognized and contested—and interests; it is normal that in taking into consideration adverse interests, a Party does not show intransigence on all of its rights. Only thus can it have some of its own interests taken into consideration.

Further, in order for negotiations to proceed in a favorable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should take pledges to this effect. If these pledges were to bind them unconditionally till the conclusion of an agreement, they would lose the very right to negotiate by signing them; this cannot be presumed.

It is important to keep these considerations in mind when drawing legal conclusions from diplomatic correspondence.

In this case, it is certain that Spain and France have always maintained their essential theses concerning the necessity for prior agreement. As the Spanish *Mémoire* recognizes (page 35), neither of the two Governments has ever modified the position that it has taken from the beginning. The French Government has notably recalled its own position on several occasions, as shown in the dispatch of 1 May 1922 (Annex 25 of the Spanish *Mémoire*), and in the conversations set forth in a report of the meeting of 5 August 1955 of the Mixed Commission of Engineers (Annex 39 of the Spanish *Mémoire*). The Tribunal has not found in the diplomatic correspondence any elements

which involve recognition by France of the Spanish Government's interpretation according to which the execution of works such as those envisaged in the present case would be dependent upon a prior agreement between the two Governments.

In 1949 the French Government had given a pledge in the International Commission for the Pyrenees, that the Mixed Commission of Engineers established at this meeting "would be charged with studying the case and making a report to the respective Governments, while it is understood that the present state of affairs would not be modified until the Governments decided differently by common agreement." The Spanish Government now claimed that this pledge precluded the French Government from proceeding with its project on Lake Lanoux in the absence of such "common agreement." The French Government, however, contended that in the light of later developments, i.e., the fact that the latest French project does not involve any interference with the regime of water on the Spanish side of the border, this pledge has no meaning and France could proceed in accordance with its intentions as manifested in the reservation of November 14, 1955, "to resume their freedom of action within the limits of their rights," if the new Special Mixed Commission then set up failed to reach an agreement. On this point the Tribunal stated:

The good faith of both Parties being absolutely unchallenged, it falls to the Tribunal to make an objective search for the full significance of the pledge; it is not necessary in fact that it should determine its scope; it will suffice for it to establish its duration.

In view of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of the Pyrenees which possesses no power of its own to decide questions which are submitted to it, and whose competence is limited to making studies and giving information. The agreement contained not only the pledge to maintain the present state of affairs, but above all and essentially it established a Mixed Commission of Engineers whose rather vague mandate was to study the question of Lake Lanoux and to submit the result of its labors to the Governments. The pledge to maintain the *status quo* therefore appears to be an accessory consequence of the task entrusted to this Commission. The maintenance of the *status quo* is therefore, in some manner, a provisional measure which could last only on condition that the Mixed Commission of Engineers engaged in some real activity. But this Commission, after its first meeting held at Gerone on 29 and 30 August 1949, became dormant after having done no useful work at all. The pledge of the French Government came to a normal end at the moment when, faced with this default, it had recourse to a procedure, provided for by treaty, to refer a new project to Spain which comprised, unlike all the preceding ones, the restitution, at first partial and then total, of the diverted waters. Nevertheless, some doubts may persist, as both the French Note of 27 June 1953 and that of 18 July 1954 allude to a Mixed Commission of Engineers; and this body met at Perpignan on 5 August 1955 to put on record that it was definitely unable to accomplish anything. After this setback, it may be held as certain that the Commission disappears as an instrument for study and negotiation and that the pledges which were tied to its existence disappear

with it. The International Commission of the Pyrenees met in November 1955 and set up a new procedure for negotiation, a Special Mixed Commission of new composition with its competence established by one of the two Governments for a period of three months. It sanctioned no pledge resembling that of 1949. The agreement of 1949, therefore, could not prolong its effect beyond the existence of the Mixed Commission of Engineers unless it was of indefinite duration. But in this last hypothesis it would lose its provisional character; it would subordinate the very right to execute the works to the necessity for an agreement, whereas such an agreement was simply to mark the moment when their execution might be begun.

Finally the Tribunal considered whether any other obligations can be claimed to arise out of Article 11 of the Additional Act, and interpreted that article as giving rise to an obligation to give notice of intended work as well as a further obligation to set up a system of claims and safeguards for all interests affected by such work. In the interpretation whether other interests are so affected, the Tribunal felt that "the State exposed to the repercussions of work undertaken by a neighboring State is the sole judge of its own interests," and thus could exact information regarding intended projects. The Tribunal found as a fact that France had given notice of its projects in relation to Lake Lanoux.

As regards the interests which must be safeguarded, the Tribunal found that such interests include all those "which might conceivably be affected by the work undertaken," whatever their nature and even though they do not correspond to a right. The question how they are to be safeguarded could not be answered by the Tribunal as involving the formal noting of protests or claims where meetings and discussions are contemplated by the parties. But the Tribunal was of the opinion

that the upstream State has, according to the rules of good faith, the obligation to take into consideration the different interests at stake, to strive to give them all satisfactions compatible with the pursuit of its own interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own.

Whether this has been done, the judge will appraise on the basis of the information furnished to him. The Tribunal continued:

In the present case, the Spanish Government reproaches the French Government for not having based the development project of the waters of Lake Lanoux on a foundation of absolute equality; this is a double reproach. It attacks simultaneously form and substance. As to form, the French Government is claimed to have imposed its project unilaterally without associating the Spanish Government in it for a common search for an acceptable solution. Substantively, the French project is asserted not to maintain a just balance between the French interests and the Spanish interests. The French project, in the Spanish view, would serve perfectly French interests . . . but would not take into sufficient consideration Spanish interests in irrigation. According to the Spanish Government, the French Government refused to take into consideration projects which, in the opinion of the Spanish Government, would have necessitated a very small sacrifice of French interests and yielded great advantages for the rural economy of Spain. . . .

On a theoretical basis the Spanish thesis is unacceptable to the Tribunal; for Spain tends to put rights and simple interests on the same plane. Article 11 of the Additional Act makes this distinction and the two Parties have reproduced this distinction in the basic statement of their theses at the beginning of the *Compromis* . . .

\* \* \* \* \*

France may make use of her rights; she cannot ignore Spanish interests.

Spain may demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its projects. If, in the course of discussions, the downstream State submits projects to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own project, provided it takes into consideration in a reasonable manner the interests of the downstream State.

In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the Carol to the Ariège with full restitution. By making this choice France is only making use of a right; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory, under the reservation of Articles 9 and 10 of the Additional Act, which the French project does not violate.

On her side, Spain may not invoke a right to obtain a development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity to her wishes be carried out. Therefore, she can only assert her interests to obtain, within the framework of the project decided upon by France, terms which reasonably safeguard those interests.

It remains to be established whether this requirement has been fulfilled.

Reviewing the various proposals made by France to safeguard Spanish interests and their rejection by the Spanish Government, the Tribunal concluded:

When one examines the question of whether France either in the course of the dealings or in her proposals has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligations to take into consideration adverse interests in the course of negotiations, and the obligation to give a reasonable place to these interests in the adopted solution. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not dispensed from giving a reasonable place to adverse interests in the solution it adopts because the conversations had been interrupted, though owing to the intransigence of its partner. Conversely, in determining the manner in which a project has taken into consideration the interests involved, the way in which negotiations have developed, the total number of the interests which have been presented, the price which each Party was ready to pay to obtain the safeguard of those interests, are all essential factors in establishing, with regard to the obligations set out in Article 11 of the Additional Act, the merits of this project.



✓ The Tribunal thus reached the conclusion that the French project did not violate the Treaty of Bayonne and the Additional Act of the same date, nor did the French actions in relation thereto contravene any rule of international law.

*Passports—right to travel and due process—strict construction of statute restricting such right—invalidity of regulations denying passports to Communists and aiders of Communist causes—non-Communist affidavit requirement invalid*

KENT and BRIEHL v. DULLES. 357 U. S. 116.

United States Supreme Court, June 16, 1958. Douglas, J.

Separate actions were filed for declaratory judgments that the plaintiffs were entitled to passports. Relief was denied in both courts below. See 52 A.J.I.L. 345 (1958). The Supreme Court, *per* Douglas, J., held that Sections 1185<sup>1</sup> and 211a<sup>2</sup> of the statutes under which the Secretary had issued regulations did not authorize denial of passports to Communists and aiders of Communist causes, nor was the requirement of a non-Communist affidavit authorized. No constitutional questions were reached. Clark, J., dissented in an opinion in which Justices Burton, Harlan, and Whittaker joined. The opinion<sup>3</sup> of Mr. Justice Douglas for the Court stated in full:

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by § 51.135 of the Regulations promulgated by the Secretary of State on two grounds: (1) that he was a Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under § 51.137 of the Regulations. But he was also told that, whether or not a hearing was requested, it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist. Kent did not ask for a hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position that the requirement of an affidavit concerning Communist Party membership "is unlawful and that for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book *It's Me O Lord*, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations.

<sup>1</sup> 8 U.S.C.A. § 1185.

<sup>2</sup> 22 U.S.C.A. § 211a.

<sup>3</sup> Footnotes omitted.

Thereupon Kent sued in the District Court for declaratory relief. The District Court granted summary judgment for respondent. On appeal the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist. When Briehl applied for a passport, the Director of the Passport Office asked him to supply the affidavit covering membership in the Communist Party. Briehl, like Kent, refused. The Director then tentatively disapproved the application on the following grounds:

"In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated."

The Director advised Briehl of his right to a hearing but stated that, whether or not a hearing was held, an affidavit concerning membership in the Communist Party would be necessary. Briehl asked for a hearing and one was held. At that hearing he raised three objections: (1) that his "political affiliations" were irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics"; and (3) that the burden was on the Department to prove illegal activities by Briehl. Briehl persisted in his refusal to supply the affidavit. Because of that refusal Briehl was advised that the Board of Passport Appeals could not under the Regulations entertain an appeal.

Briehl filed his complaint in the District Court which held that his case was indistinguishable from Kent's and dismissed the complaint.

The Court of Appeals heard the two cases *en banc* and affirmed the District Court by a divided vote. 101 U. S. App. D.C. 278, 248 F. 2d 600; 101 U. S. App. D.C. 239, 248 F. 2d 561. The cases are here on writ of certiorari. 355 U. S. 881, 78 S.Ct. 140, 2 L.Ed. 2d 111.

The Court first noted the function that the passport performed in American law in the case of *Urtetiqui v. D'Arbel*, 9 Pet. 692, 699, 9 L.Ed. 276, decided in 1835:

"There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only

to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."

A passport not only is of great value—indeed necessary—abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. See *Browder v. United States*, 312 U. S. 335, 339, 61 S.Ct. 599, 602, 85 L.Ed. 862; 3 Moore, *International Law Digest* (1906), § 512. But throughout most of our history—until indeed quite recently—a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. See Jaffe, *The Right to Travel: The Passport Problem*, 35 *Foreign Affairs* 17. Apart from minor exceptions to be noted, it was first made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, 8 U.S.C. § 1185, 8 U.S.C.A. § 1185, which states that, after a prescribed proclamation by the President, it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made.

Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official. 3 Stat. 199-200. The Secretary of State took similar steps during the Civil War. See Dept. of State, *The American Passport* (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring passports from citizens of the two nations. 11 Stat. 587, 589-590. Finally in 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60-61, 22 U.S.C. § 211a, 22 U.S.C.A. § 211a, Congress put an end to those practices. This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads,

"The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Thus for most of our history a passport was not a condition to entry or exit.

It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918.

The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States "unless he bears a valid passport." See H.R. Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. See S.Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31, 50 U.S.C.A. Appendix, note preceding section 1. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and over again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars, the courts, the Chief Executive, and the Attorneys General, all so said. This long-continued executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See *Allen v. Grand Central Aircraft Co.*, 347 U. S. 535, 544-545, 74 S.Ct. 745, 750-751, 98 L.Ed. 933; *United States v. Allen-Bradley Co.*, 352 U. S. 306, 310, 77 S.Ct. 343, 345, 1 L.Ed. 2d 347. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, *Three Human Rights in the Constitution of 1787* (1956), 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall v. State of Nevada*, 6 Wall. 35, 44, 18 L.Ed. 744; *Williams v. Fears*, 179 U. S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186; *Edwards v. People of State of California*, 314 U. S. 160, 62 S.Ct. 164, 86 L.Ed. 119. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful

conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Id.*, at 197.

Freedom of movement also has large social values. As Chafee put it:

"Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." *Id.*, at 195-196. And see Vestal, *Freedom of Movement*, 41 *Iowa L.Rev.* 6, 13-14.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U.S.C. § 212, 22 U.S.C.A. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States? See 3 Moore, *International Law Digest* (1906), § 512; 3 Hackworth, *Digest of International Law* (1942), § 268; 2 Hyde, *International Law* (2d rev. ed.), § 401.

The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around

the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 72 S.Ct. 863, 96 L.Ed. 1153.

In a case of comparable magnitude, *Korematsu v. United States*, 323 U. S. 214, 218, 65 S.Ct. 193, 195, 89 L.Ed. 194, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420-430, 55 S.Ct. 241, 248-252, 79 L.Ed. 446. Cf. *Cantwell v. State of Connecticut*, 310 U. S. 296, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213; *Niemotko v. State of Maryland*, 340 U. S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo*, 323 U. S. 283, 301-302, 65 S.Ct. 208, 218, 89 L.Ed. 243. Cf. *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586; *United States v. Rumely*, 345 U. S. 41, 46, 73 S.Ct. 543, 97 L.Ed. 770. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective. It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion the free movement of citizens in order to satisfy himself about their beliefs or associations.

To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

*Reversed.*

NOTE: In *Dayton v. Dulles*, 357 U. S. 144 (U. S. Supreme Court, June 16, 1958, Douglas, J.), case below noted in 51 A.J.I.L. 645 (1957), *Kent v. Dulles, supra*, was applied in upsetting the denial of a passport to alleged aider of Communist causes. The dissenters in *Kent* again dissented.

*Discovery—Swiss law against production of records—dismissal of action with prejudice for failure to produce records—Federal Rules of Civil Procedure.*

SOCIÉTÉ INTERNATIONALE etc. v. ROGERS. 357 U. S. 197.

United States Supreme Court, June 16, 1958. Harlan, J.

Action was brought by the Swiss holding company to recover assets seized as alleged enemy property. Plaintiff had been ordered to produce the records of a Swiss banking house. The Swiss Government approved a plan for a neutral investigator to inspect the records for relevancy and to secure production of the relevant records by letters rogatory. The courts below held this to be insufficient compliance with the discovery order, and the complaint was dismissed with prejudice after seven years of litigation. See 51 A.J.I.L. 818 (1957). The Supreme Court, *per* Harlan, J., held that, where plaintiff's failure of compliance was due to the possibility of violating Swiss law and not to circumstances under its control, dismissal of the complaint with prejudice was not justified. Justice Harlan's opinion<sup>1</sup> for the Court stated in full:

<sup>1</sup> Footnotes omitted.

The question before us is whether, in the circumstances of this case, the District Court erred in dismissing, with prejudice, a complaint in a civil action as to a plaintiff that had failed to comply fully with a pretrial production order.

This issue comes to us in the context of an intricate litigation. Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. Appendix, § 5(b), 50 U.S.C.A. Appendix, § 5(b), sets forth the conditions under which the United States during a period of war or national emergency may seize "... any property or interest of any foreign country or national. ... ." Acting under this section, the Alien Property Custodian during World War II assumed control of assets which were found by the Custodian to be "owned by or held for the benefit of" I. G. Farbenindustrie, a German firm and a then enemy national. These assets, valued at more than \$100,000,000, consisted of cash in American banks and approximately 90% of the capital stock of General Aniline & Film Corporation, a Delaware corporation. In 1948 petitioner, a Swiss holding company, also known as I. G. Chemie or Interhandel, brought suit under § 9(a) of the Trading with the Enemy Act, 40 Stat. 419, as amended, 50 U.S.C. Appendix, § 9(a), 50 U.S.C.A. Appendix, § 9(a), against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States, to recover these assets. This section authorizes recovery of seized assets by "[a]ny person not an enemy or ally of enemy" to the extent of such person's interest in the assets. Petitioner claimed that it had owned the General Aniline stock and cash at the time of vesting and hence, as the national of a neutral power, was entitled under § 9(a) to recovery.

The Government both challenged petitioner's claim of ownership and asserted that in any event petitioner was an "enemy" within the meaning of the Act since it was intimately connected with I. G. Farben and hence was affected with "enemy taint" despite its "neutral" incorporation. See *Uebersee Finanz-Korp., A. G. v. McGrath*, 343 U. S. 205, 72 S.Ct. 618, 96 L.Ed. 888. More particularly, the Government alleged that from the time of its incorporation in 1928, petitioner had conspired with I. G. Farben, H. Sturzenegger & Cie, a Swiss banking firm, and others "[t]o conceal, camouflage, and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

At an early stage of the litigation the Government moved under Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., for an order requiring petitioner to make available for inspection and copying a large number of the banking records of Sturzenegger & Cie. Rule 34, in conjunction with Rule 26(b), provides that upon a motion "showing good cause therefor," a court may order a party to produce for inspection non-privileged documents relevant to the subject matter of pending litigation "... which are in his possession, custody, or control. ... ." In support of its motion the Government alleged that the records sought were relevant



to showing the true ownership of the General Aniline stock and that they were within petitioner's control because petitioner and Sturzenegger were substantially identical. Petitioner did not dispute the general relevancy of the Sturzenegger documents, but denied that it controlled them. The District Court granted the Government's motion, holding, among other things, that petitioner's "control" over the records had been *prima facie* established.

Thereafter followed a number of motions by petitioner to be relieved of production on the ground that disclosure of the required bank records would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions, including fine and imprisonment, on those responsible for disclosure. The Government in turn moved under Rule 37(b) (2) of the Federal Rules of Civil Procedure to dismiss the complaint because of petitioner's noncompliance with the production order. During this period the Swiss Federal Attorney, deeming that disclosure of these records in accordance with the production order would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espionage, and Article 47 of the Swiss Bank Law, relating to secrecy of banking records, "confiscated" the Sturzenegger records. This "confiscation" left possession of the records in Sturzenegger and amounted to an interdiction on Sturzenegger's transmission of the records to third persons. The upshot of all this was that the District Court, before finally ruling on petitioner's motion for relief from the production order and on the Government's motion to dismiss the complaint, referred the matter to a Special Master for findings as to the nature of the Swiss laws claimed by petitioner to block production and as to petitioner's good faith in seeking to achieve compliance with the court's order.

The Report of the Master bears importantly on our disposition of this case. It concluded that the Swiss Government had acted in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the Sturzenegger records, and found that there was "... no proof, or any evidence at all of collusion between plaintiff and the Swiss Government in the seizure of the papers herein." Noting that the burden was on petitioner to show good faith in its efforts to comply with the production order, and taking as the test of good faith whether petitioner had attempted all which a reasonable man would have undertaken in the circumstances to comply with the order, the Master found that "... the plaintiff has sustained the burden of proof placed upon it and has shown good faith in its efforts [to comply with the production order] in accordance with the foregoing test."

These findings of the Master were confirmed by the District Court. Nevertheless the court, in February 1953, granted the Government's motion to dismiss the complaint and filed an opinion wherein it concluded that: (1) apart from considerations of Swiss law petitioner had control over the Sturzenegger records; (2) such records might prove to be crucial in the outcome of this litigation; (3) Swiss law did not furnish an adequate excuse for petitioner's failure to comply with the production order,

since petitioner could not invoke foreign laws to justify disobedience to orders entered under the laws of the forum; and (4) that the court in these circumstances had power under Rule 37(b) (2), as well as inherent power, to dismiss the complaint. 111 F.Supp. 435. However, in view of statements by the Swiss Government, following petitioner's intercession, that certain records not deemed to violate the Swiss laws would be released, and in view of efforts by petitioner to secure waivers from those persons banking with the Sturzenegger firm who were protected by the Swiss secrecy laws, and hence whose waivers might lead the Swiss Government to permit production, the court suspended the effective date of its dismissal order for a limited period in order to permit petitioner to continue efforts to obtain waivers and Swiss consent for production.

By October 1953, some 63,000 documents had been released by this process and tendered the Government for inspection. None of the books of account of Sturzenegger were submitted, though petitioner was prepared to offer plans to the Swiss Government which here too might have permitted at least partial compliance. However, since full production appeared impossible, the District Court in November 1953 entered a final dismissal order. This order was affirmed by the Court of Appeals, which accepted the findings of the District Court as to the relevancy of the documents, control of them by petitioner, and petitioner's good-faith efforts to comply with the production order. The court found it unnecessary to decide whether Rule 37 authorized dismissal under these circumstances since it ruled that the District Court was empowered to dismiss both by Rule 41(b) of the Federal Rules of Civil Procedure, and under its own "inherent power." It did, however, modify the dismissal order to allow petitioner an additional six months in which to continue its efforts. 96 U.S.App.D.C. 232, 225 F. 2d 532. We denied certiorari. 350 U. S. 937, 76 S.Ct. 302, 100 L.Ed. 818.

During this further period of grace, additional documents, with the consent of the Swiss Government and through waivers, were released and tendered for inspection, so that by July of 1956, over 190,000 documents had been procured. Record books of Sturzenegger were offered for examination in Switzerland, subject to the expected approval of the Swiss Government, to the extent that material within them was covered by waivers. Finally, petitioner presented the District Court with a plan, already approved by the Swiss Government, which was designed to achieve maximum compliance with the production order: A "neutral" expert, who might be an American, would be appointed as investigator with the consent of the parties, District Court, and Swiss authorities. After inspection of the Sturzenegger files, this investigator would submit a report to the parties identifying documents, without violating secrecy regulations, which he deemed to be relevant to the litigation. Petitioner could then seek to obtain further waivers or secure such documents by letters rogatory or arbitration proceedings in Swiss courts.

The District Court, however, refused to entertain this plan or to inspect the documents tendered in order to determine whether there had been substantial compliance with the production order. It directed final dis-

missal of the action. The Court of Appeals affirmed, but at the same time observed: "That [petitioner] and its counsel patiently and diligently sought to achieve compliance . . . is not to be doubted." 100 U.S.App.D.C. 148, 149, 243 F. 2d 254, 255. Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U. S. 812, 78 S.Ct. 61, 2 L.Ed. 2d 30.

# I.

We consider first petitioner's contention that the District Court erred in issuing the production order because the requirement of Rule 34, that a party ordered to produce documents must be in "control" of them, was not here satisfied. Without intimating any view upon the merits of the litigation, we accept as amply supported by the evidence the findings of the two courts below that, apart from the effect of Swiss law, the Sturzenegger documents are within petitioner's control. The question then becomes: Do the interdictions of Swiss law bar a conclusion that petitioner had "control" of these documents within the meaning of Rule 34?

We approach this question in light of the findings below that the Swiss penal laws did in fact limit petitioner's ability to satisfy the production order because of the criminal sanctions to which those producing the records would have been exposed. Still we do not view this situation as fully analogous to one where documents required by a production order have ceased to exist or have been taken into the actual possession of a third person not controlled by the party ordered to produce, and without that party's complicity. The "confiscation" of these records by the Swiss authorities adds nothing to the dimensions of the problem under consideration, for possession of the records stayed where it was and the possibility of criminal prosecution for disclosure was of course present before the confiscation order was issued.

In its broader scope, the problem before us requires consideration of the policies underlying the Trading with the Enemy Act. If petitioner can prove its record title to General Aniline stock, it certainly is open to the Government to show that petitioner itself is the captive of interests whose direct ownership would bar recovery. This possibility of enemy taint of nationals of neutral powers, particularly of holding companies with intricate financial structures, which asserted rights to American assets was of deep concern to the Congress when it broadened the Trading with the Enemy Act in 1941 ". . . to reach enemy interests which masqueraded under those innocent fronts." *Clark v. Uebersee Finanz-Korp.*, 332 U. S. 480, 485, 68 S.Ct. 174, 176, 92 L.Ed. 88. See Administration of the War-time Financial and Property Controls of the United States Government, Treasury Department (1942), pp. 29-30; H.R.Rep. No. 2398, 79th Cong., 2nd Sess. 3.

In view of these considerations, to hold broadly that petitioner's failure to produce the Sturzenegger records because of fear of punishment under the laws of its sovereign precludes a court from finding that petitioner had "control" over them, and thereby from ordering their production, would

undermine congressional policies made explicit in the 1941 amendments, and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records. The District Court here concluded that the Sturzenegger records might have a vital influence upon this litigation insofar as they shed light upon petitioner's confused background. Petitioner is in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order, and indeed to that end it has already made significant progress. United States courts should be free to require claimants of seized assets who face legal obstacles under the laws of their own countries to make all such efforts to the maximum of their ability where the requested records promise to bear out or dispel any doubt the Government may introduce as to true ownership of the assets.

We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control. Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule in this instance to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order.

## II.

We consider next the source of the authority of a District Court to dismiss a complaint for failure of a plaintiff to comply with a production order. The District Court found power to dismiss under Rule 37(b) (2) (iii) of the Federal Rules of Civil Procedure as well as in the general equity powers of a federal court. The Court of Appeals chose not to rely upon Rule 37, but rested such power on Rule 41(b) and on the District Court's inherent power.

Rule 37 describes the consequences of a refusal to make discovery. Subsection (b), which is entitled "Failure to Comply With Order," provides in pertinent part:

"(2) . . . If any party . . . refuses to obey . . . an order made under Rule 34 to produce any document or other thing for inspection. . . , the court may make such orders in regard to the refusal as are just, and among others the following:

. . . . .

"(iii) An order striking out pleadings or parts thereof . . . , or dismissing the action or proceeding or any part thereof. . . ."

Rule 41(b) is concerned with involuntary dismissals and reads in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule

37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is "just." There is no need to resort to Rule 41(b), which appears in that part of the Rules concerned with *trials* and which lacks such specific references to discovery. Further, that Rule is on its face appropriate only as a defendant's remedy, while Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party. Reliance upon Rule 41, which cannot easily be interpreted to afford a court more expansive powers than does Rule 37, or upon "inherent power," can only obscure analysis of the problem before us. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480.

It may be that the Court of Appeals invoked Rule 41(b), which uses the word "failure," and hesitated to draw upon Rule 37(b) because of doubt that Rule 37 would cover this situation since it applies only where a party "*refuses to obey*." (Italics added.) Petitioner has urged that the word "refuses" implies willfulness and that it simply *failed* and did not *refuse* to obey since it was not in willful disobedience. But this argument turns on too fine a literalism and unduly accents certain distinctions found in the language of the various subsections of Rule 37. Indeed subsection (b), as noted above, is itself entitled "*Failure to Comply with Order*." (Italics added.) For purposes of subdivision (b) (2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

### III.

We turn to the remaining question, whether the District Court properly exercised its powers under Rule 37(b) by dismissing this complaint despite the findings that petitioner had not been in collusion with the Swiss authorities to block inspection of the Sturzenegger records, and had in good faith made diligent efforts to execute the production order.

We must discard at the outset the strongly urged contention of the Government that dismissal of this action was justified because petitioner conspired with I. G. Farben, Sturzenegger & Cie, and others to transfer ownership of General Aniline to it prior to 1941 so that seizure would be avoided and advantage taken of Swiss secrecy laws. In other words, the Government suggests that petitioner stands in the position of one who deliberately courted legal impediments to production of the Sturzenegger records, and who thus cannot now be heard to assert its good faith after this expectation was realized. Certainly these contentions, if supported by the facts, would have a vital bearing on justification for dismissal of the action, but they are not open to the Government here. The findings

below reach no such conclusions; indeed, it is not even apparent from them whether this particular charge was ever passed upon below. Although we do not mean to preclude the Government from seeking to establish such facts before the District Court upon remand, or any other facts relevant to justification for dismissal of the complaint, we must dispose of this case on the basis of the findings of good faith made by the Special Master, adopted by the District Court, and approved by the Court of Appeals.

The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U. S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and *Hammond Packing Co. v. State of Arkansas*, 212 U. S. 322, 29 S.Ct. 370, 53 L.Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.) p. 4325.

In *Hovey v. Elliott*, *supra*, it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by *Hammond Packing Co. v. State of Arkansas*, *supra*, where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend "as a mere punishment"; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence ". . . was but an admission of the want of merit in the asserted defense." 212 U. S. at pages 350-351, 29 S.Ct. at page 380. But the Court took care to emphasize that the defendant had not been penalized ". . . for a failure to do that which it may not have been in its power to do." All the State had required "was a *bona fide* effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . ." of the order. 212 U. S. at page 347, 29 S.Ct. at page 378.

These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. *Tot v. United States*, 319 U. S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a

court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr v. Wallace*, 255 U. S. 239, 245-246, 41 S.Ct. 293, 296, 65 L.Ed. 604; *Guessefeldt v. McGrath*, 342 U. S. 308, 318, 72 S.Ct. 338, 344, 96 L.Ed. 342; cf. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489, 51 S.Ct. 229, 231, 75 L.Ed. 473.

The findings below, and what has been shown as to petitioner's extensive efforts at compliance, compel the conclusion on this record that petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control. It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated. Cf. *United States v. Murdock*, 284 U.S. 141, 149, 52 S.Ct. 63, 76 L.Ed. 210. Here the findings below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation of Swiss laws. In our view, petitioner stands in the position of an American plaintiff subject to criminal sanctions in Switzerland because production of documents in Switzerland pursuant to the order of a United States court might violate Swiss laws. Petitioner has sought no privileges because of its foreign citizenship which are not accorded domestic litigants in United States courts. Cf. *Guaranty Trust Co. of New York v. United States*, 304 U. S. 126, 133-135, 58 S.Ct. 785, 82 L.Ed. 1224. It does not claim that Swiss laws protecting banking records should here be enforced. It explicitly recognizes that it is subject to procedural rules of United States courts in this litigation and has made full efforts to follow these rules. It asserts no immunity from them. It asserts only its *inability* to comply because of foreign law.

In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

This is not to say that petitioner will profit through its inability to tender

the records called for. In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an "enemy" within the meaning of the Trading with the Enemy Act. The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner. It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case. It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.

On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

*It is so ordered.*

Mr. Justice CLARK took no part in the consideration or decision of this case.

#### BRITISH COMMONWEALTH CASES \*

##### *Shipping—charter-party incorporating United States Carriage of Goods by Sea Act, 1936*

The House of Lords held that, although the United States Carriage of Goods by Sea Act, 1936, is expressly stated to be inapplicable to charter-parties, the parties, by incorporating the Act into their contractual relationship, must have intended to give some effect to such incorporation. They could not have intended to incorporate a nullity into their relationship. The provision of the incorporated U. S. "Paramount Clause," insofar as it refers to "bills of lading," should therefore be treated as *falsa demonstratio* and read as referring to the charter-party. The House of Lords further held (Lords Morton and Reid dissenting) that the United States Act applies to the totality of the charter-party and not just to voyages to and from United States ports. On the interpretation of the words "loss or damage" in Section 4(1) and (2) of the Act, the House of Lords held unanimously that this is not limited to physical loss or damage to the goods but only to the limitations imposed in Section 2 of the Act. Although the ship was unseaworthy, this was due to mechanical

\* Prepared by Egon Guttman, Esq.



breakdowns for which the incompetence of the engine-room staff was to blame. The owners, having exercised due diligence in appointing such staff, escaped liability under the provisions of the Act (Section 4(1) and (2) as incorporated). *Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*, [1958] 1 All E.R.725 (House of Lords, Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow, March 6, 1958).

*Foreign legislation—effect of foreign legislation on debt governed by English law—characterization into law of succession or law governing status*

The National Bank of Greece had unconditionally guaranteed the due payment of principal and interest and the due performance of all the conditions of sterling mortgage bonds issued in England by the National Mortgage Bank of Greece. By Law No. 2292 the National Bank of Greece and the Bank of Athens were amalgamated, both ceased to exist and a new entity, the National Bank of Greece and Athens S.A., came into existence, which was "substituted *ipso iure* . . . in all rights and obligations of the said amalgamated banks as their universal successor." In *National Bank of Greece and Athens S.A. v. Metliss*, [1957] 3 W.L.R.1056, 3 All E.R.608, it was held that English courts will give effect to that law and the new entity will be held liable on the debts of any one of the previous banks. On July 16, 1956, the Greek Government passed Decree No. 3504 whereby the National Bank of Greece and Athens S.A. was to be absolved from all liabilities, whether as principal or guarantor, on any loans through bonds payable in gold or foreign currency. This law was to have retroactive effect as if contained in the earlier law No. 2292. The National Mortgage Bank of Greece having defaulted on the payment of interest, the defendant National Bank of Greece and Athens S.A. claimed exemption under Decree No. 3504. Diplock, J., held that this new law (No. 3504) was not a law of succession so as to regulate the rights and liabilities of the successor, but was a law attempting to discharge contractual liabilities governed by English law. Had this restriction been in the original Law No. 2292, it would not have been possible to hold the new entity liable on the liabilities of the previous two banks whose dissolution would have to be recognized, whatever rights against the assets might be available in England on the winding up of the two banks. Law No. 3504 was passed after the National Bank of Greece and Athens S.A. had come into being and had been held the universal successor of the previous banks. Thus it is not a law laying down the attributes of the fictitious person created by a foreign state, but is a law which attempts to affect rights governed by English law to which a foreign successor is subject. As such it cannot be considered as binding in England, even though the foreign law attempts by a fiction to read these new provisions into an earlier law which set up the successor. Such fiction may have to be given effect in the forum of the foreign legal system, but is not binding in England, for it cannot alter the true fact that the successor is already in existence and liable and this is an attempt to dis-

charge its liability. *Adams v. National Bank of Greece and Athens S.A.*, [1958] 2 W.L.R.588, 2 All E.R. 3 (Q.B.D., Diplock, J., March 13, 1958).

*Diplomatic immunity—family of diplomat—ward of court*

Subsequent to the death of the mother of his child, the father had married an English woman who looked after the child, although he had ceased to live with her. The father, a member of the Greek Diplomatic Service, acknowledged as such by the British Foreign Office, now wished to send the child to Greece to be educated. His wife objected to the interruption in the child's schooling and attempted to prevent such interruption by making the child a ward of court by issuing an originating summons under the Law Reform (Miscellaneous Provisions) Act, 1949, Section 9. The father entered a conditional appearance to have the action stayed on the ground of diplomatic immunity. Harman, J., held that the father is entitled, under the shield of diplomatic immunity, to reject "the paternal jurisdiction of the Crown, exercised through the court of Chancery," for judicial jurisdiction is also included in such immunity. He then considered whether making the child a party to the summons would give the court jurisdiction, but found that the child was a member of the family of a diplomat within the Diplomatic Privileges Act, 1708, as explained by Lord Phillimore in *Engelke v. Musmann*, [1928] A.C.432 at 450, since the father had never given up his parental rights when he allowed the child to remain with his wife. *In re C. (An Infant)*, [1958] 3 W.L.R. 309, 2 All E.R.656 (Ch.D., June 10, 1958).

*C.I.F. contract—shipping by customary route—closing of Suez Canal—frustration of contract for the sale of unascertained goods*

The sellers were under an obligation to supply cattle food from Port Sudan, c.i.f. Belfast, shipment October–November, 1956. Due to hostilities the Suez Canal was closed from November 2, 1956, until April 9, 1957. On a special case stated by the Board of Appeal of the London Cattle Food Association, acting as arbitrators in the dispute which had arisen due to non-shipment by the sellers, McNair, J., held that the contract had become frustrated. At the time the contract was entered into, the usual route for shipment was through the Suez Canal. But in a c.i.f. contract the seller has the right to delay shipment to the last date available to him under the contract. Thus the usual route for shipment available in November would have been via the Cape. It was therefore not possible to claim that frustration occurred because the *usual route* was not available. On the other hand, shipping these goods around the Cape route, which is two and a half times as long, could not have been in the mind of the parties when they entered into the contract, since this would involve obligations which were fundamentally different from those involved in a shipment through the Suez Canal. Thus the provision that shipment would be through the Canal was of so fundamental a nature that the contract

became frustrated when that became impossible. The doctrine of frustration is not excluded merely by the fact that the contract involves unascertained goods. *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.*, [1958] 3 All E.R. 115 (Q.B.D., McNair, J., July 18, 1958).

*United Kingdom income tax—checks drawn on American account sold to authorized dealer not income*

On an appeal from the Special Commissioners of Income Tax, Wynn-Parry, J., held that where a resident in the United Kingdom sells a dollar check to an authorized dealer, he is not receiving an income nor being paid the proceeds "arising from securities out of the United Kingdom" and thus is not liable to United Kingdom taxation. The proceeds are purchases, not income. Case iv, Schedule D, Income Tax Act, 1918, is inapplicable. Further, as he did not bring any dollars into the United Kingdom, such dollars, if any, being brought into the country by the Bank of England to whom the authorized dealer transferred the dollars, there is nothing taxable as income arising from foreign possessions. Case v, of Schedule D, Income Tax Act, 1918, is inapplicable. *Thomson (Inspector of Taxes) v. Moyse*, [1958] 3 All E.R.225 (Ch.D., Wynn-Parry, J., July 22, 1958).

*Taxation—interest in property in foreign government—use for public purpose—principle of immunity of foreign state*

The decision below, noted in 52 A.J.I.L.529 (1958), holding that property acquired by a Canadian firm on behalf of the United States Government for the construction of the Pine Tree Line of defense was not subject to taxation in the Province of New Brunswick, was unanimously affirmed by the Supreme Court of Canada. The Supreme Court agreed on the finding of fact that the property, chattels real and personal, had been acquired on behalf of the United States, i.e., a foreign sovereign, and was in Canada at the express invitation of the Parliament of Canada under powers vested in it by Section 91(7) of the British North America Act. Rand, J. (with whom Abbott, J., concurred), pointed out that new contacts and relations between states demanded the rejection of the fiction of extraterritoriality and the acceptance of the test basing the rights of foreign sovereigns or of their representatives on the circumstances of the invitation and its acceptance to enter the inviting state. Thus, since public work of this sort is not normally subject to taxation, such work is not taxable when carried out jointly for the defense of both Canada and the United States. Lock, J. (with whom Cartwright, J., concurred), based himself on the more traditional theory as laid down in the *Parlement Belge*, [1880] 5 P.D.197, and further held it to be immaterial whether the United States granted equal immunities to other countries. Fauteux, J., also agreed. *Municipality of the City and County of St. John, Logan and Clayton v. Fraser-Brace Overseas Corp. et al.*, [1958] 13 D.L.R. (2d) 177 (Supreme Court of Canada, Rand, Lock, Cartwright, Fauteux and Abbott, JJ., April 1, 1958).

*Conflict of laws—capacity to enter into polygamous marriage—recognition of polygamous marriage in bar to monogamous marriage*

Petition was filed for annulment of marriage. The respondent had been domiciled in India when she married one Argen Singh, who was domiciled in British Columbia. The marriage was potentially polygamous, but was valid by the *lex loci celebrationis*, i.e., the Punjab, India. Brown, J., held that, although Argen Singh was domiciled in British Columbia, the marriage entered into in the Punjab was a valid marriage which, though not giving right to either party in the courts of British Columbia, would be recognized as a bar to any subsequent marriage. Brown, J., claimed to be following *Berthiaume v. Dastous*, [1930] A.C.79 at 83, per Viscount Dunedin, that the rule of *locus regit actum* governed so as to enable Argen Singh to enter into the potentially polygamous marriage. *Kaur v. Ginder*, *Ginder v. Kor*, [1958] 13 D.L.R.(2d) 465 (British Columbia Supreme Court, April 14, 1958).

*Conflict of laws—proof of foreign law—expert evidence*

In a petition for the annulment of a marriage entered into in Minnesota between persons domiciled in Ontario, the ground alleged was that the petitioner had been under twenty years of age at the time of the marriage and thus was under age to enter into a marriage without the consent of his legal guardians. No such consent having been obtained, expert evidence was given by a lawyer practicing in Minnesota that failure to produce such consent would make the marriage voidable by the law of Minnesota. Ferguson, J., held that, although capacity to marry is governed by the *lex domicilii* of the parties (*Re Bethell*, (1888) 38 Ch. D. 220), the necessity for consent has been characterized in the conflict of laws as a question of procedure and is thus governed by the *lex loci celebrationis* (*Sottomayor v. De Barros*, (1877) 3 P.D. 1). In giving evidence of the foreign law the expert witness gave his interpretation of the relevant codified provisions of Minnesota. Indicating that an expert witness can only give evidence of fact and not of interpretation of the law, Ferguson, J., noted that merely to state the wording of the law may lead to its wrong comprehension, and thus an expert witness is allowed to state what law results from the wording of such law. The opinion of what the courts of Minnesota would do was thus accepted as a fact, and the marriage held voidable and a decree issued. *Hunt v. Hunt*, [1958] 14 D.L.R. (2d) 243 (Ontario High Court, Ferguson, J., June 23, 1958).

NOTES

*Liability for governmental atomic explosions—Federal Tort Claims Act—State law*

In *Bartholomae Corporation v. U. S.*, 253 F.2d 716 (U. S. Ct.A., 9th Circuit, Aug. 15, 1957, rehearing denied Jan. 11, 1958, Fee, Ct. J.), the court held that damage to private property from governmental atomic explosion was not a "taking," that there was no liability without fault on

these facts, that evidence sustained no negligence, and that, if there were, it depended on the State law of the place of the accident under the jurisdictional provision <sup>1</sup> of the Federal Tort Claims Act.

*Treaties—eminent domain*

In *Guerrero-Zapata Bridge Company v. U. S.*, 252 F.2d 116 (U. S. Ct.A., 5th Circuit, Feb. 11, 1958, *Per Curiam*), on the basis of the opinion below, 157 F.Supp. 150 (Allred, D. J.), the court held that the 1944 treaty with Mexico <sup>2</sup> constituted an implied repeal of the Act of Congress <sup>3</sup> which had authorized the toll bridge and reserved a right to repeal the Act.

*Territory under trusteeship a "foreign country" within Federal Tort Claims Act*

The decision below, noted in 52 A.J.I.L. 137 (1958), that Kwajalein Island in the Marshalls, of which the U. S. was administering authority under a strategic trusteeship agreement,<sup>4</sup> was a "foreign country" under the Federal Tort Claims Act,<sup>5</sup> was affirmed by a divided court. *Callas v. U. S.*, 253 F. 2d 838 (U. S. Ct.A., 2nd Circuit, April 1, 1958, Galston, D.J.). Hincks, Ct. J., concurred, and Lombard, Ct. J., dissented.

*Admiralty—barratry by crew under marine insurance policies—defection to Communist China of vessels owned by Chinese Nationalists*

The decision below, 151 F.Supp. 211 (1957), opinion digested in 52 A.J.I.L. 120 (1958), holding there was barratry and not seizure when master and crew of vessels defected, was affirmed, and the decision that defection by the crew alone was not barratry was reversed. *National Union Fire Ins. Co. v. Republic of China*, 254 F.2d 177 (U. S. Ct.A., 4th Circuit, April 8, 1958, Soper, Ct. J.).

*International Claims Settlement Act—denial of claim as non-national not reviewable*

In *Zutich v. Gilliland*, 254 F.2d 464 (U. S. Ct.A., 6th Circuit, April 29, 1958, *Per Curiam*), denial of award to claimant as a non-national was held non-reviewable under the terms of the International Claims Settlement Act of 1949,<sup>6</sup> and said Act was held to supersede the provision for declaratory judgment in the Immigration and Nationality Act of 1952.<sup>7</sup>

NOTE: In *First National City Bank of New York v. Gilliland*, 257 F.2d 223 (U. S. Ct.A., Dist. of Col. Circuit, June 12, 1958, Madden, J., Ct. Claims, sitting by designation), a finding by the Claims Commission that

<sup>1</sup> 28 U.S.C.A. § 1346 (2) (b).

<sup>2</sup> 45 Stat. 387.

<sup>3</sup> 28 U.S.C.A. § 2680 (k).

<sup>4</sup> 8 U.S.C.A. 1503 (a).

<sup>5</sup> 59 Stat. 1219.

<sup>6</sup> 61 Stat. 3301.

<sup>7</sup> 28 U.S.C.A. § 1623 (h).

the plaintiff did not meet the statutory requirements for recovery was held non-reviewable under the Act.

*Aviation—Warsaw Convention—liability for omission and right to indemnity*

In *Orlove v. Philippine Air Lines*, 257 F.2d 384 (U. S. Ct. A., 2nd Circuit, June 25, 1958, Clark, C. J.), the court held that liability limitations for acts of other carriers in tariff and Warsaw Convention<sup>8</sup> did not shield against the carrier's own omission, but that it could recover over against the carrier primarily at fault.

*Aviation—relation of airplane death action to Federal question jurisdiction*

In *Winsor v. United Air Lines*, 159 F.Supp. 856 (U.S. Dist. Ct., D. Del., Jan. 30, 1958, Layton, D. J.), action for airplane death under Colorado Death Act which pleaded but did not rely primarily on the Warsaw Convention,<sup>9</sup> was held not removable as a Federal question. Defendant conceded that the Warsaw Convention itself does not create a cause of action, but argued Federal question jurisdiction on the ground that the treaty would have to be construed. See notes, 52 A.J.I.L. 346, 347 (1958).

NOTE: In *Nello L. Teer Company v. J. A. Jones Construction Co.*, 160 F.Supp. 345 (U. S. Dist. Ct., M. D., N. C., April 4, 1958, Stanley, D. J.), the fact that a treaty might be raised as a defense was held no ground for Federal question jurisdiction.

*Jurisdiction—civilian employee of armed forces abroad and capital offense—constitutionality of court-martial*

In *Grisham v. Taylor*, 161 F.Supp. 112 (U. S. Dist. Ct., M. D., Pa., April 22, 1958, Follmer, D. J.), France having waived jurisdiction, petitioner, a civilian Army employee, was convicted by court-martial of murder. On habeas corpus, the court held that Article 2 (11) of the Uniform Code of Military Justice<sup>10</sup> as so applied was constitutional. See also *U. S. v. McElroy*, 158 F.Supp. 171, noted in 52 A.J.I.L. 536 (1958).

*Declaration of war in international law and in charter-party—Suez affair*

In *Navios Corporation v. The Ulysses II*, 161 F.Supp. 932 (U. S. Dist. Ct., D. Md., April 30, 1958, Thomsen, C. J.), time charter-parties provided for cancellation "if war is declared" against any NATO country. The court construed the clause as requiring more than being "engaged in war" or a "state of war." It held that war had been "declared" by the speech of President Nasser within the business and international law meanings of the phrase.

<sup>8</sup> 49 Stat. (2) 3000 *et seq.*

<sup>9</sup> 49 Stat. (2) 3000 *et seq.*

<sup>10</sup> 10 U.S.C. § 802 (11).

*Compensation for taking of property of U. S. citizen abroad—executive agreement and Fifth Amendment*

In *Seery v. U. S.*, 161 F.Supp. 395 (U. S. Ct. Claims, May 7, 1958, Madden, J.), plaintiff, U. S. citizen, was awarded compensation for damage to her property in Austria caused by personnel of the U. S. Armed Forces. The Government's renewed challenge to the jurisdiction on the ground, *inter alia*, that an executive agreement with Austria<sup>11</sup> defeated the right to compensation, was rejected without discussion on the basis of the former opinion in 127 F.Supp. 601 (1955), digested in 49 A.J.I.L. 410 (1955), and discussed in editorial, 49 A.J.I.L. 362 (1955).

*Customs—trade agreements—Proclamation denying benefits to imports directly or indirectly from Communist areas of products from such areas*

In *Dessy Enterprises v. U. S.*, 162 F.Supp. 947 (U. S. Customs Court, 1st Div., May 15, 1958, Millison, J.), the Collector of Customs, acting under Section 5 of the Trade Agreements Extension Act of 1951<sup>12</sup> and Presidential Proclamation<sup>13</sup> of August 1, 1951, classified imports from the Western Sector of Berlin as of Communist area origin. The court held that the cited provisions apply only to imports which were the product of the area at the time of Communist domination, and held further that the imports involved, which had been purchased from a West Berlin dealer, were not imported "directly or indirectly" from the Communist area. Oliver, C. J., dissented.

*Treaties—right of aliens to inherit realty—construction of treaties—effective date*

In *Lazarou v. Moraros*, 143 A.2d 669 (New Hampshire Supreme Court, July 1, 1958, Lampron, J.), a naturalized citizen died intestate on July 12, 1954, leaving New Hampshire realty. At all relevant times all the survivors except the defendant were alien residents and nationals of Greece. The court held that the defendant, an American citizen, was entitled to sole ownership. The 1937 Treaty of Establishment<sup>14</sup> was held not to affect inheritance, giving great weight to an opinion of the State Department to that effect. A new commercial treaty,<sup>15</sup> superseding the earlier treaty, entered into force October 13, 1954. The court cited the old cases holding treaties governing private rights as operative only from the final effective date rather than at the time of signature.

*Sovereign immunity—scope of waiver*

In a general assignment proceeding for benefit of creditors, assignee moved to enjoin a foreign sovereign from prosecuting plenary action for conversion of funds brought by said sovereign against assignor and said

<sup>11</sup> 61 Stat. 4168.

<sup>12</sup> 65 Stat. 72.

<sup>13</sup> 86 T. D. 300.

<sup>14</sup> 51 Stat. 230 (1937).

<sup>15</sup> T.I.A.S., No. 3057.

assignee. The court denied the motion, holding *National City Bank of New York v. Republic of China*, 348 U. S. 356, inapplicable. *In re Hughes & Company*, 172 N.Y.S. 2d 441 (Sup. Ct., Spec. Term, N. Y. County, Part I, Oct. 29, 1957, McGivern, J.).

*Illegal contracts—exchange controls—Bretton Woods Agreement*

In *Southwestern Shipping Corp. v. National City Bank*, 173 N.Y.S. 2d 509 (Sup. Ct., Special and Trial Term, N. Y. County, Part III, March 17, 1958, Backer, J.), the court held that an agreement and assignment in Italy, contrary to Italian exchange control regulations, for the transfer of dollars in New York was illegal and unenforceable both under the Bretton Woods Agreement<sup>16</sup> and general contract law.

*Constitutionality of State statute prohibiting use of name of United Nations without consent of Secretary General*

In *People v. Wright*, 173 N.Y.S. 2d 160 (Court of Special Sessions of City of New York, New York County, April 22, 1958, Gassman, J.), the constitutional validity of a New York statute<sup>17</sup> prohibiting use of the name "United Nations" without the consent of the Secretary General was upheld.

*Treaties—third-party beneficiary and agency*

Plaintiff, the alleged victim of Nazi persecution, sued the defendant, an agency for the distribution of funds under an agreement between Israel and the Federal Republic of Germany in 1952. The complaint was dismissed on the ground that plaintiff failed to establish himself as a third-party beneficiary and that the Luxembourg Agreements of 1957 did not create the agency. *Revici v. Conference of Jewish Material Claims*, 174 N.Y.S. 2d 825 (Sup. Ct., Spec. Term, N. Y. County, Part III, May 9, 1958, Hofstadter, J.).

NOTE: A similar conclusion was reached in *Application of Jewish Secondary Schools Movement*, 174 N.Y.S. 2d 560 (Sup. Ct., Spec. Term, N. Y. County, Part I, May 1, 1958, Hecht, J.).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

*Société Internationale v. Rogers*, 357 U. S. 197 (June 16, 1958), reprinted *supra*, p. 177, dismissal of complaint with prejudice not justified where failure to comply with pretrial production order was not due to own fault but to the fact that it might violate Swiss law; *Illinois Cen. R.R. v. Rogers*, 253 F.2d 349 (D.C. Cir., Feb. 27, 1958), where claim of Japanese company was not paid but correctness undisputed at time of war, title passed to custodian; *Herrmann v. Rogers*, 256 F.2d 871 (9th Cir., April 2, 1958), even though trustee had discretion to pay if he found the property not subject

<sup>16</sup> Art. VIII, Sec. 2 (b).

<sup>17</sup> Sec. 964-a of the Penal Law.



to confiscation, the interests of the beneficiary were within the seizure power; *Willenbrock v. Rogers*, 255 F.2d 236 (3rd Cir., April 22, 1958), "enemy" contemplates something more than mere physical presence but something less than domicile; *Kammholz v. Allen*, 256 F.2d 437 (2nd Cir., June 13, 1958), contingent future interests properly seized by Alien Property Custodian; *Dix v. Brownell*, 159 F.Supp. 163 (E.D.N.Y., Feb. 19, 1958), corporations were "nationals" and thus purchase without license could vest no rights in the purchaser; *Kind v. Rogers*, 162 F.Supp. 197 (W.D.N.Y., April 23, 1958), insufficient identity of interest, issues and parties to find *res judicata* in subsequent action where issues concerned alleged personal status of plaintiff-trustee as constructive enemy alien; *Kuerschner & Rauchwarenfabrik v. N. Y. Trust Co.*, 162 F.Supp. 481 (S.D.N.Y., June 2, 1958), bank depositor could not recover damages since loss was unforeseeable when deposit was made before 1941 and funds were later frozen; *In Re Ronkendorf's Estate*, 324 Pac.2d 941 (Calif. App., May 6, 1958), Attorney General entitled to succeed to property after termination of war and claim of American claimant rejected; *In Re Camac's Estate*, 172 N.Y.S. 2d 29 (Surr. Ct., N. Y. Cty., Jan. 30, 1958), Alien Property Custodian entitled to income only after accepting such a distribution for sixteen years; *In Re Stock's Estate*, 172 N.Y.S. 2d 927 (Surr. Ct., N. Y. Cty., March 5, 1958), vesting order vested both vested and contingent remainders in Attorney General.

## BOOK REVIEWS AND NOTES

*Derecho Internacional Público*. Vols. I and II (4th ed.). By Alberto Ulloa. Madrid: Ediciones Iberoamericanas, S.A., 1957. pp. 694, 569. Index.

The two recent outstanding treatises by the Argentine jurist, Podestá Costa, and the Brazilian jurist, Accioly, are now joined by a third treatise by a Peruvian jurist of equal distinction, Professor Ulloa, whose numerous contributions to the field of international law have already marked him as a scholar of first rank. This fourth edition of his two volumes, first published in 1926 and 1929, is more than a new edition; it is in large part a new work marked by what might be called a re-orientation of traditional theory to conform to modern conditions, together with an exposition of the developments of recent years.

Professor Ulloa follows the Latin American tradition in rejecting the rigidity of the positive approach to international law which dominated jurisprudence a half-century ago, but at the same time he recognizes that the older natural law is undergoing a modern resurrection which is opening up new vistas of a wider field of international relations. The whole chapter on "basis" and "method" is carefully reasoned, and the paragraphs on the Russian conception of international law show a clear understanding of the incompatibility of Soviet ideology with Western moral conceptions in relation to the rights and duties of states. Significant of the scientific approach of the author is his analysis of the so-called doctrine of "American international law," which he finds to be rather an expression of continental solidarity than a specific body of rules exclusively applicable in America.

Of special value to North American students will be the Peruvian interpretation of particular issues involving the foreign policy of that country, in much the same way in which a Peruvian might turn to the works of Moore, Hyde and Hackworth for international law as understood by the United States. Thus the author's comments upon the Estrada Doctrine of recognition are illustrated by the citation of numerous Peruvian cases and by a valuable commentary upon the procedure of recognition in general; the right of "conservation" gives us details of the Letitia dispute between Peru and Colombia; the question of boundaries leads to the distinction between *uti possidetis* and *uti possidetis juris* and its application to the boundaries between Peru and its neighbors; the international protection of the rights of man leads to comment on the Peruvian law of immigration; the freedom of the seas raises in acute form the question of the continental shelf and the extension of territorial waters based upon the urgent needs of the Peruvian national fisheries; under jurisdiction the problem of asylum is treated at length and the case of Haya de la Torre explained in full.

The closing chapters of Volume II deal with the pacific settlement of disputes, the inter-American system of consultation, international administration, the United Nations, the historical background and development of the Organization of American States, and finally a brief outline of measures of coercion.

Professor Ulloa is to be congratulated upon the scholarly treatise here presented to us, and students in their turn can welcome the original observations which the author makes in chapter after chapter upon international law in its present stage of development. The reviewer has long wished that the individual Latin American countries might prepare collections of documents from the records of their foreign offices. Professor Ulloa's volumes open the door to that task, giving it a classification of topics and indicating the more important fields of research.

C. G. FENWICK

*International Law.* By Georg Schwarzenberger. Vol. 1 (3rd ed.): *International Law As Applied by International Courts and Tribunals.* I. London: Stevens and Sons Ltd., 1957. pp. xlviii, 808. Index. £3 3 s.

The third edition of Dr. Schwarzenberger's work is much larger than its predecessor. It is divided into two parts, of which only the first is reviewed here. In this part, 808 pages are required to cover topics which, with ancillary material, occupied only some 280 pages in the second edition. The second part, not yet published, is to deal with war, neutrality and the law of international institutions. The new edition is longer not only because new material is included, but also because the author expresses his own views with greater freedom.

Dr. Schwarzenberger's general attitude toward the law of nations remains conservative. He stresses the need for judicial restraint, warns against "subjectivity unlimited" which would irreparably blur "the border line between *lex lata* and *lex ferenda*," and subordinates the rôle of international courts ("law-determining agencies") in the development of international law to that of the "law-creating processes" (treaties, custom and "general principles of law"). Among the latter, he still views "general principles of law" with considerable caution, although he no longer dubs them a "subsidiary source" of international law. The reserved attitude toward "general principles of law" is consistent with Dr. Schwarzenberger's general distrust of concepts derived by analogy from private law and his insistence on the autonomy and distinctiveness of international law. It does not prevent him, however, from invoking "estoppel" as an operative concept in a wide variety of situations.

The author's conservatism is further evident in his treatment of many substantive topics. Sovereignty occupies an honored place among the seven "fundamental principles of international law" formulated in his 1955 Hague lectures and now used freely as analytical tools. The existence of a strong presumption in favor of sovereignty is repeatedly affirmed. This positivist position is reflected in a skeptical attitude toward new doc-

trines on such matters as the international legal personality of individuals, the continental shelf, rights to the use of international rivers, and treaty rights of third-party beneficiaries. The author criticizes the International Court for going beyond what he regards as existing law and encouraging undue subjectivity in the *Fisheries*, *Nottebohm* and *Reservations to the Genocide Convention* cases. He also questions the attribution of objective international legal personality to the United Nations in the *Reparation for Injuries* case.

Much of Dr. Schwarzenberger's conservatism is justified. It is based on a sober apprehension of the realities of international life and of the frailty of many international institutions, including the Court. It should serve as a needed warning against the fatuous hopes and the flights of legal fancy still fashionable in certain quarters. Yet one wonders if Dr. Schwarzenberger remains faithful to his own inductive method in dogmatically seeking to minimize the importance of judicial decisions in the development of international law by denying them the rôle of a "law-creating process." Whether the conceptualistic subordination of judicial decisions to customary law in Article 38 of the Statute of the Court is true to life can be determined, after all, only by empirical observation. Although the author rightly points out that "the more an asserted rule happens to be in line with the basic structure of the legal systems in question and generally felt requirements of the society or community which it serves, the more likely it is to be accepted," he presents no evidence on the actual impact of the Court's decisions upon the subsequent behavior of state officials and other decision-makers. Yet, unless a static position is dogmatically taken, it must be admitted that the Court's decisions may sometimes effectively serve to change the law precisely because they help to sweep away rules consecrated by past practice which are no longer responsive to the needs of the international community.

Dr. Schwarzenberger, despite his studied conservatism, is by no means a partisan of the naïve view that judges do not make the law. Although the courts "maintain the pious fiction that they have merely applied the law as it stands," judicial legislation does take place. The courts necessarily have a "practically free hand" in the interpretation of treaties, where the choice of one or another method "is a characteristic form of masking inarticulate preferences and individual views on the proper balance between rights and duties in a treaty nexus." The same is largely true of the interpretation of customary law. In vast areas of the law, good decisions can be made only by the application of "considerations of reasonableness and good faith" which Dr. Schwarzenberger now terms "the *jus aequum* rule." Despite his distaste for "subjectivity," he freely admits that in the application of this rule "a measure of subjectivity in the judicial balancing process is unavoidable." He urges the courts to be more explicit in revealing the real grounds for their decisions, including equitable considerations. It is only for reasons of policy, therefore, that he counsels the Court "to curb severely" its "quasi-legislative tendencies," lest "impatience and reforming zeal" lead "to undue acceleration of the process."

Although the book does not pretend to be an exhaustive digest of international case law, its great practical value needs no emphasis. It contains a wealth of new interpretations and insights. The readers of this JOURNAL, for example, will recognize Dr. Schwarzenberger's radically new approach to the problem of acquisition of territory, first presented here in 1957. The 93-page bibliography, though hardly exhaustive, is among the best in the field. There are also some weaknesses. Some *dicta* are unduly magnified in importance. Explicit differentiation of the various kinds of *jurisdiction* (judicial, legislative, executive) would have improved the presentation of that topic. The discussion of *international torts* suffers from generality and lack of lucidity. The rich arbitral material on the content of the "minimum standard" is not fully utilized, and unnecessary doubt is cast on its value. The old problem of state responsibility for acts of different kinds of officials appears under the strange and misleading title of "Senior and Junior Civil Servants." The use of preparatory work in the interpretation of treaties is analyzed with far greater perception and persuasiveness in Lauterpacht's *The Development of International Law by the International Court* (1958). Certain cases of interest (e.g., *Megalidis v. Turkey*) are inexplicably omitted.

One looks with pleasant anticipation to the appearance of the second part of this distinguished work.

O. J. LISSITZYN

*Diritto Internazionale*. Vol. II: *Organizzazione Internazionale*. Part I: *Soggetti a Carattere Territoriale*. By Angelo Piero Sereni. Milan: Dott. A. Giuffrè, 1958. pp. xvi, 235-770.

Professor Sereni's treatise on international law will consist of four parts in five volumes. The General Part (Volume I) has been published (see this writer's review in this JOURNAL, 1957, pp. 441-443). The third part will treat international relations, particularly treaties, the fourth part, international controversies and their solution. The second part (Volume II) gives the organization of the international community. Its first part, now under review, treats of international persons of territorial character (states and insurgents recognized as a belligerent party); the second part has as its subject international persons of a functional character, particularly international organizations.

The book is an excellent work and would, as we have said of the first volume, invite long and friendly discussions as to agreements and disagreements. After a discussion of the general principles, the author treats the coming into existence, modifications, extinction and subjective qualifications of states, their organization, territory, subjects and national jurisdiction. All the present-day problems are fully discussed. It is a work of much research, of great knowledge and, generally speaking, free from factual errors.<sup>1</sup>

Naturally, there are disagreements in details. The author accepts only

<sup>1</sup> Only on p. 742 a curious *lapsus calami* happened to the author, tracing the Calvo clause to a "Mexican statesman."

states and recognized insurgents as international persons of a territorial character. We believe this no longer corresponds to present-day positive international law, which recognizes non-states as partial subjects of international law. The author himself recognizes that a subject of international law is any entity to which *one* or more norms of international law are addressed. Non-states are partial subjects of international law: that was the status of the Dominions and of India in the League of Nations, that is the status of the Ukraine and of Byelorussia in the United Nations; that would have been the status of the "Free Territory of Trieste," had it come into existence. There are European colonies in the Americas admitted, with a limited status, to Pan American specialized organizations.

As we have stated with regard to the first volume, Professor Sereni in general stands close to the "Vienna School," and with many of his formulations we fully agree. It is entirely correct that international law itself determines who its subjects are; that sovereignty as a legal concept is, in Verdross' formulation, "*Völkerrechtsunmittelbarkeit*"; that the theory of so-called "fundamental rights of states" is a remnant of natural law doctrines; that the coming into existence of a new state is not merely a historical fact, but international law lays down the legal requisites which condition the birth of a new state. In the formulation of this reviewer, the author clearly distinguishes between "states in the sense of international law" and "states in the sense of municipal law" and builds on this basis his theory of the Unions of States. The principle of equality of states is correctly understood as equality before, but not necessarily in, law. We entirely agree with his pages on the recognition of states and *de facto* governments, on the identity of states under international law, and with his insistence on the norm of effectivity. It is entirely correct that it is international law which determines the "*domaine réservé*" of states. We agree that states have constitutional autonomy by international law, that the territory, in Kelsen's formula, is the spatial sphere of validity of the municipal legal order. The distinction between territorial sovereignty and mere territorial supremacy is correct. In harmony with the "Vienna School," the book is a legal treatise, distinguishing clearly not only between general and particular international law, but, first of all, between law and politics and between positive law and proposals *de lege ferenda*.

Sereni's general approach also often brings him close to the monistic construction of the primacy of international law. Yet he retains the logically untenable dualistic doctrine as a heritage of the Italian School. Thus, the author is unable to conceive the internal law, *e.g.*, of the United Nations as international law; this internal law seems to him to be neither international nor municipal law. For the same reason, he is unable, contrary to positive law, to see in an individual even a partial subject under particular international law. Again, for the same reason, the *Tribunaux Arbitraux Mixtes*, instituted by the peace treaties concluded at the end of the first World War, are for the author not international tribunals.

The gravest damage which the dualistic doctrine has done to this work is the part dealing with international organs. Again we find the theory of

"common organs," a theory which goes back to Jellinek and has been greatly nurtured in the Italian School, although some prominent Italian international lawyers have abandoned it. This theory believes that where the international organization is not itself a subject in international law, there are no organs of the organization, but the acts of the representatives of the members are identically imputed to the member states, a construction obviously already inadequate, where resolutions are adopted by majority vote. But the whole construction is basically untenable. An organ is an international organ, if it is international by creation and function. A legal community, and hence also the international community, can only act through organs. It must have *its own* organs; but in the primitive international community there are *no special* organs. The organs of the international community are the states or organs composed of men who are, at the same time, also organs of their states: Scelle's "*dédoublement fonctionnel*." The international community is not, as is usually said, "unorganized"; it is only primitively organized, just as in a primitive municipal law the individual, through legally recognized self-help, becomes an organ of the community; otherwise he could only be conceived as a criminal. It is high time to throw the theory of "*organi comuni*" definitively overboard; it not only prevents insight and legal construction of international organizations, which become more important from day to day, but also bars understanding of the primitive "unorganized" international community.

JOSEF L. KUNZ

*Mezhdunarodnyi Sud Organizatsii Ob'edinennykh Natsii* [*The International Court of the United Nations Organization*]. By S. B. Krylov. Moscow: Gosudarstvennoye Izdatelstvo Yuridicheskoi Literatury, 1958. pp. 167. Rubles 6.40.

The first Soviet judge of the International Court of Justice, who retired from the bench in 1952, has written an unpretentious but informative account of the Court and its work. As he explains in the prefatory note, this account incorporates in part the numerous articles written by him for the Soviet legal periodical *Sovetskoe Gosudarstvo i Pravo* under the pen name of S. Borisov. Following a brief outline of the organization, composition, procedure and competence of the Court, its decisions and advisory opinions are summarized and commented upon under the headings of the competence of the Court, interpretation of the United Nations Charter, responsibility of states, "questions of population" (the *Morocco* and the *Nottebohm* cases), territorial sovereignty, diplomatic immunity (the *Asylum* cases), treaties, and the arbitral process.

The treatment is very largely factual, although Judge Krylov does not hesitate to characterize certain decisions and opinions (particularly those from which he dissented) as unsatisfactory or incorrect. There is an interesting description of the steps by which the Court reached its decision and prepared its opinion in the *Corfu Channel* case. From time to time the reader encounters references to "American-English imperialists" and

the like, as well as occasional imputations of political motivation to the Court, but, in comparison with many Soviet commentaries on international affairs, the book is written in a restrained vein. Judge Krylov praises Judges McNair and Basdevant for the independence they showed in voting in certain cases against their own governments, but refrains from pointing out that on at least one issue (the competence of the Court to interpret the United Nations Charter) he, too, tacitly disagreed with his government.

Despite the strictures on some particular decisions and opinions, Judge Krylov's over-all verdict on the Court is cautiously favorable. He believes that the Court, despite its "modest rôle in international life," has on the whole served the causes of "international legality" and "peaceful co-existence."

O. J. LISSITZYN

*"Obshchiye Printsipy Prava" v Mezhdunarodnom Prave* [*"General Principles of Law" in International Law*]. By V. M. Koretsky. Kiev: Izdatelstvo Akademii Nauk Ukrainskoi SSR, 1957. pp. 52. Rubles 1.85.

Soviet and Western jurists have long disagreed on the correct interpretation of the concept of "general principles of law recognized by civilized nations" as a source of international law. V. M. Koretsky, of the Ukrainian Academy of Sciences, who is known to many Western international lawyers as the first Soviet member of the United Nations International Law Commission, now contributes an exposition and defense of the Soviet position in the form of an attack on the predominant Western view that "general principles of law" are primarily principles common to various systems of municipal law. This view is characterized as an effort to impose the Western capitalist concepts on the rest of the world. It is said to be linked with the tendency to revive "natural law" as another device designed for the same purpose. Both devices, it is asserted, are employed in attempts to diminish the sovereignty and independence of states and to facilitate intervention in domestic affairs, particularly for the purpose of protecting the property interests of foreign investors.

Academician Koretsky does not deny that certain general legal concepts, such as self-defense, *vis major*, lease, trusteeship and succession, are to be found in both municipal and international law, but he stresses that their content need not be the same. The content of international law, he maintains, must be determined solely by reference to international relations, agreements between states, international practice, and the principles deduced from this practice. He points out that in endeavoring to determine the content of "general principles of law" Western jurists rarely make a comparative study of all the systems of municipal law, but usually limit themselves to one or two Western systems, ignoring the law of Asian-African countries and of the socialist states. He concludes by reiterating the familiar Soviet contention that "general principles of law" mean general principles of *international* law, and by calling for the acceptance of the "great democratic principles" of complete equality, respect for the



territorial integrity, independence and sovereignty of states, and non-intervention.

It would be easy but sterile to dismiss Academician Koretsky's pamphlet as "just another piece of Soviet propaganda." It is better to take heed of it as a warning against Western myopia.

O. J. LISSITZYN

*World Peace through World Law.* By Grenville Clark and Louis B. Sohn. Cambridge, Massachusetts: Harvard University Press; London: Oxford University Press, 1958. pp. xxxvi, 540. Appendices. Index. \$7.50.

This volume represents a combination of the document entitled "Peace through Disarmament and Charter Revision," published by the authors in 1953, and the supplement to that document published in 1956. As stated by Mr. Clark in the introduction (p. xxxiii), it "reflects a change of emphasis"; complete disarmament is treated in the present volume "as one of several interrelated and equally indispensable elements of world order rather than as an end in itself." The other measures considered by the authors to be essential for the achievement of world peace through world law are indicated in their proposals for organization of a United Nations Peace Force and for radical changes in the composition, powers and method of voting of the General Assembly of the United Nations; replacement of the present Security Council by an Executive Council responsible to the General Assembly; establishment of a World Equity Tribunal, a World Conciliation Board and regional courts inferior to the International Court of Justice; establishment of a World Development Authority under the general supervision of the Economic and Social Council; establishment of a United Nations Revenue System; and adoption of a Bill of Rights.

National disarmament, according to the authors' proposals, would be provided for in a revision of Article 1 of the Charter and in their first Annex (pp. 203-299), based on the view that "if the peoples of the world really want to prevent war, they must be willing to pay the price in the shape of disarmament which is not only universal and enforceable, but also *complete*" (p. 204). After the achievement of "universal and complete national disarmament . . . in a simultaneous and proportionate manner" in "a preparatory stage of two years and an actual disarmament stage of ten years" (p. 204), the only military forces in the world would be the United Nations Peace Force, of 200,000 to 600,000 men on active duty and 600,000 to 1,200,000 in reserve, provided for in Annex II (pp. 300-320). The Inspection Service charged with verification of the observance of the obligations of each nation under the plan would be under the general direction of an Inspection Commission composed of five nationals of smaller nations (p. 206). It would exercise its powers in relation to nuclear as well as conventional weapons, but "additional safeguards in respect of nuclear (atomic) energy would be placed in the hands of a new and separate world agency—the United Nations Nuclear Energy Authority" (p. 206). The enforcement measures which may be adopted "against individuals, organizations and nations" are set forth in general terms in

Articles 29 to 32 (pp. 292-299) of Annex I. Article 29 provides that the General Assembly of the United Nations shall "enact laws defining what violations of this Annex or of any law or regulation enacted thereunder, either by individuals or by private organizations, shall be deemed to be offenses against the United Nations."

The General Assembly, according to the authors' proposed revision of Article 9 of the Charter, would consist, not of the Members of the United Nations, but of "Representatives from all the member Nations and from the non-self-governing and trust territories under their administration." The number of representatives from each member nation would be in proportion to its population, the numbers ranging from thirty representatives for each nation with a population of over 140,000,000, to one representative for each nation with a population of not over 500,000.

According to the authors' revision of Articles 10, 11 and 17 of the Charter, the General Assembly would have the power to enact legislation binding upon member nations with respect to national disarmament, the United Nations Peace Force, sanctions against nations and individuals, and the raising of revenue. Under their revision of Articles 10, 11 and 24, the General Assembly would also have the primary responsibility for the maintenance of international peace and security and would have the power to direct and control the policies and actions of all organs and agencies of the United Nations with the exception of the judicial and conciliation organs.

Under the authors' revision of Article 18, the members of the General Assembly would vote as individuals, and each of them would have one vote.

The Security Council, under the authors' revision of Chapter V of the Charter, would be replaced by an Executive Council consisting of seventeen Representatives elected by the General Assembly for four-year terms and subject to removal upon a vote of lack of confidence by the General Assembly. The Executive Council would act as the agent of the General Assembly in maintaining international peace and security and in ensuring compliance with the revised Charter and the laws and regulations enacted thereunder. The members of the Council would vote as individuals, and, except as to specified important matters, on which an affirmative vote of fourteen members would be required, decisions of the Council would be by affirmative vote of eleven members.

The authors' proposals for rounding out a United Nations judicial and conciliation system are presented in connection with their proposed revision of Articles 36, 37, and 92 to 95 of the Charter and in their Annex III (pp. 321-330). The World Equity Tribunal of fifteen members and the World Conciliation Board of five members would be established by separate statutes (pp. 324-327). The Tribunal would deal with disputes, not primarily of a legal nature, involving nations, non-self-governing territories, the United Nations and specialized agencies of the United Nations. The Board would "help in bringing about mutually acceptable agreements between nations which become involved in disputes or situations dangerous to peace" (p. 325). Under Article 36 of the Charter, as revised by the

authors, the General Assembly, the Executive Council or any nation concerned would have the right to submit to the International Court of Justice for final determination legal questions on the basis of which a dispute or situation endangering peace and security could be satisfactorily settled; and non-legal questions material to such a dispute or situation could be referred to the World Conciliation Board or to the World Equity Tribunal. Under Article 94 of the Charter, as revised by the authors, any nation which failed to comply with any recommendation of the World Equity Tribunal approved by the General Assembly under Article 36 could be subjected to measures decided upon by the General Assembly. The regional courts which would constitute a part of the judicial and conciliation system would be established in not less than twenty nor more than forty regions throughout the world. Each of these courts would be composed of three to nine judges. Their jurisdiction would include offenses of individuals and private organizations against the revised Charter or the laws and regulations enacted thereunder; authorization of inspections in connection with disarmament; disputes regarding rent of premises occupied by United Nations agencies; matters of which they are given jurisdiction in any law or regulation enacted under the revised Charter, involving nations, individuals or private organizations, et cetera (pp. 327-329).

The World Development Authority provided for in the authors' revision of Article 59 of the Charter and in their Annex IV is

intended to be . . . the most important medium for the realization by the United Nations of its great purpose to advance "social progress and better standards of life in larger freedom" through "international machinery for the promotion of the economic and social advancement of all peoples."

The proposed Revenue System of the United Nations (Annex V, pp. 333-343) is intended to supplement Article 17 of the revised Charter.

The formula for the apportionment of the total budget would be based upon the ability to pay of the people of the member Nations, with the limitation . . . that the amount to be contributed by the people of any member Nation in any year shall not exceed two and one half per cent of the estimated gross national product of that nation in that year. (p. 333.)

The authors believe that "for the support of the United Nations a reliable system for the raising of large sums—of the order of \$30-\$40 billion per annum—is absolutely essential" (p. 343).

The proposed Bill of Rights (Annex VII, pp. 350-351) would reserve to the member nations or their peoples all powers not delegated, expressly or by clear implication, to the United Nations, and would contain prohibitions and guarantees designed "to provide the utmost possible assurance against the violation by the United Nations of . . . fundamental rights of man."

The authors "have tried hard" to set forth in this volume a plan which "*ought* (their italics) to be acceptable to all nations" (p. xiii). They recognize that "better solutions may be hammered out in the process of

debate" (p. xxxiii). They believe that the Charter, revised in accordance with their proposals, "would actually create world institutions with fully adequate power to enforce peace in all circumstances" (p. 199). They consider it reasonable to hope that the Charter, so revised, would be ratified by five-sixths of all the nations of the world, including every nation with a population of more than forty million, "quite promptly after its submission" (p. 201).

Many of the readers of this JOURNAL will have less confidence than the authors have in the ultimate victory of reason over unreason in the conduct of nations. None of us can withhold applause for the energy, the industry, the erudition and skill and the faith in mankind that are represented by this book.

EDGAR TURLINGTON

*Le Raccomandazioni Internazionali.* By Antonio Malintoppi. Pubblicazioni dell'Istituto di Diritto Internazionale dell'Università di Roma, No. 1.) Milan: Dott. A. Giuffrè, 1958. p. xiv, 371. L. 2,000.

International recommendations are declarations of intentions, directives or mere wishes which, within the realm of international relations, are usually addressed by corporate bodies to their members or to outsiders. Recommendations were probably adopted at first by conferences and congresses; at the present time they are one of the chief forms of expression of international organizations. International recommendations, therefore, have come to be identified with the functioning of international organizations, and they have been the object of legal analyses, especially in connection with the nature and activities of those bodies.

Malintoppi, a worthy addition to the ranks of the Italian School of international law, has now written the first book-length treatment of this important subject preparatory to his appointment as a full professor. The book constitutes a thorough, well-reasoned and amply documented analysis of the vexing problem of the nature of international recommendations.

The work is divided into three long chapters (each subdivided into several sections), respectively dealing with the legal problem of recommendations (pp. 1-114), recommendations constituting what he calls "legal facts" (pp. 115-245), and recommendations constituting what he calls "legally relevant facts" (pp. 246-368). According to the author, recommendations fall into two classes: *inter-organic recommendations*, which are those addressed by one organ to another within the same organization (e.g., by the General Assembly to the Economic and Social Council of the United Nations); and *inter-subjective recommendations*, which are addressed by an international organization to another subject of international law, whether or not a member of the organization itself. The book deals with inter-subjective recommendations only. According to the author, these recommendations, aside from their *social validity*, have *legal validity* in that they are governed by legal rules. The author asserts and proposes to demonstrate the existence of a general rule of international law empowering international organizations to enact recommendations. All rec-

ommendations, therefore, have *some* legal basis and value in that they are contemplated by a rule of international law. The legal effect of recommendations, however, is not always the same: some have direct and others merely indirect effect. A recommendation has direct effect, and is, therefore, following the author's terminology, a *legal fact*, if it either waives or creates an obligation of the addressee.

In the second chapter of his book the author examines the various types of recommendations having direct effect, very few of which waive pre-existing obligations of the states; less infrequently, an organization may, by means of a recommendation, impose duties on its members or impart binding directives upon other organizations (*e.g.*, the recommendations addressed by the United Nations to the specialized agencies for purposes of co-ordination). The third chapter deals with the recommendations which produce indirect effects only, and are, therefore, according to the author's terminology, nothing more than *legally relevant facts*. These recommendations, and they are in the majority, while not legally binding, have some legal relevancy: for instance, deliberate, systematic and unjustified refusal by one of its members to pay heed to the recommendations of an organization may constitute a violation of the duty of co-operation which, according to the author, is incumbent upon all members of international organizations.

Professor Malintoppi's book is a provocative work, although in the reviewer's opinion it outlines certain trends in the development, rather than the present status, of the law of international recommendations. So far, the term "recommendation" is a vague and ill-definable expression at best, which therefore hardly lends itself as a basis for systematic analysis and general conclusions. The general approach to the problem of recommendations should be historical rather than conceptual. Recommendations having binding force are creatures of a few provisions in some charters; they constitute an anomalous class. It is highly questionable, therefore, whether they should be lumped into the same class with those which have a merely exhortative value. Perhaps the former are closer and more akin to other acts of international organizations, often called "decisions" or "directives," the binding force of which is expressly provided for in the charters of the international bodies from which they originate. The whole topic would be clarified if, in the future, the term "recommendation" were consistently used in international instruments in its usual meaning, namely, to indicate an utterance which is not legally binding. Limiting the analysis to the majority of the recommendations, which by general consent do not have binding force in themselves, it is important to note that acts devoid of binding force (*e.g.*, protests, declarations, notifications, etc.) have been known in international law for a long period of time. The power to issue them is inherent in the very existence of the subject from which they emanate; they are, in fact, manifestations of the freedom of every subject of international law to express its intentions, aims and wishes. Proceeding on this general assumption, a constructive approach to the subject of the legal effect of recommendations may be that of determining the possible binding force of each of them on its own merits and on the basis of the circumstances under which it was adopted.

In the realm of international law as well as in that of the common law, there is at all times a twilight zone which is not yet law, but in which social and moral considerations are especially persuasive. It is in dealing with issues which are within this area that recommendations serve a specific purpose and may be more effective; for the real function of most recommendations is not to create binding rules of law but rather to compel the states to take sides and to go on record before public opinion on the issues which are involved. A study of this aspect and purpose of recommendations would be especially effective if it would consider analogies in nature and purpose between them and certain non-binding acts, often resorted to in legal relations within common-law countries, such as gentlemen's agreements, letters of intent, et cetera, which are slowly finding their way into international relations.

The preceding remarks are not so much a criticism of Professor Malintoppi's thesis as a suggestion of a broader approach to the subject. Professor Malintoppi's brilliant and thoughtful book has laid the foundation for any future treatment of the basic problems raised by international recommendations.

ANGELO PIERO SERENI

*The Red Cross Conventions.* By G. I. A. D. Draper. New York: Frederick A. Praeger, Inc.; London: Stevens and Sons Ltd., 1958. pp. ix, 228. Index. \$6.00; 35 s.

This volume consists of the revised texts of five public lectures on the Geneva Conventions for the Protection of War Victims of August 12, 1949, delivered at King's College, University of London, in 1957. A zealous publisher has nearly doubled the size of the book by including the texts of the Geneva Conventions and of the British Geneva Conventions Act, 1957, as appendices.

The five chapters of the book, corresponding to the lectures as originally delivered, deal with the background and general principles of the conventions, the Civilians Convention, the Prisoners of War Convention, the two Sick and Wounded Conventions, and the contributions of the conventions to the law of war. A short series of lectures could no more than provide an introduction to the 417 articles of the treaties, and, for a detailed treatment of the conventions, Mr. Draper refers the student to comprehensive commentaries which are being published by the International Committee of the Red Cross.

The book is more than a mere synopsis of the provisions of the treaties. Mr. Draper has not hesitated to draw attention to the inadequacies of the conventions, whether as the consequence of faults in their drafting or of later technical developments, and to the problems to which they are likely to give rise in major wars of the future. Among the more important of these problems is the question whether Article 7 of the Prisoners of War Convention, prohibiting the renunciation of rights by prisoners, offers an obstacle to the release of prisoners to civilian status or to their volunteering for service with the armed forces of the Detaining Power (pp.

18 and 54). This question of the prisoner's changing ideological sides during captivity leads to an inquiry whether the soldier deserting from the enemy forces must be held as a prisoner of war, a question which Mr. Draper answers in the negative (p. 53), consistently with views published by the International Committee of the Red Cross. He correctly points out that the conventions are not altogether adaptable to the operations of international military commands (pp. 57-58) and that the problem was not correctly analyzed by the United Nations Command during the Korean conflict (p. 70). While some reference is made to the requirement that future war crimes trials be held before national tribunals (pp. 21 and 108), insufficient emphasis has perhaps been placed on the fact that the Prisoners of War Convention, in requiring that prisoners of war be tried for war crimes under the same conditions as the armed forces of the Detaining Power, may forbid another Nuremberg Tribunal, unless nations are willing to create international tribunals to try their own soldiers, sailors, and airmen.

Because Mr. Draper has not hesitated to deal with the really difficult questions, a number of his conclusions will not necessarily meet with general acceptance. Some of his readers may not agree that the provisions of the Prisoners of War Convention on repatriation "failed" at the conclusion of the Korean War (p. 112) or that the fact that nuclear weapons may cause injury to the wounded and sick would make their use unlawful (p. 100). But the views of Mr. Draper, who has prosecuted war criminals and has served as Assistant Director of Army Legal Services in the War Office and as a consultant to the British Government on questions of the law of war, are undoubtedly entitled to great weight. There can certainly be no dissent from his conclusion that the Geneva Conventions are "an emphatic avowal before the world that the humanitarian principles of justice and compassion must govern and determine the treatment of man by man if our civilisation is to be worthy of the name."

R. R. BAXTER

*Nationalization: A Study in the Protection of Alien Property in International Law.* By Isi Foighel. London: Stevens and Sons, Ltd.; Toronto: Carswell & Co.; Copenhagen: Nyt Nordisk Forlag Arnold Busck, 1957. pp. 136. Appendices. \$4.85; £1 8 s. 6 d.

The author of this small volume is an assistant professor in the University of Copenhagen. As stated in the preface by his colleague, Professor Alf Ross, the treaties and national enactments which he has brought together and analyzed present "a body of information not to be found elsewhere in legal literature." The national enactments referred to are the nationalization laws of eighteen states: Austria, Bulgaria, Burma, China, Czechoslovakia, Egypt, France, Great Britain, Holland, Hungary, India, Iran, Yugoslavia, Mexico, New Zealand, Poland, Rumania and the Soviet Union. These laws are analyzed at pages 59-69 in Part II of the book, subtitled "Legality." The treaties referred to are bilateral treaties concluded by

nine nationalizing states (Bulgaria, Czechoslovakia, France, Hungary, Yugoslavia, Mexico, Poland, Rumania and the Soviet Union) for payment of compensation to other states. The detailed analysis of these treaties, with special reference to liability in international law to pay compensation, forms of compensation, property for which compensation is given, eligibility to claim compensation and extent of compensation, constitutes Part III of the book, subtitled "Compensation" (pp. 75-133). The content of Part I (pp. 11-38) is indicated by the subtitle: "Background."

Nationalization is defined by the author as "a special category of acquisition of property . . . dictated by economic motives and having as its purpose the continued and essentially unaltered exploitation of the particular property" (pp. 18-19). It is distinguished from "expropriations and general restrictions on property" by the fact that it is "not motivated by the desire of the state to take over or restrict the use of the property for the benefit of a special purpose . . . different from the previous use," but by the desire of the state "to take over and carry on the hitherto practised utilization of the property" (pp. 18-19).

The author's analysis of the nationalization laws of the eighteen countries mentioned above is preceded by a discussion in the course of which he observes that nationalization without compensation may possibly be "a legitimate step justified by international law," even though payment of compensation may be required by international law and failure to pay compensation may therefore be "an independent breach of the law" (p. 40).

On the basis of his analysis of the nationalization laws of the eighteen countries the author concludes that

it is inadmissible to maintain that . . . there should exist a generally accepted international standard whose substance is that nationalization . . . is in conflict with international law . . . so that the alien or the country of his nationality can oppose the nationalization and claim recovery of the property. (pp. 69-70.)

He notes, however, that the majority of these laws "contain provisions concerning the liability of the nationalizing state to pay compensation" (p. 69).

The view that "the nationalization of foreign property entails a liability for the nationalizing state to pay compensation" is, according to the author, "apparently confirmed" (p. 77) by the forty-eight treaties which he examines in detail. "Treaty practice up till now," he adds, "has not been extensive enough, and in some respects has been too special in character, to be a basis for a decisive attitude to this question," but, "with this reservation in mind, it may be maintained . . . that the recent development in the rules of international law in respect of nationalization seems to be tending towards a rule involving liability to pay compensation to foreigners affected by nationalization" (p. 85). He refers in this connection to "practical considerations" and to "the paradoxical situation that a country at the same time nationalizes foreign property and also tries to persuade foreign countries and their nationals [to] invest in, for example, technical installations for the development of the national resources of the country" (pp. 85-87).

EDGAR TURLINGTON



*La Protezione Diplomatica delle Società.* By Giovanni Battaglini. Padua: Cedam, 1957. pp. xviii, 354.

This is a monograph on the diplomatic protection of juridical persons. The author starts from the critique of the traditional theory dealing with this problem. According to him, one must begin with the diplomatic protection of individuals; here there is certainly a corresponding rule of general international law. In recent years some international lawyers have held that this diplomatic protection is an antiquated formula, since the right belongs to the individual; they emphasize that the measure of the damage claimed is the damage suffered by the individual. The author states that this construction is wrong, as it is in contradiction with positive international law, as shown by the practice of states and by the decisions of national and international courts. In this reviewer's opinion, that is correct. The Hague Court has laid down that by the espousal of an individual's claim the character of the litigation is changed; the claim is by and against a state; only states have access to the Hague Court. To exercise diplomatic protection is a discretionary right of the state; it may, for political reasons, withhold it, although its national has suffered damage in violation of a rule of general international law; on the other hand, it may exercise it, even if the damaged individual makes no claim; an individual, by accepting a Calvo clause in a contract, cannot contract away the right of diplomatic protection which belongs to his state. Damages are paid from state to state. The claimant state is under no obligation to distribute the indemnity fully to the individual in question. The claimant state can withdraw from a procedure already started, may make a settlement out of court, can accept less than the damage suffered. The claimant state is neither the representative nor the procedural substitute of the individual. Diplomatic protection is the subjective right of the state; the claimant state, as the Hague Court stated, claims for a wrong done to the state in the person of its national, because private property of nationals, invested abroad, is a part of the national wealth; not to allow illegal damage to be done to its nationals, whose property forms part of the national domain, is in the national interest. That is why an absolutely certain norm in the law of international claims demands the continuing nationality of the individual. Nationality is the "inner side" of diplomatic protection, just as diplomatic protection is the only international right growing out of nationality. But it must be effective nationality which can be opposed to other states; the *Nottebohm* decision is quoted and fully accepted.

As far as the diplomatic protection of juridical persons is concerned, it can be provided by treaty. But in general international law, a rule hardly exists as to the diplomatic protection of corporations as such. The citizenship of corporations alone is insufficient. State practice shows that states do not exercise diplomatic protection in favor of corporations which are even their own citizens, if the majority of shareholders are nationals of another state. On the other hand, they do exercise diplomatic protection on behalf of the shareholders who are their nationals, even if the corpora-

tion is a foreign citizen and even a citizen of the state vis-à-vis which the diplomatic protection is exercised.

The young Italian author makes use of the whole available literature in many languages; he does not neglect theoretical reasoning. But what is particularly interesting is that he attacks the question as a practical problem and makes full use of the practice of states, and that he makes a study and analysis of hundreds of cases of the Hague Court, international tribunals, Mixed Claims Commissions, Mixed Arbitral Tribunals. It is an interesting and a very good study.

JOSEF L. KUNZ

*La Situation Juridique des Pêcheries Sédentaires en Haute-Mer.* By Alexandre Papandreou. Athens: Revue Hellénique de Droit International, 1958. pp. xii, 153.

Mr. Papandreou's volume, written as a doctoral thesis at the University of Geneva, is a welcome addition to the scanty legal literature specifically devoted to this subject. It usefully brings together and analyzes the views of writers and some leading examples of state practice, although in neither category is it exhaustive or wholly free from minor errors. The study contains little novel information on state practice, and omits some (such as the Egyptian and Libyan sponge-fishery legislation) which might have been included. A more serious defect is the inadequate discussion (less than six pages) of the nature in fact of the so-called "sedentary" fisheries—the species concerned, the relevant biological and environmental factors, and the difficult question of defining a "sedentary" marine organism.

In his discussion of principle, the author observes that the possession of special rights by a single state over a sedentary fishery in the high seas necessarily derogates from the general freedom of the seas, and hence any such claim should be strictly evaluated and recognized in only the clearest cases. Although such claims may validly exist in exceptional situations, they must be founded on long, peaceful, and effective use and control by the claiming state without substantial opposition from other states. On this view, he persuasively finds it unnecessary and unsound to introduce the continental shelf doctrine in support of alleged rights over sedentary fisheries, and he considers that the International Law Commission erred in associating the two in its final draft articles on the law of the sea. Mr. Papandreou's study was completed before the Geneva Conference of 1958 substantially adopted the Commission's views on the subject, and he would no doubt deplore this result.

RICHARD YOUNG

*The United Nations and Economic and Social Co-operation.* By Robert E. Asher, Walter M. Kotschnig, William Adams Brown, Jr., and Associates. Washington, D. C.: The Brookings Institution, 1957. pp. xii, 561. \$2.50.

Any attempt to survey and explain the economic and social co-operation within the framework of the United Nations is welcome, as this is an area of operations little known and understood. The serious student of inter-

national organization has had no work of depth to use in connection with the transition from the system of the League of Nations to that of the United Nations. Especially lacking has been a study of the heritage from the League of Nations, the work of the Hot Springs and Bretton Woods Conferences in relation to the functions and operations of the United Nations. This and much more are accomplished in this volume, one in a seven-volume series being published by the Brookings Institution.

The approach to the complex problem of economic and social co-operation is functional. Four chapters are devoted to the economic category of problems and two to social action, welfare and social defense, one to education, science and culture, and one to problems of underdeveloped countries. In addition, there are the usual introductory and concluding appraisals, plus the second chapter entitled "Action in Emergency Situations." This chapter is both interesting and informative in its approach to an analysis of results.

There is no index. The topical table of contents assists the informed reader to locate material. The less informed person, however, may stumble in the process of finding the answer to questions. For example, the problems and accomplishments of the specialized agencies are discussed according to category of operations. Thus the reader must know how many such agencies there are or consult the summary information contained in Appendix B.

Promotion of the general welfare within the framework of the United Nations is a complicated process, as the authors successfully show. Throughout the work they give adequate attention to the scope of activities and to methods of solving problems, determining priorities, and securing financial support for programs. They have attempted to analyze results and obstacles; they have addressed themselves to the organizational framework and considered "whether changes in constitutional and organizational arrangements are needed." There is no adequate discussion of efforts of the League of Nations to revise its procedures in the area of economic and social operations. The authors have rendered a great service in presenting a detailed and documented study of economic and social co-operation.

MARY E. BRADSHAW

*Mexico and the United Nations.* By Jorge Castañeda. New York: Manhattan Publishing Company, 1958. pp. ix, 244. Index. \$3.00.

The present volume represents the contribution of the Legal Counselor of the Mexican Foreign Service to the series of studies inaugurated by the Carnegie Endowment for International Peace in the interest of assessing the "strengths and weaknesses" of the United Nations in terms of the national expectations of individual countries. What impact has the United Nations had upon their national policies, and how far in their judgment has the United Nations been effective as an agency to achieve the purposes for which it was established? The volume was planned by agreement between the Endowment and El Colegio de México, and, in addition to

designating a research assistant to study the reactions of Mexican public opinion, a study group of jurists and university professors was named to examine the author's draft, discuss it and propose modifications, leaving him, however, responsible for its final content.

The general description given by the author of the policies of the Mexican Delegations toward the United Nations during the ten-year period covered by the volume reflect the same progressive and democratic attitude shown by the Mexican Delegation to the Conference held at Mexico City two months before the Conference at San Francisco, that is to say, support for the principle of universality of membership, the elimination of the restrictions on the competence of the United Nations in cases of international controversies, the liberation of colonial countries, care for the protection of minorities and of fundamental human rights.

What will come as a surprise are the author's separate and more detailed conclusions with respect to "Pan Americanism" as a regional agency and the Inter-American Treaty of Reciprocal Assistance as a regional form of collective self-defense. He is concerned with the question whether at present it is to the interest of Latin America, and particularly of Mexico, to have a regional agency which embraces the United States. The so-called American international law, he explains, is largely made up of principles common to other countries, except for certain matters, such as the status of foreigners, in which the interests of Latin America and the United States are antagonistic. The principle of non-intervention was born not of the union but of the disunion of the Hemisphere. Instead of "representative democracy" being a bond of unity, as proclaimed in various resolutions, one of the most powerful reasons for the perpetuation of dictatorial regimes is the "decided moral and material support which they have been historically furnished by the United States." The Rio Treaty, he fears, is beginning to lose its original objective of collective defense and, in the light of the Guatemalan case in 1954, threatens to become a means to condemn and eventually to overthrow the national regimes of states, to the extent that they do not meet with the approval of a majority of the American Republics.

The indictment is severe, and it will be of interest to all who are concerned with the future of inter-American relations to know whether the author has interpreted Mexican public opinion correctly. Much evidence, it is believed, can be found to show that the author's views are not shared by other Mexican scholars of equal distinction.

C. G. FENWICK

*Un Témoignage sur la Communauté des Six.* Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1957. pp. 121. Fr. 320.

At the end of the five-years' transitional period, the European Coal and Steel Community is a going concern. This report, prepared for the Common Assembly of the Community by one of its Committees (with Mr. Wigny as *rapporteur*), reviews the state of the Community with undisguised

pride: By the end of 1956 the relative increase in coal and steel production was higher in the Community than anywhere in the world except in the Soviet Union. The intra-community trade in these commodities had gained by 92% as against a gain of 66% in other commodities. The percentage of exports to third countries was highest in the world and imports had increased considerably. While giving due credit to the liberalizing influence of the Organization for European Economic Co-operation (OEEC) and the General Agreement on Tariffs and Trade (GATT), and particularly to the important impact of the economic boom in Europe, the report attributes "a substantial part of the progress" to the opening of the common market of some 160 million people.

The first of two parts of the report examines the functioning of the several organs of the Community with the checks and balances imposed by the Community Treaty. The second part deals with the economic and social achievements, concluding that the benefits of the common market have been obtained without impairment of any significant national interests of the members or of third states; there is no indication that the Community will develop into an introverted, protectionist unit. Shortcomings (such as the failure to remove discriminatory tariffs in transportation other than by railways) as well as accomplishments are noted.

The main contribution of this well-conceived report lies in the fact that it is written from the special angle of the least powerful of the principal organs of the Community, the Common Assembly. Unlike the High Authority, which is endowed with significant "supranational" powers of decision with respect to the producers of coal and steel, the Assembly, with one exception noted below, was given the authority to do little more than to receive reports and debate them. It has sought to develop these limited powers through independent studies, fact-finding and expert opinion, questioning of the High Authority, insistence on being advised in advance of new projects, adoption of resolutions and mobilization of public opinion by its debates. The Assembly has prodded the High Authority when this executive body hesitated in the face of opposition by member governments, and has given it moral and political support in its relations with the governments. At times strong criticism was heard in the Assembly of the Authority's failure to act more effectively against cartels, of its price policies, etc. But the Assembly never considered exercising its single legally significant power—that of a vote of censure—which would force the "fall" of the High Authority. In the words of the report, the Assembly managed to exercise genuine supervision over the policies and activities of the High Authority.

In its effort to assert "democratic control" the Assembly has had less influence—the report notes regretfully—upon the Special Council of Ministers, the Community organ composed of cabinet ministers representing the member governments. This organ is to perform the delicate task of co-ordinating Community policies on steel and coal with the national economic policies of the member governments in the other economic sectors. It is mainly in this body that the Community interest is con-

fronted by special national interests. The Assembly has been pressing the Council to publish reports of its deliberations and specify the reasons for its decisions in order to allow a measure of surveillance. Thus "customary law is slowly developing."

The Consultative Committee, an advisory body in the Community composed of employers, workers and consumers, was given by the treaty the task of giving advice upon request. When the Committee sought to interrogate the High Authority on general programs, the Assembly stepped in, asserting its exclusive right of policy control. Again, the Assembly overrode the attempt by this Committee to withhold the records of its proceedings from the Assembly.

If the Assembly's influence is limited in relation to the Special Council of Ministers, it appears practically non-existent with respect to the national governments. This the report considers "a grave *lacuna*" in the scheme of democratic control: a member government which chooses to block a Community decision is not answerable to the Common Assembly.

The Common Assembly held its last session in Strasbourg in March, 1958. It has been replaced by a new Assembly serving the three Communities of the Six: the European Coal and Steel Community, the European Economic Community (the "Common Market") and the European Atomic Energy Community (EURATOM). The patterns of action developed in the Common Assembly and described by Mr. Wigny will most likely be followed in the new Assembly. This adds further utility to Mr. Wigny's interesting report.

ERIC STEIN

*International Trade Arbitration: A Road to World-Wide Cooperation.*

Edited by Martin Domke. New York: American Arbitration Association, 1958. pp. ii, 311. \$4.50.

It is singular that an activity as widespread and vital in our national and international economies as commercial arbitration should be so meager in its literature. The instant collection of essays is a notable contribution towards filling that gap. Anyone interested in the development of international trade as well as arbitration will find it interesting and rewarding reading. The timeliness of the text is illuminated by the fact that its publication coincided with the recent Conference on International Commercial Arbitration held at the United Nations on the basis of resolutions of the Economic and Social Council.

The volume consists of a series of essays by distinguished contributors under the section headings of economic aspects, treaty problems, international machinery for the settlement of trade disputes, state trading, comparative views on arbitration practice, uniform laws, enforcement of arbitral awards, special legal problems, and examples of commodity arbitration. The book closes with a number of useful appendices and a bibliography.

The articles by Charles H. Sullivan and Herman Walker, Jr., of the

Department of State, on "United States Treaty Policy on Commercial Arbitration" should be contrasted with the trenchant criticism and comment of Clifford J. Hynning at pages 120-121. It will be apparent that, although the Department may have gone as far as it could in this matter under the limitations of practical politics, it has little cause for satisfaction in the monumentality of its accomplishments in treaty legislation.

Professor Sohn has, as would be expected from him, a remarkably thorough and valuable article reviewing "Proposals for the Establishment of a System of International Tribunals" which have been made in recent years.

A most neglected and a most important topic in current legal literature, namely, state trading, is the subject of three articles by Professors Seidl-Hohenveldern and Hazard and by Samuel Pissar of UNESCO.

The section on comparative views on arbitration practice is perhaps the most valuable one. Clifford J. Hynning, in "A Comparison of British and American Policies on International Commercial Arbitration," makes abundantly clear the need for progress by the United States in this field. William Catron Jones' "History of Commercial Arbitration in England and the United States: A Summary View" brings to light many historical facts of interest. Pieter Sanders' comparative law study gives succinctly much valuable information and affords lawyers of the common-law world a brief description of the nature of the "*amiable compositeur*" on the Continent. Charles Carabiber, President, Court of Arbitration, International Chamber of Commerce, writes on the "Conditions of Development of International Commercial Arbitration." He criticizes the dichotomy of "national" and "foreign" arbitral awards and makes the significant point that so-called "foreign" awards in fact partake of an international character derived from the residence of the parties in different countries and the international character of the contract out of which the arbitration eventuates.

Professor Nadelmann contributes an article on "Uniform Legislation vs. International Conventions" as means for unification of law, which should be read by scholars of public and private international law as well as comparative law. Its significance is much wider than arbitration. Mario Matteucci, Secretary General of the International Institute for the Unification of Private Law, has a stimulating article, "Utopia and Reality in the Realm of Arbitration." Professor Kagel proposes "An International Registry for Arbitration Awards." Two other valuable articles, one on measures for the promotion of arbitration and the other on private international law, are contributed by Professor Siegert and Ernest Mezger of the Paris Bar, respectively.

While the above articles do not exhaust the contributions to the study, they indicate the breadth and quality of the inquiries gathered together under the able editorship of Dr. Martin Domke. It is a most interesting, illuminating and useful addition to a field of the literature which urgently requires further development.

KENNETH S. CARLSTON

*Le Nouveau Panaméricanisme: L'Évolution du Système Inter-Américain vers le Fédéralisme.* By René-Jean Dupuy. Paris: Éditions A. Pedone, 1956. pp. 256.

It is perhaps well that an estimate of a regional organization should be written by one outside the regional group who can view it in the light of the larger field of universal international law. At any rate, this estimate of the new Panamericanism by a French scholar presents a fresh point of view that should make American scholars check their own more limited outlook and see themselves as others see them.

"Federalism" is a strong word to use, even though it is not as strong to a European as it is to a Mexican or an Argentine, with whom it would doubtless provoke immediately a hostile reaction. But the author knows the background of his problem as well as its present application, and before proceeding to analyze the present situation he examines the development of continental solidarity in its moral and economic, as well as in its political, aspects. The physical setting of the Western Hemisphere is noted, followed by some acute observations on the ideology of America, expressed in an individualism drawn from the principles of Locke and Montesquieu and in a strong sense of national sovereignty in the relations of the state with other states. Sovereignty brings with it the equality of states, which might well have been in conflict with hemispheric unity except for the counteraction of elements of continental solidarity, due to the isolation of the New World from the Old.

Following a chapter dealing with the evolution of inter-American relations during and immediately after the war, the author examines "Pan American Law," dealing with "legislative" organs and "collective legislation"; Pan American procedures for the settlement of disputes; and Pan American "security," this last section surveying the organs established, the restraints imposed upon intervention and the resort to force, and the application of collective measures in concrete cases.

The conclusions of the author are somewhat subtle, matching the material tendencies toward greater solidarity (federalism?) with the ideological appeal of the great moral currents coming from Spain, Portugal and France:

The South American soul is by nature divided: it animates a body of which the feet are Indian, the hands Yankee, the heart Spanish, and the head often French.

C. G. FENWICK

*Soviet Diplomacy and the Spanish Civil War.* By David T. Cattell. Berkeley and Los Angeles: University of California Press, 1957. pp. xi, 204. Index. \$2.00, paper; \$3.00, cloth.

Notwithstanding the passage of twenty years, there are still many aspects of the tortuous activity connected with the Spanish Civil War that remain to be fully clarified. The present volume probes the rôle of Soviet diplomacy during the war and seeks to examine the objects of Moscow's



policy. For this purpose the author has examined Soviet literature and Russian press accounts. He has consulted the captured German Foreign Office archives. He has also had access to some of the International Non-Intervention Committee records and talked with its Secretary. The study is not narrowly confined to a description of Soviet moves alone, but views these in the context of the general maneuvering of the Powers at the time.

One sets the book down grateful to the author for turning the searchlight of determined scholarship upon Soviet diplomacy in the Spanish war. He has ferreted out and documented numerous phases of Soviet action and provided a more complete story of its diplomacy in this regard than we have had heretofore. When all is done, one is disappointed, however, in how relatively little more we know about the whole matter than was generally apparent in informed circles at the time. This shortcoming is not to be laid upon the author's doorstep, for he has done a commendable piece of research and analysis. Until scholars can gain free access to carefully guarded records in Soviet, Fascist and other hands, little more can probably be added, except by way of amplified interpretation, to what Dr. Cattell and others have set down.

The present volume deals essentially with the formal side of Soviet diplomacy. The partisan activities of the Communist apparatus have been dealt with by the author in a companion volume. The treatment covers Soviet pronouncements and diplomatic interchanges with the Powers in connection with the outbreak of the war, the Non-Intervention Agreement, the control scheme, the problem of volunteers, a few of the incidents relating to attacks upon vessels, and the rôle (or exclusion) of the League of Nations.

It is the author's thesis that Soviet diplomacy was guided largely by the rising tide of German and Italian power which Moscow was coming to see as an eventual danger to itself. The object of its diplomacy, he believes, was to draw closer to Britain and France for collective security, while goading the timid governments of these countries to take bolder stands to save the republican regime in Spain, to oppose Fascist designs there, and to "delay and deplete" German and Italian armaments. Soviet intervention by supply of arms and "volunteers" had as its goal, in the author's opinion, enabling the existent regime to fight a war of attrition against the Germans and Italians, thereby wearing down their danger to Russia. He believes that this, rather than setting up a Communist regime subordinate to Moscow, was its chief end. In reviewing Soviet actions and statements the author minimizes the traditional aspects of Soviet policy of fishing in troubled waters and of exploiting revolutionary situations. And he makes no connection between the organization of bands of "volunteers" for Spain and the use or threat of such forces in other revolutionary and critical situations before and since then.

In conclusion, the author feels that the outcome of the war did not end as disadvantageously for Britain and France as many, including the Communists, thought it would, in view of the Nazi and Fascist interventions. But it did mark a turning point in Soviet policy. For from "pre-

ferring a policy of collective security and alliance with England and France, the Soviet leaders decided on appeasement and agreement with Hitler." It was "no accident," in the author's view, "that this reversal came with the end of the Spanish Civil War." The refusal of London and Paris, for good reasons of their own national choosing, to make common cause with Moscow in the turgid diplomacy of 1936-1938 was unquestionably a factor, along with the Munich Accord, in paving the way for the Russo-German Pact of 1939.

NORMAN J. PADELFORD

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# OFFICIAL DOCUMENTS

## UNITED NATIONS

### REPORT OF THE INTERNATIONAL LAW COMMISSION

COVERING THE WORK OF ITS TENTH SESSION, APRIL 28-JULY 4, 1958\*

#### CHAPTER I

##### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the Statute of the Commission annexed thereto, as subsequently amended, held its tenth session at the European Office of the United Nations, Geneva, from 28 April to 4 July 1958. The work of the Commission during the session is described in the present report. Chapter II of the report contains the model rules on arbitral procedure, which are submitted to the General Assembly for its consideration. Chapter III contains the final draft on diplomatic intercourse and immunities which is also submitted to the General Assembly. Chapter IV gives an account of the progress so far made in the Commission's work on the subjects of state responsibility, the law of treaties and consular intercourse and immunities. Chapter V deals with certain administrative and other matters.

##### I. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Roberto Ago	Italy
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China

\* U.N. General Assembly, 13th Sess., Official Records, Supp. No. 9 (A/3859). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105; Vol. 45 (1951), p. 103; Vol. 47 (1953), p. 1; Vol. 48 (1954), p. 1; Vol. 49 (1955), p. 1; and Official Documents, Vol. 50 (1956), p. 190; Vol. 51 (1957), p. 154; Vol. 52 (1958), p. 177.

Mr. Thanat Khoman	Thailand
Faris Bey El-Khoury	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A.E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

3. On 30 April 1958 the Commission elected Mr. Ricardo J. Alfaro of Panama to fill the casual vacancy caused by the resignation of Mr. Jean Spiropoulos consequent upon the latter's election to the International Court of Justice. Mr. Alfaro assisted in the work of the Commission from 28 May onwards.

4. At the 454th meeting on 2 June 1958, the Commission received a letter from Mr. Abdulah El-Erian, United Arab Republic, in which he stated that, having regard to the provision in Article 2, paragraph 2, of the Commission's Statute that no two members of the Commission shall be nationals of the same state, he wished to tender his resignation. The Commission accepted the resignation and, as from 2 June 1958, Mr. El-Erian took no further part in the work of the Commission. At a private meeting on 6 June 1958 the Commission decided to postpone until the beginning of the next session the election to fill the casual vacancy caused by the resignation of Mr. El-Erian.

5. Mr. Thanat Khoman was not able to be present during the session.

## II. OFFICERS

6. At its 431st meeting on 28 April 1958, the Commission elected the following officers:

*Chairman:* Mr. Radhabinod Pal;

*First Vice-Chairman:* Mr. Gilberto Amado;

*Second Vice-Chairman:* Mr. Grigory I. Tunkin;

*Rapporteur:* Sir Gerald Fitzmaurice.

7. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

## III. AGENDA

8. The Commission adopted an agenda for the tenth session consisting of the following items:

1. Filling of casual vacancy in the Commission (Article 11 of the Statute).
2. Arbitral procedure: General Assembly resolution 989 (X).
3. Diplomatic intercourse and immunities.

4. Law of treaties.
5. State responsibility.
6. Consular intercourse and immunities.
7. Date and place of the eleventh session.
8. Planning of future work of the Commission.
9. Limitation of documentation: General Assembly resolution 1203 (XII).
10. Other business.

9. In the course of the session the Commission held forty-eight meetings. It considered all the items on the agenda with the exception of the law of treaties (item 4) and state responsibility (item 5). As regards the latter two items, and consular intercourse and immunities (item 6) which was considered only briefly, see Chapter IV.

## CHAPTER II

### ARBITRAL PROCEDURE

#### I. GENERAL OBSERVATIONS

##### A. HISTORICAL

10. In presenting its final report on arbitral procedure, the International Law Commission recalls the following passages from the opening paragraphs of the report on this subject which it drew up at its fifth session in 1953:<sup>1</sup>

"9. At its first session in 1949, the International Law Commission selected arbitral procedure as one of the topics of codification of international law and appointed Mr. Georges Scelle as special rapporteur. The successive stages of the preparation and discussion of that topic are set forth in paragraphs 11-14 of the report of the Commission on its fourth session.<sup>2</sup>

"10. At its fourth session in 1952, the Commission adopted a 'draft on arbitral procedure' with accompanying comments.<sup>3</sup> In accordance with Article 21, paragraph 2, of its statute, the Commission decided to transmit the draft, through the Secretary-General, to Governments with the request that they should submit their comments. The Commission also decided to draw up, during its fifth session in 1953, a final draft for submission to the General Assembly in accordance with Article 22 of its statute.

"11. . . .

"12. During its fifth session in 1953, the Commission, at its 185th to 194th meetings, considered the draft in the light of the comments of Governments and of the study of the provisional draft by its members in the intervening period between the fourth and fifth sessions. As the result, the Commission adopted a number of substantial changes

<sup>1</sup> Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), Ch. II.

<sup>2</sup> *Ibid.*, 7th Sess., Supp. No. 9 (A/2168), pars. 11-14.

<sup>3</sup> *Ibid.*, par. 24.

which are commented upon in the present report. No reference is made to verbal changes and alterations in drafting."

11. In submitting its 1953 draft on arbitral procedure, which was at that time intended as a final draft, the Commission, in paragraph 55 of its report for that year,<sup>4</sup> expressed the view that this final draft, as adopted, called for action on the part of the General Assembly of the kind contemplated in Article 23, paragraph 1 (c), of the Statute of the Commission, namely, that the draft should be recommended to Member States with a view to the conclusion of a convention; the Commission recommended accordingly. The reasons why the Commission considered the conclusion of a general convention on the subject to be important and highly desirable were set out in full in paragraph 56 of that report.

12. The draft was not, however, finally considered by the Assembly until the tenth session in 1955, when it was subjected to considerable criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the subject. These criticisms were summarized as follows by the special rapporteur, Mr. Georges Scelle, in the report he prepared for the Commission at its ninth session in 1957:

"The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, [*i.e.*] the codification of custom."<sup>5</sup>

Accordingly, the Assembly eventually adopted resolution 989 (X) of 14 December 1955 which reads as follows:

"The General Assembly,

"*Having considered* the draft<sup>6</sup> on arbitral procedure prepared by the International Law Commission at its fifth session and the comments<sup>7</sup> thereon submitted by Governments,

"*Recalling* General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

"*Noting that* a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and

<sup>4</sup> *Ibid.*, 8th Sess., Supp. No. 9 (A/2456).

<sup>5</sup> See Yearbook of the International Law Commission, 1957, Vol. II (A/CN.4/SER.A/1957/Add. 1), Doc. A/CN.4/109, par. 7.

<sup>6</sup> Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), par. 57.

<sup>7</sup> *Ibid.*, 10th Sess., Annexes, agenda item 52, docs. A/2899 and Add.1 and 2.

in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

"*Believing* that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

"1. *Expresses* its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

"2. *Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session;

"3. *Decides* to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

13. The International Law Commission was not able to take the matter up at its eighth session in 1956, because of the necessity of completing at that session its final draft on the law of the sea; but it devoted some time to the subject at its ninth session in 1957, with a view to completing the work during its present (tenth) session, for presentation to the General Assembly at its forthcoming thirteenth session, as requested in resolution 989 (X) quoted above. As stated in paragraph 19 (Chapter III) of its 1957 report,<sup>8</sup> the Commission, at the ninth session, considered the matter principally from the point of view of what, in the light of the Assembly's resolution, ought to be "the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether this object should be a convention or simply a set of rules which might inspire states in the drawing up of provisions for inclusion in international treaties and special arbitration agreements." As stated in the same paragraph, the Commission, at its 419th meeting, decided in favour of the second alternative. It may be noted, without unduly stressing the point, that the Assembly resolution, while leaving fully open the possibility of convening an eventual international conference to conclude a convention on the subject, appeared rather to incline to the alternative solution.

14. In coming to this conclusion, a majority of the members of the Commission<sup>9</sup> were motivated by the feeling that the draft as it stood constituted a homogeneous and self-consistent whole, based on the view that the process of arbitration flowed logically from the agreement of the parties to submit to arbitration and that, the agreement to arbitrate having once been entered into, certain necessary consequences followed which affected the whole

<sup>8</sup> *Ibid.*, 12th Sess., Supp. No. 9 (A/3623).

<sup>9</sup> See, *passim*, the summary record of the 419th meeting of the Commission in Vol. I of the Yearbook of the International Law Commission, 1957 (A/ON.4/SER.A/1957), pp. 181-185.



of the ensuing arbitral procedure, and which the parties must, in order to honour their agreement, be prepared to accept. It was, however, clear from the reactions of governments that this concept of arbitration, while not necessarily going beyond what two states might be prepared to accept for the purposes of submitting a particular dispute to arbitration *ad hoc*, or even beyond what two individual states might be willing to embody in a bilateral treaty of arbitration intended to govern generally the settlement of disputes arising between them *inter se*, did definitely go beyond what the majority of governments would be prepared to accept in advance as a general multilateral treaty of arbitration to be signed and ratified by them, in such a way as to apply automatically to the settlement of all future disputes between them. To re-cast the draft in such a way that it might attract the signature and ratification of a majority of governments it would be necessary to embark on a complete revision, involving in all probability an alteration in the whole concept on which it was based. In these circumstances the Commission took the view that it would be preferable to leave the existing general form and structure of the draft as it stood, but to present it to the General Assembly not as the basis of a general multilateral convention on arbitral procedure, but as a set of model draft articles which states could draw upon, to such extent as they might see fit in concluding bilateral or plurilateral arbitral agreements *inter se*, or in submitting particular disputes to arbitration *ad hoc*.

15. The special rapporteur, Mr. Georges Scelle, accordingly drew up a further report<sup>10</sup> in the light of this conclusion, for consideration by the Commission at its present session. On the basis of this report the Commission discussed the matter at its 433rd to 448th, 450th and 471st to 473rd meetings and adopted the articles set out in Part II below. These articles are followed by a general commentary, but no article-by-article commentary is furnished, for the following reasons. For the purposes of its original draft of thirty-two articles prepared at its fourth session in 1952<sup>11</sup> for comment by governments, the Commission had furnished an article-by-article commentary prepared by the special rapporteur, Mr. Georges Scelle. Although, as stated in paragraph 12 of its report for 1953,<sup>12</sup> a number of substantial changes were, in the light of the comments of governments, introduced into the final draft submitted to the Assembly in that report, these changes were not considered to be of such a character as to require a further or new article-by-article commentary, and the matter was dealt with by means of a general commentary contained in paragraphs 15-52 of the report prepared by the general rapporteur for that year, Mr. H. Lauterpacht (now Sir Hersch Lauterpacht, Judge of the International Court of Justice). The present text, now presented, while also containing a number of changes of substance and, as explained in paragraph 13 above, entailing a change of objective so to speak, equally involves no fundamental alterations of structure or concept, for the reasons set out in paragraph 14. The in-

<sup>10</sup> A/CN.4/113 of 6 March 1958.

<sup>11</sup> Official Records of the General Assembly, 7th Sess., Supp. No. 9 (A/2163), Ch. II.

<sup>12</sup> *Ibid.*, 8th Sess., Supp. No. 9 (A/2456).

crease in the original number of articles from thirty to thirty-eight is due almost wholly to the fact that the Commission decided, on the recommendation of the special rapporteur, and in the light of certain comments made in the General Assembly in 1955, to include a number of provisions relating to the routine conduct of arbitral proceedings, such as are normally inserted in the *compromis d'arbitrage*.<sup>13</sup> These provisions are for the most part of a type which do not involve important points of principle and call for no special comment. Having regard to these considerations, to the detailed commentary contained in the 1952 report, to the further detailed commentary on the 1952 articles contained in the documents referred to in footnote 13 below, to the very full general commentary contained in the 1953 report, and also to the existence of further commentaries contained in the special rapporteur's reports for 1957<sup>14</sup> and 1958,<sup>15</sup> the Commission feels that any further general or detailed restatement of the principles governing the text would be otiose, and that the comparatively brief commentary on certain of the articles which is contained in Part III below will suffice to explain any points of special importance or any changes to which particular attention should be drawn.

#### B. SCOPE AND PURPOSE OF THE DRAFT<sup>16</sup>

16. The commentary to the 1953 text states fully the fundamental principles governing the law of arbitration on which the text is based.<sup>17</sup> There is no need to re-state all these principles. Special reference will however be made presently to two of them (namely the character and consequences of the obligation to arbitrate, and the autonomy of the parties), on account of their great overriding importance.

17. The structural and other affinities between the present text and that of 1953 are clearly apparent from the comparative table of articles which,

<sup>13</sup> This decision was taken despite the fact that the valuable printed Commentary on the Draft Convention on Arbitral Procedure (A/CN.4/92) to the original mimeographed version of which the Commission referred in paragraph 13 of its 1953 report, contained an annex of about 130 pages devoted to this type of provision.

<sup>14</sup> A/CN.4/109, par. 7. See Yearbook of the International Law Commission, 1957, Vol. II (A/CN.4/SER.A/1957/Add.1). <sup>15</sup> A/CN.4/113 of 6 March 1958.

<sup>16</sup> The present draft is of course intended to apply to arbitrations between states. The Commission discussed the question how far it might also be applicable to other types of arbitration, such as arbitrations between international organizations, or between states and international organizations, or between states and foreign private corporations or other juridical entities. The Commission decided not to proceed with these aspects of the matter. Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purposes of arbitrations between states and international organizations or between international organizations.

In the case of arbitrations between states and foreign private corporations or other juridical entities, different legal considerations arise. However, some of the articles of the draft, if adapted, might be capable of use for this purpose also.

<sup>17</sup> Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), Ch. II, pars. 18-29 and 48-52.

for convenience of reference, is given in a footnote below.<sup>18</sup> But these affinities must not be allowed to obscure the fact that the text is not now presented as a prospective convention the adoption of which by the General Assembly would involve for Member States the question of deciding whether to sign and ratify it or not. This question, considered as such, no longer arises. If, as the Commission, in accordance with Article 23, paragraph 1 (b), of its Statute, now recommends, the Assembly adopts the present report by resolution, the draft articles would become binding on any Member State only in the following circumstances, which indicate the three or four purposes they are now specifically intended to serve:

(i) If they were embodied in a convention between two or more states for signature and ratification *inter se*, intended to govern the settlement of all, or of any specified category of future disputes arising between them;

(ii) If they were similarly embodied in a particular arbitral agreement for the settlement *ad hoc* of an already existing dispute;

(iii) If—which is a variant of (ii)—parties to a dispute which they propose to refer to arbitration, wished to embody the articles, in whole or in part, in their arbitral agreement or in the *compromis d'arbitrage*, or to include clauses based upon them, or for which the articles would serve as a model;

(iv) If, in the same circumstances as (iii), the parties did not wish, or found it difficult, to draw up a detailed arbitral agreement or *compromis*, and preferred simply to declare that the settlement of the dispute and the process of arbitration would be governed by the present articles with or without such exceptions, variations or additions as the parties might indicate.

18. It is thus clear that the draft articles are not intended as, and do not constitute a general treaty of arbitration. They are intended as a guide, not as a straitjacket; in this way the fundamental principle of the autonomy of the parties to a dispute, to which further reference will be made presently, is fully preserved. Nevertheless, this principle itself is not unfettered. It is absolute only in the sense that nothing can compel two states to engage in arbitration except their own agreement to do so, given either generally and in advance, or *ad hoc* in relation to the particular dispute. But this consent, once given, binds the parties and obliges them to

<sup>18</sup> The present numbers of the articles are followed by numbers in brackets which indicate the article in the 1953 draft (A/2456, par. 57) on which the present article is broadly based. Where the present article had no equivalent in 1953, this fact is indicated by the word "new" in brackets after the number of the article.

Preamble (1 and 14), Article 1 (2), Article 2 (9), Article 3 (3 and 4), Article 4 (5), Article 5 (6), Article 6 (8), Article 7 (new), Article 8 (10), Article 9 (11), Article 10 (12, par. 1), Article 11 (12, par. 2), Article 12 (13), Article 13 (new), Article 14 (new), Article 15 (new), Article 16 (new), Article 17 (new), Article 18 (15), Article 19 (16), Article 20 (17), Article 21 (18), Article 22 (21), Article 23 (22), Article 24 (23), Article 25 (20), Article 26 (19), Article 27 (19, 7 and part new), Article 28 (24, 25), Article 29 (24, par. 2), Article 30 (26), Article 31 (27), Article 32 (new), Article 33 (28), Article 34 (new), Article 35 (30), Article 36 (31), Article 37 (32), Article 38 (29 and part new).

carry out the undertaking to arbitrate. From this, certain consequences follow, which are legal consequences. These cannot be escaped by the parties, whether they make use of the present articles to govern their arbitration or not—for these consequences are inherent in, and spring from, the simple undertaking to arbitrate, once this has been given in binding form.

19. The present text therefore, like that of 1953, is based on the fundamental concept that an agreement to arbitrate involves in substance an international obligation equivalent to a treaty obligation.<sup>19</sup> Having once entered into it (which they were free not to do) the parties are legally bound to carry it out and, in consequence, to take all the steps necessary to enable the arbitration to take place and the dispute to be finally liquidated; and, similarly, to refrain from any action, positive or negative, which would impede or frustrate that consummation. This may be styled the principle of non-frustration. Experience having shown that there are a number of ways in which a party to a dispute, despite its undertaking to arbitrate, can in fact frustrate the process of arbitration—e.g., by failing to appoint its arbitrator, or otherwise to co-operate in setting up the arbitral tribunal; by withdrawing its arbitrator during the course of the proceedings and failing to appoint another; by failing to appear and present or defend its case before the tribunal, etc.—the present text, like that of 1953, provides automatic procedures for filling in any gaps thus created by the action or inaction of the parties, and thereby for preventing the frustration of the agreement and enabling the arbitration to take place and result in a final settlement binding on the parties.<sup>20</sup>

20. Within these limits which, it should be emphasized, do not spring from these articles as such, but from the inherent legal position on which they are based, and by which they themselves are governed, the parties, by virtue of the principle of their autonomy,<sup>21</sup> remain free to conduct their arbitration as they please. Subject to the overriding principle of non-frustration, they can adopt what procedural or other rules they like. Insofar as they adopt or proceed on the basis of the present articles, they can (subject always to the same limitation) introduce what exceptions, variations or additions seem good to them. In this respect, it is desirable to make it quite clear that, within the limits stated, the application of the present articles, insofar as adopted by the parties to a dispute, will always be subject to any special provisions in the arbitral agreement or *compromis d'arbitrage*. Consequently, although for reasons of convenience or emphasis certain of the articles contain phrases such as "Unless otherwise provided in the *compromis* . . .," this should not be taken to mean that the application of other articles is not equally subordinated to the will of the parties and to variation or even exclusion under the terms of the *compromis*.

21. Naturally, where in the preceding paragraph reference is made to the limitations implied by the principle of non-frustration, it is not intended

<sup>19</sup> The forms taken by arbitral agreements may of course be of very diverse characters.

<sup>20</sup> See Official Records of the General Assembly, 8th Sess., Supp. No. 9 (A/2456), pars. 18-25.

<sup>21</sup> *Ibid.*, para. 48-52.

to suggest that states can in practice be prevented from drawing up their arbitral agreement or *compromis* in such a way that it will be possible for one or other of them to frustrate the purpose of the arbitration. But (at any rate with the exception of those cases where the agreement or *compromis* expressly permits it) the party taking the frustrating action will be acting in a manner which, even if not actually contrary to the arbitral agreement as such, will be contrary to the basic principles of general international law governing the process of arbitration. The present articles are designed (and this is now one of their chief objects) to ensure that, if the parties draw up their arbitral agreement or *compromis* in such a way that its object can be frustrated, they will at least do so with open eyes. If two states, aware of what they are doing, choose to draft their agreement or *compromis* in this way, they are entitled—or at any rate they have the faculty—to do so. But if they wish to close the door to the possibility of frustration, the present articles indicate by what means this can be done.

## II. TEXT OF THE DRAFT

22. The final text on arbitral procedure in the form of a set of model draft articles, as adopted by the Commission at its 473rd meeting, reads as follows:

### MODEL RULES ON ARBITRAL PROCEDURE

#### PREAMBLE

The undertaking to arbitrate is based on the following fundamental rules:

1. Any undertaking to have recourse to arbitration in order to settle a dispute between states constitutes a legal obligation which must be carried out in good faith.
2. Such an undertaking results from agreement between the parties and may relate to existing disputes or to disputes arising subsequently.
3. The undertaking must be embodied in a written instrument, whatever the form of the instrument may be.
4. The procedures suggested to states parties to a dispute by these model rules shall not be compulsory unless the states concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.
5. The parties shall be equal in all proceedings before the arbitral tribunal.

#### The Existence of a Dispute and the Scope of the Undertaking to Arbitrate

##### ARTICLE 1

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the

obligation to go to arbitration, such preliminary question shall, at the request of any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.

2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

### The Compromis

#### ARTICLE 2

1. Unless there are earlier agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, as a minimum :

(a) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;

(b) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

(c) The method of constituting the tribunal and the number of arbitrators.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular :

(i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;

(ii) The power, if any, of the tribunal to make recommendations to the parties;

(iii) Such power as may be conferred on the tribunal to make its own rules of procedure;

(iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;

(v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;

(vi) The majority required for the award;

(vii) The time limit within which the award shall be rendered;

(viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award, or any prohibition of such opinions;

(ix) The languages to be employed in the course of the proceedings;

(x) The manner in which the costs and disbursements shall be apportioned;

(xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

## Constitution of the Tribunal

### ARTICLE 3

1. Immediately after the request made by one of the states parties to the dispute for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, either by means of the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal.

2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on arbitrability, the President of the International Court of Justice shall, at the request of either party, appoint the arbitrators not yet designated. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

4. Where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed to be constituted when the president is selected. If the president has not been chosen within two months of the appointment of the arbitrators, he shall be designated in accordance with the procedure in paragraph 2.

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law.

### ARTICLE 4

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. Once the proceedings have begun, an arbitrator appointed by a party may not be replaced except by mutual agreement between the parties.

3. Arbitrators appointed by mutual agreement between the parties, or by agreement between arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in Article 3, paragraph 2, may not be changed even by agreement between the parties.

4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first procedural order.

#### ARTICLE 5

If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of an arbitrator, it shall be filled in accordance with the procedure prescribed for the original appointment.

#### ARTICLE 6

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may only propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator or of the president of the tribunal, the question of disqualification shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of one of them.

3. Any resulting vacancy or vacancies shall be filled in accordance with the procedure prescribed for the original appointments.

#### ARTICLE 7

Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning, if these have already been started.

### Powers of the Tribunal and the Process of Arbitration

#### ARTICLE 8

1. When the undertaking to arbitrate or any supplementary agreement contains provisions which seem sufficient for the purpose of a *compromis*, and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in Article 2. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the institution or continuation of the proceedings. In the contrary case, the tribunal shall order the parties to complete or conclude the *compromis* within such time limits as it deems reasonable.

2. If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal,



within three months after the parties report failure to agree—or after the decision, if any, on the arbitrability of the dispute—shall proceed to hear and decide the case on the application of either party.

#### ARTICLE 9

The arbitral tribunal, which is the judge of its own competence, has the power to interpret the *compromis* and the other instruments on which that competence is based.

#### ✓ ARTICLE 10

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono*.

#### ARTICLE 11

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.

#### ARTICLE 12

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure.

2. All decisions shall be taken by a majority vote of the members of the tribunal.

#### ARTICLE 13

If the languages to be employed are not specified in the *compromis*, this question shall be decided by the tribunal.

#### ARTICLE 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.

2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.

3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may

deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.

4. The members of the tribunal shall have the right to put questions to agents, counsel or advocates, and to ask them for explanations. Neither the questions put nor the remarks made during the hearing are to be regarded as an expression of opinion by the tribunal or by its members.

#### ARTICLE 15

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.

3. The time limits fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.

4. The hearing shall consist in the oral development of the parties' arguments before the tribunal.

5. A certified true copy of every document produced by either party shall be communicated to the other party.

#### ARTICLE 16

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.

2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

#### ARTICLE 17

1. After the tribunal has closed the written pleadings, it shall have the right to reject any papers and documents not yet produced which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any such papers and documents which the agents, advocates or counsel of one or other of the parties may bring to its notice, provided that they have been made known to the other party. The latter shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing.

2. The tribunal may also require the parties to produce all necessary documents and to provide all necessary explanations. It shall take note of any refusal to do so.

#### ARTICLE 18

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall

have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.

2. The parties shall co-operate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

#### ARTICLE 19

In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis*, the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

#### ARTICLE 20

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

#### ARTICLE 21

1. When, subject to the control of the tribunal, the agents, advocates and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

2. The tribunal shall, however, have the power, so long as the award has not been rendered, to re-open the proceedings after their closure, on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.

#### ARTICLE 22

1. Except where the claimant admits the soundness of the defendant's case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal without the consent of the defendant.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

#### ARTICLE 23

If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of either party, the tribunal may, if it thinks fit, embody the settlement in an award.

#### ARTICLE 24

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend this period if it would otherwise be unable to render the award.

## ARTICLE 25

1. Whenever one of the parties has not appeared before the tribunal, or has failed to present its case, the other party may call upon the tribunal to decide in favour of its case.

2. The arbitral tribunal may grant the defaulting party a period of grace before rendering the award.

3. On the expiry of this period of grace, the tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if satisfied that they are well founded in fact and in law.

## Deliberations of the Tribunal

## ARTICLE 26

The deliberations of the tribunal shall remain secret.

## ARTICLE 27

1. All the arbitrators shall participate in the decisions.

2. Except in cases where the *compromis* provides for a quorum, or in cases where the absence of an arbitrator occurs without the permission of the president of the tribunal, the arbitrator who is absent shall be replaced by an arbitrator nominated by the President of the International Court of Justice. In the case of such replacement the provisions of Article 7 shall apply.

## The Award

## ARTICLE 28

1. The award shall be rendered by a majority vote of the members of the tribunal. It shall be drawn up in writing and shall bear the date on which it was rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it. The arbitrators may not abstain from voting.

2. Unless otherwise provided in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or having been duly summoned to appear.

4. The award shall immediately be communicated to the parties.

## ARTICLE 29

The award shall, in respect of every point on which it rules, state the reasons on which it is based.

## ARTICLE 30

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has allowed a time limit for the carrying out of the award or of any part of it.

## ARTICLE 31

During a period of one month after the award has been rendered and communicated to the parties, the tribunal may, either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature.

## ARTICLE 32

The arbitral award shall constitute a definitive settlement of the dispute.

## Interpretation of the Award

## ARTICLE 33

1. Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within three months of the rendering of the award, be referred to the tribunal which rendered the award.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within the above-mentioned time limit the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

3. In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request.

## ARTICLE 34

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the International Bureau of the Permanent Court of Arbitration or with another depositary selected by agreement between the parties.

## Validity and Annulment of the Award

## ARTICLE 35

The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- (d) That the undertaking to arbitrate or the *compromis* is a nullity.

## ARTICLE 36

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the Inter-

national Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.

2. In the cases covered by Article 35, sub-paragraphs (a) and (c), validity must be contested within six months of the rendering of the award, and in the cases covered by sub-paragraphs (b) and (d) within six months of the discovery of the corruption or of the facts giving rise to the claim of nullity, and in any case within ten years of the rendering of the award.

3. The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment.

#### ARTICLE 37

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement between the parties, or, failing such agreement, in the manner provided by Article 8.

#### Revision of the Award

#### ARTICLE 38

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact, and in any case within ten years of the rendering of the award.

3. In the proceedings for revision, the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.

4. If the tribunal finds the application admissible, it shall then decide on the merits of the dispute.

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to the tribunal which rendered the award, it may, unless the parties otherwise agree, be made by either of them to the International Court of Justice.

7. The tribunal or the Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for revision.

#### III. COMMENTS ON PARTICULAR ARTICLES

##### *Notes:*

- (i) The following comments are not intended as an article-by-article commentary. Only those articles are commented upon which are either new or involve substantial changes not otherwise self-explanatory.

Many of the changes made, as compared with the 1953 text, are only changes of a technical or drafting character or in the nature of re-arrangement.

- (ii) No attempt is made to indicate the reason why in a number of cases no changes have been made in order to meet criticisms made in the General Assembly or elsewhere by governments. In the first place, the reasons for and against the proposed changes are fully set out in the 1957<sup>22</sup> and 1958<sup>23</sup> reports of the special rapporteur, Mr. Georges Scelle. In the second place, the fact that the articles are now presented as a model draft rather than as a potential general convention of arbitration which would be binding upon states has the effect of placing these criticisms against a different background thus causing them to lose a good deal of their point.

23. PREAMBLE. Subject to language changes, the first three paragraphs of this preamble correspond to Article 1 of the 1953 text. Paragraph 4 is new, but merely states the position already set out earlier in the present commentary, according to which the articles have no binding effect unless specifically embodied by the parties in a *compromis* or other agreement. Paragraph 5 corresponds to Article 14 of the 1953 text.

24. In view of the fact that all the provisions of the preamble relate to the substantive law of arbitration rather than to arbitral procedure as such, the Commission felt that in the present context of the draft it would be preferable to state them in preambular form and not keep them as substantive articles. In effect they govern any arbitration, but they govern it as principles of general international law rather than as deriving from the agreement of the parties.

25. ARTICLE 1. This article, like a number of others in the text, *e.g.*, Articles 3, 6, 27, 33, 36, 37 etc., involves the exercise of functions by the President of the International Court of Justice, or by the Court itself. Criticisms of similar provisions in the 1953 text were made on the ground that this set up the International Court of Justice as a sort of super-tribunal not subordinate to the agreement of the parties. Despite doubts expressed by certain of its members, the Commission did not consider these criticisms to be well founded, particularly in the present context of the draft, according to which the articles in question will be binding upon the parties only in so far as they accept those articles and make them part of the arbitral agreement. On the other hand, the articles are necessary if the process of arbitration is not to be liable to possible frustration as described in paragraphs 18, 19, 20 and 21 above. The practice of conferring functions upon the President of the International Court, or even upon the Court itself, is a fairly common one and has never given rise to any difficulty. Further comments on this matter are contained in paragraphs 45 and 46 of the commentary to the 1953 text.

<sup>22</sup> See Yearbook of the International Law Commission, 1957, Vol. II (A/CN.4/SER.A/1957/Add.1), Doc. A/CN.4/109.

<sup>23</sup> A/CN.4/113 of 6 March 1958.

26. ARTICLE 2. There is now included, amongst the matters which a *compromis* must deal with, the specification of the undertaking to arbitrate in virtue of which the dispute is to be submitted to arbitration. The list of matters which ought if possible to be regulated by the *compromis* remains substantially unchanged.

27. ARTICLE 4. This article, as compared with the 1953 text, has been amplified so as to include possible cases not previously covered.

28. ARTICLE 5. This article covers the previous Articles 6 and 7 of the 1953 text. The changes effected are based in particular on the feeling that it is not in practice possible to prevent an arbitrator from withdrawing or resigning if he wishes to do so, and that in such event it is not necessary to do more than provide for the filling of the vacancy by the same means as were employed for the original appointment.

29. ARTICLE 7. This article is new. It is obviously undesirable that the proceedings should have to start again from the beginning merely because a vacancy has occurred and has been filled. There is, moreover, no difficulty over the written proceedings, which the new arbitrator is able to read. On the other hand, if the oral proceedings have begun, the new arbitrator ought to have the right to require that these be started again.

30. ARTICLE 8. The first paragraph of this article does not differ substantially from the corresponding Article 10 of the 1953 text, but embodies technical improvements and simplifications in what was a somewhat complicated provision. As regards paragraphs 2 and 3 of the previous Article 10, various objections were felt to the idea of the tribunal itself drawing up the *compromis*; nor was this felt to be necessary. Whether or not there is a *compromis* in the technical sense of that term, there is always an undertaking to arbitrate, whether this has been completed by the drawing up of a *compromis* or not. Even if the parties are unable to draw up or complete the *compromis*, it is always possible for the tribunal to proceed with the case, so long as one of the parties requests it to do so. Either the nature of the dispute will have been defined in the original agreement to arbitrate or, alternatively, it will be defined in the application made to the tribunal to proceed with the case and in the subsequent written pleadings the deposit of which the tribunal will order.

31. ARTICLE 9. Despite the considerations set out in paragraph 42 of the commentary to the 1953 text, in favour of retaining the term "widest," which appeared in the corresponding Article 11 of that text, the Commission decided that the use of this term was unnecessary and might give rise to difficulties.

32. ARTICLE 10. The substance of this article, as compared with the corresponding Article 12 of the 1953 text, remains the same; but as the phrase "shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice" was considered to be unsatisfactory, and no other general phrase referring to that provision seemed free from drafting difficulties, it was decided to set out the actual terms of Article 38, paragraph 1. Paragraph 2 of old Article 12 (the question of *non liquet*) now appears, somewhat amended, as Article 11.



33. ARTICLES 13 TO 17. These articles, as explained in paragraph 15 above, have been newly introduced, in order to meet certain wishes expressed in the course of the General Assembly's discussions. They are articles relating to the routine procedure of arbitration and call for no special comment, except with reference to Article 17, which is based on the consideration that it is undesirable, once the written proceedings have been closed, for further documentary material to be presented or adduced in evidence by the parties. Nevertheless, it is equally not desirable to exclude all possibility of presenting such new material. The essential consideration is that, if new material presented by one of the parties is admitted, the other should have an opportunity of dealing with it in writing and should be able to require a prolongation of the written proceedings for that purpose. In this way the possibility of new written material being presented on the eve of the oral hearing, so that the other party has inadequate time to consider or reply to it in writing before the oral hearing takes place, can be eliminated.

34. ARTICLE 19. This article has been a good deal simplified in comparison with the corresponding Article 16 of the 1953 text. In particular, the general reference to ancillary claims, in place of the phraseology used in the previous Article 16, should get over a number of difficulties of definition which that phraseology might have entailed. The basic object is that the grounds of dispute between the parties arising out of the same subject matter should be completely disposed of.

35. ARTICLE 21. Paragraph 2 of this article, which otherwise corresponds to Article 18 of the 1953 text, is new. It seemed to the Commission desirable to give the tribunal this faculty in order to insure that no element material to its decision should be excluded.

36. ARTICLE 22. The corresponding Article 21 of the 1953 text provided that in no case could discontinuance of the proceedings by the claimant party be accepted by the tribunal without the consent of the defendant party. It seemed to the Commission that this principle ought only to apply in those cases where the claimant party proposed to discontinue the proceedings without any recognition of the validity of the defendant's case, since in that event the defendant state may still have an interest in endeavouring to secure from the tribunal a positive pronouncement in its favour. Where, however, such recognition is given, it would obviously be unnecessary to require the consent of the defendant party before the proceedings could be discontinued.

37. ARTICLE 25. The drafting of the corresponding Article 20 of the 1953 text was defective inasmuch as it seemed to imply that it would always be the defendant party which would fail to appear and defend the claim, and the claimant party whose case would accordingly be adjudged valid. It is, however, equally possible that the claimant party may fail to pursue its case, but that the defendant party will not be content with anything short of an actual decision in favour of its own arguments in case the claimant should attempt to re-open the matter at a later date. The article has, therefore, been amended to take account of both possibilities. The second paragraph is new, but self-explanatory.

38. ARTICLES 26 AND 27. These articles include the matters previously dealt with by the single Article 19 of the 1953 text. The second paragraph of Article 27 is new. The Commission felt it undesirable to adhere to the somewhat rigid system of the previous Article 19, which could be interpreted as involving the unremitting attendance on all occasions of all the members of the tribunal. It is, on the other hand, necessary to ensure that an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of the award.

39. ARTICLE 28. Paragraphs 1, 3 and 4 of this article correspond to the same paragraphs of Article 24 of the 1953 text, and paragraph 2 corresponds to Article 25 of that text. The first sentence of paragraph 1 is, however, new. Despite the general provision on the subject of majority decisions contained in Article 12, it was felt desirable to repeat this requirement specifically in respect of the rendering of the award. Paragraph 2 of the previous Article 24 concerning the statement of the reasons for the award now appears as Article 29 of the present text.

40. ARTICLE 32. This article is new. It no doubt goes without saying that the award constitutes a final settlement of the dispute, but it seemed desirable to the Commission to emphasize this fact in view of the provisions concerning the possible interpretation, revision or annulment of the award. These possibilities do not alter the fact that, subject to any necessity for interpreting, or to any eventual revision or annulment of the award, it constitutes, in principle, a definitive and final settlement.

41. The provisions concerning interpretation in ARTICLE 33, which previously figured in Article 28 of the 1953 text, remain substantially unchanged apart from re-wording and re-arrangement.

42. ARTICLE 34. This article is new. Its object is to ensure that the documents and written records of arbitral proceedings, which may be of great value for the study of international law and in other ways, should not become lost or forgotten. It goes without saying that the Secretary-General of the Permanent Court of Arbitration, or other depositary, would not permit any inspection of the records by a third party without obtaining the consent of the parties to the dispute.

43. ARTICLE 35. Sub-paragraph (*d*) is new as compared with the corresponding Article 30 of the 1953 text. Despite the cogent considerations contained in paragraph 39 of the commentary to that text, the Commission decided to add the nullity of the undertaking to arbitrate or of the *compromis* as a ground of the nullity of the eventual award. It is difficult, in principle, to deny that the nullity of the original undertaking or *compromis*, if established, must automatically entail the nullity of the award. Such cases should, however, prove exceedingly rare. The principle at issue is the same as that which governs the essential validity of treaties, and it is noticeable that there are very few precedents involving the nullity of a treaty or other international agreement, when drawn up in proper form, and apparently regularly concluded between duly authorized plenipotentiaries or governmental organs empowered to act on behalf of the state.

## CHAPTER III

DIPLOMATIC INTERCOURSE<sup>24</sup> AND IMMUNITIES

## I. INTRODUCTION

44. In the course of its first session, in 1949, the International Law Commission selected "diplomatic intercourse and immunities" as one of the topics the codification of which it considered desirable and feasible. It did not, however, include this subject among those to which priority was accorded.<sup>25</sup>

45. At its fifth session in 1953, the Commission was apprised of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and to treat it as a priority topic.<sup>26</sup>

46. At its sixth session in 1954, the Commission decided to initiate work on the subject, and appointed Mr. A. E. F. Sandström special rapporteur.<sup>27</sup>

47. Owing to lack of time, the Commission was unable to take up the subject until its ninth session in 1957. At that session, the Commission considered the topic on the basis of the report prepared by the special rapporteur (A/CN.4/91). It adopted a provisional set of draft articles with a commentary.<sup>28</sup>

48. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit this draft, through the Secretary-General, to governments for their observations. By 16 May 1958, the governments of the following countries had communicated their observations: Argentina, Australia, Belgium, Cambodia, Chile, China, Czechoslovakia, Denmark, Finland, Italy, Japan, Jordan, Luxembourg, Netherlands, Pakistan, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia (A/CN.4/114 and Add.1-6). The text of these observations is reproduced in an annex to the present report.\* The Commission also had before it a summary (A/CN.4/L.72), prepared by the Secretariat, of opinions expressed in the Sixth Committee of the General Assembly relative to the 1957 draft.

49. During the present session, at its 448th, 449th, 451st to 468th and 474th to 478th meetings, the Commission examined the text of the provisional draft in the light of the observations of governments and of the conclusions drawn from them by the special rapporteur (A/CN.4/116 and

<sup>24</sup> The term "intercourse" (in the English text) has traditionally been employed by the Commission in relation to this subject. The term used in the French text is "Relations (diplomatiques etc.)." There is no reason why in English the title "Diplomatic relations and immunities" should not also be employed.

<sup>25</sup> See Official Records of the General Assembly, 4th Sess., Supp. No. 10 (A/925), pars. 16 and 20.

<sup>26</sup> *Ibid.*, 8th Sess., Supp. No. 9 (A/2456), par. 170.

<sup>27</sup> *Ibid.*, 9th Sess., Supp. No. 9 (A/2693), par. 73.

<sup>28</sup> *Ibid.*, 12th Sess., Supp. No. 9 (A/3623), par. 16.

\* Not printed here.

Add. 1 and 2). In consequence of that examination, the Commission made a number of changes in the provisional draft.

50. At its 468th meeting, the Commission decided (under Article 23, paragraph 1 (c) of its Statute) to recommend to the General Assembly that the draft articles on diplomatic intercourse and immunities should be recommended to Member States with a view to the conclusion of a convention.

51. The draft deals only with permanent diplomatic missions. Diplomatic relations between states also assume other forms that might be placed under the heading of "*ad hoc* diplomacy," covering itinerant envoys, diplomatic conferences and special missions sent to a state for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report at a future session.

52. Apart from diplomatic relations between states, there are also relations between states and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions.

## II. TEXT OF THE DRAFT ARTICLES AND COMMENTARY

53. The text of the draft articles together with a commentary, as adopted by the Commission at its present session, is reproduced below.

### DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

#### DEFINITIONS

##### ARTICLE 1

For the purpose of the present draft articles, the following expressions shall have the meanings hereunder assigned to them:

(a) The "head of the mission" is the person charged by the sending state with the duty of acting in that capacity;

(b) The "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) The "diplomatic staff" consists of the members of the staff of the mission having diplomatic rank;

(e) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) The "administrative and technical staff" consists of the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) The "service staff" consists of the members of the staff of the mission in the domestic service of the mission;

(h) A "private servant" is a person in the domestic service of the head or of a member of the mission.

## SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

### *Establishment of diplomatic relations and missions*

#### ARTICLE 2

The establishment of diplomatic relations between states, and of permanent diplomatic missions, takes place by mutual consent.

#### *Commentary*

(1) There is frequent reference in doctrine to a "right of legation" said to be enjoyed by every sovereign state. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, since no right of legation can be exercised without agreement between the parties, the Commission did not consider that it should mention it in the text of the draft.

(2) Article 2, which corresponds to Article 1 of the 1957 draft, remains unchanged. It merely states that the establishment of diplomatic relations between two states, and in particular of permanent diplomatic missions, takes place by mutual agreement.

(3) The most efficient way of maintaining diplomatic relations between two states is for each to establish a permanent diplomatic mission (*i.e.*, an embassy or a legation) in the territory of the other; but there is nothing to prevent two states from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third state.

(4) All independent states may establish diplomatic relations. In the case of a state which is a member of a federation, the question whether it is qualified to do so depends on the federal constitution.

### *Functions of a diplomatic mission*

#### ARTICLE 3

The functions of a diplomatic mission consist *inter alia* in:

- (a) Representing the sending state in the receiving state;
- (b) Protecting in the receiving state the interests of the sending state and of its nationals;
- (c) Negotiating with the government of the receiving state;
- (d) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting thereon to the government of the sending state;
- (e) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations.

### *Commentary*

(1) A detailed enumeration of all the functions of a diplomatic mission would be very lengthy. The Commission has merely mentioned the main categories under very broad headings.

(2) First of all, under sub-paragraph (a), comes the task which characterizes the whole activity of the mission. The mission represents the sending state in the receiving state. The mission, and in particular the head of the mission, is the spokesman for its government in communications with the receiving government, or in any discussions with that government to which relations between the two states may give rise.

(3) Sub-paragraphs (b), (c), and (d) state the classic functions of the mission, *viz.* protecting in the receiving state the interests of the sending state and of its nationals; negotiating with the government of the receiving state and ascertaining conditions and developments in the receiving state and reporting thereon to the government of the sending state.

(4) The functions mentioned in sub-paragraph (b) must be carried on in conformity with the rules of international law. The validity of the rule laid down in Article 40, paragraph 1, which prohibits interference in the internal affairs of the receiving state, and of the rule concerning the exhaustion of remedies in the local courts (in cases in which this rule is applicable) is not affected in any way.

(5) The phrase "conditions and developments" in sub-paragraph (d) covers the political, cultural, social and economic activities of the country, and in general all aspects of life which may be of interest to the sending state. Only lawful means may be used by the mission in ascertaining these conditions and developments.

(6) The enumeration of functions as given in the draft prepared at the ninth session (1957), has been supplemented by a reference to certain functions which, in consequence of the establishment of the United Nations and of modern developments, have acquired steadily increasing importance, *viz.* (e) promoting friendly relations between the sending state and the receiving state and developing economic, cultural and scientific relations between the two states.

(7) With regard to trade missions, it should be noted that the question of commercial representation as such—*i.e.*, apart from the commercial attachés of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement.

### *Appointment of the head of the mission: agrément*

#### ARTICLE 4

The sending state must make certain that the *agrément* of the receiving state has been given for the person it proposes to accredit as head of the mission to that state.

*Appointment to more than one state*

ARTICLE 5

Unless objection is offered by any of the receiving states concerned, a head of mission to one state may be accredited as head of mission to one or more other states.

*Appointment of the staff of the mission*

ARTICLE 6

Subject to the provisions of Articles 7, 8 and 10, the sending state may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving state may require their names to be submitted beforehand, for its approval.

*Appointment of nationals of the receiving state*

ARTICLE 7

Members of the diplomatic staff of the mission may be appointed from amongst the nationals of the receiving state only with the express consent of that state.

*Persons declared persona non grata*

ARTICLE 8

1. The receiving state may at any time notify the sending state that the head of the mission, or any member of the staff of the mission is *persona non grata* or not acceptable. In such case, the sending state shall, as the case may be, recall the person concerned or terminate his functions with the mission.

2. If the sending state refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving state may refuse to recognize the person concerned as a member of the mission.

*Commentary*

(1) Article 5 is new, but the text of Articles 4, 6, 7 and 8 as adopted at the ninth session was left unchanged, with the exception of some purely drafting alterations.

(2) Articles 4 to 8 deal with the appointment of the persons who compose the mission. The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities, administrative and technical staff, and service staff. While it is the sending state which appoints the persons who compose the mission, the choice of these persons and, in particular,

of the head of the mission, may considerably affect relations between the states, and it is clearly in the interests of both states that the mission should not contain members whom the receiving state finds unacceptable.

(3) The procedure for achieving this result differs according as the person concerned is the head of mission or another member of the mission. As regards the former, the sending state ascertains in advance whether a person whom it proposes to accredit as head of its mission to another state is *persona grata* with that state. If the *agrément* is not given, then the person in question cannot be accredited. The fact that a head of mission has been approved does not, however, prevent a receiving state which has meanwhile found reasons for objecting to him from subsequently notifying the sending state that he is no longer *persona grata*, in which case he must be recalled and, if the sending state fails to recall him, the receiving state may declare his functions terminated.

(4) As regards other members of the mission, they are in principle freely chosen by the sending state, that is to say, their names are not submitted in advance; but if at any time—if need be, before the person concerned arrives in the country to take up his duties—the receiving state finds that it has objections to him, that state may, as in the case of a head of mission who has been approved, inform the sending state that he is *persona non grata*, with the same effect as in the case of the head of the mission.

(5) This procedure is sanctioned by Articles 4, 6 and 8. So far as details are concerned, it should be noted first that the use of the term "not acceptable" as an alternative for the term *persona non grata* in Article 8, paragraph 1, is intended to cover non-diplomatic staff, with respect to whom the term *persona non grata* is not usually employed. At the end of the same paragraph, the words "or terminate his functions with the mission" are intended principally to cover cases where the person concerned is a national of the receiving state.

(6) The fact that the draft does not say whether or not the receiving state is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed, should be interpreted as meaning that this question is left to the discretion of the receiving state.

(7) When a person who has already taken up his duties is declared *persona non grata*, the normal consequence is (as indicated above) that the sending state recalls him or declares his functions terminated (see Article 41, sub-paragraph (b)). But, if the sending state fails to do this within a reasonable time, the receiving state is authorized to take action of its own accord. It may declare that the functions of the person concerned are terminated, that he is no longer recognized as a member of the mission, and that he has ceased to enjoy diplomatic privileges.

(8) As is clear from the reservation stated in Article 6, the free choice of the staff of the mission is a principle to which there are exceptions. One of these exceptions is mentioned in paragraph (4) of this commentary. Another, for which Article 6 expressly provides, is that in the case of military, naval and air attachés, the receiving state may, in accordance



with what is already a fairly common practice, require their names to be submitted beforehand for its approval.

(9) A further exception is that arising out of Article 7 of the draft, concerning cases where the sending state wishes to choose as diplomatic agent a national of the receiving state or a person who is a national of both the sending and receiving states. The Commission takes the view that such an appointment is subject to the express consent of the receiving state, even though some states do not insist on this condition. The Commission did not, on the other hand, think it necessary to provide that the consent of the receiving state is a condition necessary for the appointment as a diplomatic agent of a national of a *third* state, or for the appointment of a national of the receiving state to the administrative, technical or service staff of a foreign mission. In these cases, the considerations underlying Article 7 do not apply; and in the case of administrative and technical staff and service staff, the Commission was influenced by the further factor that it is undeniably necessary to recruit for these categories of the staff persons with a good knowledge of the local language and of local conditions. Serious difficulties might be created for the sending state if the receiving state refused to authorize local recruitment of staff in these categories, whereas the difficulties created would probably be inconsiderable so far as diplomatic staff was concerned. The only objection which might be raised to these considerations is that, in some states, nationals have to seek the consent of their own government before entering the service of a foreign government. Such a requirement, however, is merely an obligation governing the relationship between a national and his own government, and does not affect relations between states, and is not therefore a rule of international law. While the practice of appointing nationals of the receiving state as members of the diplomatic staff has now become fairly rare, and there are grounds for believing that it will disappear altogether with the development of states which have recently obtained their independence, the majority of the members of the Commission thought that the case should be mentioned. Certain members of the Commission, however, stated that they were in principle opposed entirely to the appointment of nationals of the receiving state as members of the diplomatic staff, and to the grant of diplomatic privileges and immunities to such persons.

(10) The free choice of staff mentioned in Article 6 does not imply exemption from visa formalities, where these are required by the receiving state.

(11) Article 5, which is new, is concerned with the fairly frequent case in which a sending state wishes to accredit a head of mission to one or more other states. This is permissible, provided that none of the receiving states concerned objects.

#### *Notification of arrival and departure*

#### ARTICLE 9

The arrival and departure of the members of the staff of the mission, and also of members of their families, and of their private servants, shall

be notified to the Ministry for Foreign Affairs of the receiving state. A similar notification shall be given whenever members of the mission and private servants are locally engaged or discharged.

### *Commentary*

It is desirable for the receiving state to know the names of the persons who may claim privileges and immunities. Accordingly, it is *inter alia* provided in Article 9, which is new, that the names of persons recently appointed to a mission and of those who are finally leaving their posts must be notified.

### *Size of staff*

#### ARTICLE 10

1. In the absence of specific agreement as to the size of the mission, the receiving state may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the receiving state, and to the needs of the particular mission.

2. The receiving state may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

### *Commentary*

(1) The English text of paragraph 1, as drafted at the ninth session (Article 10 corresponds to Article 7 of the 1957 draft), has been amended by the substitution of the word "normal" for the word "customary," for the sake of concordance with the French text. The last sentence in paragraph 2 of the 1957 text has been moved to Article 6, with certain drafting changes based on paragraph (3) *in fine* of the 1957 commentary, which it was felt more accurately expressed the Commission's intentions.

(2) There are questions connected with the mission's composition which may cause difficulty besides that of the choice of the persons comprising the mission. In the Commission's view, these matters require regulation, and Article 10 is intended to deal with them.

(3) Paragraph 1 of the article refers to cases where the staff of the mission is inordinately increased; experience in recent years having shown that such cases may present a problem. Such an increase may cause the receiving state real difficulties. Should the receiving state consider the staff of a mission unduly large, it should first endeavour to reach an agreement with the sending state. Failing such agreement, the receiving state should, in the view of the majority of the Commission, be given the right within certain limits to refuse to accept a size exceeding what is reasonable and normal. In such cases there are two sets of conflicting interests, and the solution must be a compromise between them. Account must be taken both of the mission's needs, and of prevailing conditions in the receiving state. Any claim for the limitation of the staff must remain within the bounds stated by the article.

(4) Paragraph 2 gives the receiving state the right to refuse to accept officials of a particular category. But its right to do so is circumscribed in the same manner as its right to claim a limitation of the size of the staff, and must, furthermore, be exercised without discrimination between one state and another.

(5) The provisions of this article have been criticized on the grounds that the criteria by reference to which a dispute is to be settled are too vague and would not solve the problems arising. Furthermore, it has been argued that the provisions of paragraph 2 go beyond the principles of international law as now recognized, and that, once the establishment of a mission has been agreed, the sending state has the right to equip the mission with all the categories of staff needed for the discharge of the mission's functions, because only the two states concerned are in a position to decide what circumstances and conditions had a bearing on the size and composition of their respective missions. The Commission does not deny that the parties concerned are best qualified to settle disputes of the kind to which this article relates. That is why the Commission has referred to the desirability of such disputes being settled, if possible, by agreement between the parties. At the same time, criteria must be laid down which are to guide the parties, or which, in the absence of agreement between the parties, are to be observed in the arbitral or judicial decision to which it would be necessary to have recourse. As so often happens when conflicting interests are the subject of a compromise, these criteria are necessarily vague. The reason why these provisions do not form part of existing international law is that the problem is new. It can hardly be said that the mission's needs are in any way jeopardized, seeing that it is precisely one of the safeguards offered by these provisions that the mission's needs constitute one of the decisive considerations, and since, in addition, special account is to be taken of "what is reasonable and normal."

#### *Offices away from the seat of the mission*

##### ARTICLE 11

The sending state may not, without the consent of the receiving state, establish offices in towns other than those in which the mission itself is established.

##### *Commentary*

The provisions of this article have been included to forestall the awkward situation which would result for the receiving government if mission premises were established in towns other than that which is the seat of the government.

#### *Commencement of the functions of the head of the mission*

##### ARTICLE 12

The head of the mission is considered as having taken up his functions in the receiving state either when he has notified his arrival and a

true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving state, or when he has presented his letters of credence, according to the practice prevailing in the receiving state, which shall be applied in a uniform manner.

### *Commentary*

(1) The text of the corresponding provision (Article 8) prepared at the Commission's ninth session gave as the principal alternative the first part of the present article (i.e., the passage preceding the phrase: "or when he has presented his letters of credence"). The latter phrase was at that time given as a "variant." The article was accompanied by the following commentary: "So far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving state—which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving state, there being no need to await the presentation of the letters of credence to the head of state. The Commission, however, decided also to mention the alternative stated in the text of the article."

(2) Of the governments which submitted observations on the draft, six were in favour of the principal alternative and nine in favour of the variant. Hence the Commission, although considering the establishment of a uniform regulation desirable, decided to leave the choice of the system to be applied to the discretion of the receiving state subject, however, to the condition that a separate decision is not taken *ad hoc* as each case occurs, but that a uniform system is applied to all missions. This stipulation now forms part of the article. In addition, some slight drafting changes have been made to the text. The significance of the matter lies in the fact that the precedence and seniority of heads of mission depends upon the date on which their functions are deemed to have been taken up (see Article 15 below).

### *Classes of heads of mission*

#### ARTICLE 13

1. Heads of mission are divided into three classes, namely:

- (a) That of ambassadors or nuncios accredited to Heads of State;
- (b) That of envoys, ministers and internuncios accredited to Heads of State;
- (c) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

## ARTICLE 14

The class to which the heads of their missions are to be assigned shall be agreed between states.

*Precedence*

## ARTICLE 15

1. Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice prevailing in the receiving state, which must be applied without discrimination.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. The present article is without prejudice to any existing practice in the receiving state regarding the precedence of the representative of the Pope.

*Mode of reception*

## ARTICLE 16

The procedure to be observed in each state for the reception of heads of mission shall be uniform in respect of each class.

*Commentary*

(1) These articles correspond to Articles 10 to 14 of the previous session's draft, which have been amended in the following respects:

(a) In Article 10 (a) of the old text, the word "legates" has been deleted, as legates are never heads of mission;

(b) In Article 10 (b) the words "other persons" have been replaced by "internuncios," since these representatives of the Pope can be the only persons referred to;

(c) Article 10 of the old text, amended as described above, has become paragraph 1, and the former Article 14 is now paragraph 2 of the new Article 13;

(d) In Article 15, paragraphs 1 and 3, there are certain changes of terminology. Paragraph 2 has been amended to clarify the rule stated therein.

(2) In the report covering the work of the ninth session, Articles 10 to 13 (new Articles 13 to 16) were accompanied by the following passages (*inter alia*) by way of commentary:

"(1) Articles 10-13 are intended to incorporate in the draft the gist of the Vienna Regulation concerning the rank of diplomats.<sup>29</sup>

<sup>29</sup> The text of the Regulation of Vienna on the classification of diplomatic agents is as follows:

"In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the

Article 10 lists the different classes of heads of mission, the classes conferring rank according to the order in which they are mentioned.

"(2) In view of the recent growing tendency—intensified since the Second World War—on the part of states to appoint ambassadors rather than ministers to represent them, the Commission considered the possibility of abolishing the title of minister or of abolishing the difference in rank between these two classes.

" . . .

"(10) Some of the provisions of the Vienna Regulation have not been included in the draft: Articles 2 and 6 because the questions dealt with therein are no longer of current interest, Article 3 because the draft has exclusive reference to permanent missions, and Article 7 because it deals with a matter which falls rather within the province of the law of treaties."

This commentary should now be supplemented by the following:

(3) The rule in Article 14 that "The class to which the heads of their missions are to be assigned shall be agreed between states" does not imply that the heads of mission by which states are represented in each other's territory must necessarily belong to the same class. There are instances in which that has not been the case.

(4) As a consequence of Article 12, the precedence of heads of missions is determined under Article 15, paragraph 1, as being in the order of date

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Plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite representatives of other crowned heads to adopt the same regulations.

"Article 1. Diplomatic officials shall be divided into three classes: that of ambassadors, legates or nuncios; that of envoys, whether styled ministers or otherwise, accredited to sovereigns; that of *chargés d'affaires* accredited to Ministers of Foreign Affairs.

"Article 2. Only ambassadors, legates or nuncios shall possess the representative character.

"Article 3. Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank.

"Article 4. Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified.

"The present regulation shall not in any way modify the position of the Papal representatives.

"Article 5. A uniform method shall be established in each State for the reception of diplomatic officials of each class.

"Article 6. Ties of relationship or family alliances between Courts shall not confer any rank on their diplomatic officials. The same shall be the case with political alliances.

"Article 7. In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

"The present Regulation was inserted in the Protocol concluded by the Plenipotentiaries of the eight Powers which have signed the Treaty of Paris at their meeting on 19 March 1815."

(The Regulation was signed by the following countries: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden. Translation taken from the report of a sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, C.203.M.77.1927.V, p. 2.)

either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice of the receiving state.

(5) The Commission's object in incorporating the text of Article 14 of the 1957 draft as paragraph 2 of the new Article 13 was to stress the equality in law of heads of mission. Differences in class between heads of mission are not material except for purposes of precedence and etiquette. "Etiquette" refers only to ceremonial (Article 16) and matters of conduct (protocol).

(6) The new text of Article 15, paragraph 2, emphasizes in unambiguous terms that the rule set forth in that provision does not apply to a change of class. If the head of mission is promoted to a higher class, he ranks in the new class according to the decisive date applicable for that class.

(7) The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. The staff comprises the following classes:

Ministers or Ministers-Counsellors;  
Counsellors;  
First Secretaries;  
Second Secretaries;  
Third Secretaries;  
Attachés.

(8) There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned.

#### Chargé d'affaires ad interim

#### ARTICLE 17

If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of the mission shall be conducted by a *chargé d'affaires ad interim*, whose name shall be notified to the Ministry for Foreign Affairs of the receiving state.

#### Commentary

(1) This article, which apart from certain drafting changes reproduces the text of Article 9, paragraph 1, of the draft prepared at the Commission's ninth session (1957), provides for situations where the post of head of the mission falls vacant, or the head of the mission is unable to perform his functions. The *chargé d'affaires ad interim* here referred to is not to be confused with the *chargé d'affaires* mentioned in Article 13, sub-paragraph (c), who is called *chargé d'affaires en pied* and is appointed on a more or less permanent footing.

(2) The question when a head of a mission is to be regarded as unable to perform his functions must be answered according to the practice of the receiving state. Usage differs from country to country; in some, the head of the mission is not regarded as requiring to be replaced so long as he is in the country; in others his actual ability to perform his functions is taken

into consideration. It is not possible to lay down a hard-and-fast rule.

(3) The text of this article as drafted at the ninth session contained a paragraph 2 which stipulated that, in the absence of notification, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list would be presumed to be in charge. This provision was criticized, and the Commission considered that the (undoubtedly rather rare) case of "absence of notification" did not justify a special provision. It can be left to the states concerned to find methods of communication if needed.

### *Use of flag and emblem*

#### ARTICLE 18

The mission and its head shall have the right to use the flag and emblem of the sending state on the premises of the mission, and on the residence and the means of transport of the head of the mission.

#### *Commentary*

This article is new. The rule laid down in the article was considered desirable in view of the existence in certain countries of restrictions concerning the use of flags and emblems of foreign states.

### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

#### *General Comments*

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the "extritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending state; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending state.

(2) There is now a third theory which appears to be gaining ground in modern times, namely, the "functional necessity" theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.

(3) The Commission was guided by this third theory in solving the problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.

(4) Privileges and immunities may be divided into the following three groups, although the division is not completely exclusive:

- (a) Those relating to the premises of the mission and to its archives;
- (b) Those relating to the work of the mission;
- (c) Personal privileges and immunities.



## SUB-SECTION A. MISSION PREMISES AND ARCHIVES

*Accommodation*

## ARTICLE 19

The receiving state must either permit the sending state to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

*Commentary*

(1) The laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission has inserted in the draft an article which makes it obligatory for the receiving state to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.

(2) This obligation, because it would impose too heavy a burden on the receiving state, does not apply to the residences of the members of the staff of the mission.

*Inviolability of the mission premises*

## ARTICLE 20

1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, save with the consent of the head of the mission.

2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

*Commentary*

(1) This article (which reproduces unchanged the text of Article 16 of the 1947 draft) deals firstly with the inviolability of the premises of the mission.

(2) The expression "premises of the mission" includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending state or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park.

(3) From the point of view of the receiving state, this inviolability has two aspects. In the first place, the receiving state is obliged to prevent its

agents from entering the premises for any official purpose whatsoever (paragraph 1). Secondly, it is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or impairment of its dignity (paragraph 2). The receiving state must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order.

(4) The inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending state by reason of the fact that the premises are used as the headquarters of the mission.

(5) A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way. In some countries, the persons concerned may apply to the Ministry for Foreign Affairs of the receiving state. There is nothing to prevent service through the post if it can be effected in that way.

(6) The inviolability concerned confers on the premises, their furnishings and fixtures, immunity from any search, requisition, attachment or execution. The opinion had been expressed that the rule laid down in paragraph 3 of this article was unnecessary, because the acts referred to could not be performed without a contravention of the provisions of paragraph 1. Nevertheless, the rule has a value of its own in that it provides that the premises must not be entered even in pursuance of a judicial order. If the premises are leased or rented, measures of execution may of course be taken against the private owner, provided that it is not necessary to enter the premises of the mission.

(7) While the inviolability of the premises may enable the sending state to prevent the receiving state from using the land on which the premises of the mission are situated, in order to carry out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending state should co-operate in every way in the implementation of the plan which the receiving state is contemplating; and the receiving state, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending state. The Commission did not consider it advisable to insert in the article itself a provision on these lines, which had formed paragraph (4) of the commentary on Article 16 of the draft adopted by the Commission at its ninth session. To do so would convey the erroneous impression that the commentary was concerned with an exception to the principle of inviolability. The text of the commentary refers solely to the moral duty of the sending state to co-operate.

*Exemption of mission premises from tax*

## ARTICLE 21

The sending state and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

*Commentary*

(1) The text of this article reproduces that of Article 17 of the 1957 draft, with slight changes which do not alter the substance. The article now mentions "national, regional or municipal dues or taxes," which is a more comprehensive description and, according to the Commission's interpretation, covers all dues and taxes levied by any local authority. The phrase at the end of the article "for services actually rendered" has been replaced by the corresponding phrase used in Article 32 "for specific services rendered." The Commission thought that a reference to *specific* services rendered was preferable to the phrase "for services *actually* rendered."

(2) The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.

*Inviolability of the archives*

## ARTICLE 22

The archives and documents of the mission shall be inviolable.

*Commentary*

(1) This article reproduces unchanged the text of the corresponding provision in Article 18 of the 1957 draft. As the Commission pointed out in the commentary to its 1957 draft: "The inviolability applies to archives and documents, regardless of the premises in which they may be. As in the case of the premises of the mission, the receiving state is obliged to respect the inviolability itself and to prevent its infringement by other parties."

(2) It was suggested that the words "and documents" in the text of the article should be deleted, and that the statement in the commentary that the inviolability applies to archives and documents, regardless of the premises in which they may be, was too sweeping. The Commission cannot share this view. The mission's documents, even though separated from the archives, and whether belonging to the archives or not, must, like the

archives themselves, be inviolable, irrespective of their physical whereabouts (e.g., while carried on the person of a member of a mission). It was for that reason that this extension was provided for in the General Convention on the Privileges and Immunities of the United Nations (Article II, section 4).

(3) Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of this inviolability to the functions of the mission. This inviolability is connected with the protection accorded by Article 25 to the correspondence and communications of the mission.

SUB-SECTION B. FACILITATION OF THE WORK OF THE MISSION,  
FREEDOM OF MOVEMENT AND COMMUNICATION

*Facilities*

ARTICLE 23

The receiving state shall accord full facilities for the performance of the mission's functions.

*Commentary*

(1) This article, which corresponds to Article 19 of the 1957 draft, remains unchanged.

(2) A diplomatic mission may often need the assistance of the government and authorities of the receiving state, in the first place during the installation of the mission, and to an even greater extent in the performance of its functions, for instance in obtaining information, an activity referred to in Article 3 (d). The receiving state (which has an interest in the mission being able to perform its functions satisfactorily) is obliged to furnish all the assistance required, and is under a general duty to make every effort to provide the mission with all facilities for the purpose. It is assumed that requests for assistance will be kept within reasonable limits.

*Free movement*

ARTICLE 24

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure to all members of the mission freedom of movement and travel in its territory.

*Commentary*

One of the necessary facilities for the performance of the mission's functions is that its members should enjoy freedom of movement and travel. Without such freedom, the mission would not be able to perform adequately

its function of obtaining information under Article 3 (d). This freedom of movement is subject to the laws and regulations of the receiving state concerning zones entry into which is prohibited or regulated for reasons of national security. The establishment of prohibited zones must not, on the other hand, be so extensive as to render freedom of movement and travel illusory.

### *Freedom of communication*

#### ARTICLE 25

1. The receiving state shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and the other missions and consulates of the sending state, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The official correspondence of the mission shall be inviolable.

3. The diplomatic bag shall not be opened or detained.

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.

5. The diplomatic courier shall be protected by the receiving state. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

#### *Commentary*

(1) Apart from paragraph 2, which is new, the article substantially reproduces the text of Article 21 of the 1957 draft. Paragraph 2 being new, the succeeding paragraphs have been re-numbered accordingly. In the former paragraph 3 (now paragraph 4) the phrase "which must bear visible external marks of its character" has been added after the words "The diplomatic bag."

(2) This article deals with another generally recognized freedom, which is essential for the performance of the mission's functions, namely freedom of communication. Under paragraph 1, this freedom is to be accorded for all official purposes, whether for communications with the government of the sending state, with the officials and authorities of that government or the nationals of the sending state, with missions and consulates of other governments or with international organizations. Paragraph 1 of this article sets out the general principle, and states specifically that, in communicating with its government and the other missions and consulates of that government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. If a mission wishes to make use of its own wireless transmitter it must, in accordance with the international conventions on telecommunications, apply to the receiving state for special permission. Provided that the regulations applicable to all users of such communications are observed, such permission must not be refused.

(3) Formerly, the freedom to employ all appropriate means of communications was limited in principle to the diplomatic mission's exchanges, on the one hand with the government of the sending state and, on the other, with the consulates under its authority within the receiving state. Nowadays, with the extension of air communications, the practice has changed. Communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending state; often use is made of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed. The Commission has therefore not changed the rule laid down in paragraph 1.

(4) Paragraph 3 (former paragraph 2) states that the diplomatic bag is inviolable. Paragraph 4 (former paragraph 3) indicates what the diplomatic bag may contain. The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable. In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving state, and in the presence of a representative of the mission concerned. While recognizing that states have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving state, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

(6) Paragraph 5 deals with the inviolability and the protection enjoyed by the diplomatic courier in the receiving state. The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft, he is not regarded as a diplomatic courier. This case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags. There is no reason for treating such a courier differently from one who carries the bag in a car driven by himself.

(7) The protection of the diplomatic bag and courier in a third state is dealt with in Article 39.

#### ARTICLE 26

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

*Commentary*

This article states a rule which is universally accepted.

## SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

This sub-section deals with members of the mission who are foreign nationals (Articles 27 to 36), with nationals of the receiving state (Article 37), and with certain general matters (Articles 38 and 39).

*Personal inviolability*

## ARTICLE 27

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all reasonable steps to prevent any attack on his person, freedom or dignity.

*Commentary*

(1) This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving state's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving state must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so require. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

(2) The paragraph 2 which formed part of the corresponding Article 22 in the 1957 draft has been deleted in consequence of the introduction of Article 1 (definitions).

*Inviolability of residence and property*

## ARTICLE 28

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 29, his property, shall likewise enjoy inviolability.

*Commentary*

(1) This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because the inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.

(2) Paragraph 2 of the corresponding Article 23 of the 1957 draft has been amended so as to make the exception to immunity from jurisdiction provided for in Article 29, paragraph 3, applicable to the inviolability of property.

(3) So far as movable property is concerned (as was explained in the commentary on Article 23 in the 1957 draft), the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account, and goods which are intended for his personal use or essential to his livelihood. In mentioning his bank account, the Commission had in mind immunity from the measures referred to in Article 20, paragraph 3.

### *Immunity from jurisdiction*

#### ARTICLE 29

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, save in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of his government for the purposes of the mission;

(b) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee;

(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving state, and outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b), (c) of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

#### *Commentary*

(1) Certain drafting changes have been made in paragraphs 1 (a) and 3 of this article as it stood in the 1957 draft (Article 24). In paragraph 4, the end of the first sentence ("to which he shall remain subject etc.") and the second sentence have been deleted.

(2) The jurisdictions mentioned comprise any special courts in the categories concerned, e.g. commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial functions.

(3) A diplomatic agent enjoys immunity from the receiving state's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also immunity from its civil and administrative jurisdiction. At the same time, he has the duty to respect the laws and regulations of the receiving state as laid down in Article 40 of the present draft.



(4) The immunity from criminal jurisdiction is complete, whereas the immunity from civil and administrative jurisdiction is subject to the exceptions stated in the text.

(5) The first exception concerns immovable property belonging to the diplomatic agent personally. All states claim exclusive jurisdiction over immovable property on their territory. This exception is subject to the conditions that the diplomatic agent holds the property in his private capacity and not on his government's behalf for the purposes of the mission.

(6) The second exception is based on the consideration that, because it is of general importance that succession proceedings should not be hampered, the diplomatic agent cannot plead diplomatic immunity for the purpose of refusing to appear in a suit or action relating to a succession.

(7) The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.

(8) There may be said to be a fourth exception, in the case referred to in Article 30, paragraph 3 (counterclaim directly connected with the diplomatic agent's principal claim).

(9) Paragraph 2 of the article derives from the diplomatic agent's inviolability. There is no obligation on a diplomatic agent to testify, *i.e.*, to give evidence as a witness. This does not mean that a diplomatic agent ought necessarily to refuse to co-operate with the authorities of the receiving state, for example in the investigation of a crime of which he has been an eye-witness. On the contrary, it may be proper for him to give the authorities the information he possesses. Where his immunity is waived, he may give either written or oral testimony. In certain countries there are special rules concerning the manner in which a diplomatic agent's testimony is to be taken in those cases in which he consents to give evidence.

(10) In consequence of certain observations, the Commission considered whether paragraph 2 of the article should not contain an exception to cover the cases referred to in paragraph 1. The Commission concluded that these cases should not be mentioned. It is debatable whether the question of the obligation to give evidence is relevant in cases where the diplomatic agent is himself a party to the suit. At all events—and this was the decisive point in the Commission's opinion—in such cases the diplomatic agent is called upon to testify in his own interest and, if he fails to do so, he must accept the consequences.

(11) The effect of immunity from jurisdiction, and of the privileges mentioned in Articles 27 and 28, is that the diplomatic agent is also immune from measures of execution, subject to the exceptions mentioned in paragraph 3 of the present article.

(12) Paragraph 4 states the obvious truth that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving state does not exempt him from the jurisdiction of his own country. But it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in which the action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the government of the sending state. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law. Although of the opinion that governments should see to it that there is in their states a competent forum for hearing cases against members of their diplomatic missions abroad, the Commission did not wish to press the matter, and the provision in question was deleted. In some countries the problem is solved, at least in part, by a rule to the effect that diplomatic agents while on mission abroad have a specified domicile in their own country.

### *Waiver of immunity*

#### ARTICLE 30

1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending state.

2. In criminal proceedings, waiver must always be express.

3. In civil or administrative proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counterclaims directly connected with the principal claim.

4. Waiver of immunity of jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment for which a separate waiver must be made.

### *Commentary*

(1) This article corresponds to Article 25 of the 1957 draft. Paragraph 1 which, except for a minor drafting amendment, remains unchanged, implies that the immunity of its diplomatic agents from jurisdiction may be waived by the sending state alone. The waiver of immunity must be on the part of the sending state because the object of the immunity is that the diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them. This is the principle underlying the provision contained in paragraph 1.

(2) In the text adopted at the ninth session in 1957, paragraph 2 read as follows: "In criminal proceedings, waiver must always be effected expressly by the government of the sending state." The Commission decided to delete the phrase "by the government of the sending state," because

it was open to the misinterpretation that the communication of the waiver should actually emanate from the government of the sending state. As was pointed out, however, the head of the mission is the representative of his government, and when he communicates a waiver of immunity the courts of the receiving state must accept it as a declaration of the government of the sending state. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending state and to the head of the mission.

(3) In view of the amended text of paragraph 2, there is no longer any doubt but that paragraphs 2 and 3 deal only with the question of the form which the waiver should take in order to be effective (see commentary of the report of the ninth session, paragraph 2). A distinction is drawn between criminal and civil proceedings. In the former case, the waiver must be express. In civil, as in administrative proceedings, it may be express or implied, and paragraph 3 explains the circumstances in which it is presumed to be implied. Thus, if in such proceedings a valid waiver may be inferred from the diplomatic agent's behaviour, his expressly declared waiver must naturally also be regarded as valid. He is presumed to have the necessary authorization.

(4) Paragraphs 3 and 4 have been amended to include also administrative procedure.

(5) It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance.

(6) Under paragraph 3, the initiation of proceedings by a diplomatic agent precludes him from invoking immunity in respect of counterclaims directly connected with the principal claim. In such a case the diplomatic agent is deemed to have accepted the jurisdiction of the receiving state as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.

### *Exemption from social security legislation*

#### ARTICLE 31

The members of the mission and the members of their families who form part of their households, shall, if they are not nationals of the receiving state, be exempt from the social security legislation in force in that state except in respect to servants and employees if themselves subject to the social security legislation of the receiving state. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving state.

#### *Commentary*

National social security legislation grants substantial benefits, often in the form of insurance, to persons living in the country, in consideration,

however, of the payment of annual premiums by the beneficiary or his employer (old age pensions, industrial accident and sickness insurance, unemployment insurance, etc.). Whereas members of a mission and members of their families who are nationals of the receiving state would naturally be subject to such legislation, this is not necessarily the case when they have foreign nationality. Under the present article, which is new, such persons are exempt from the receiving state's social security legislation so far as they themselves are concerned, but not as regards the payment of any contributions due in respect of servants or employees.

### *Exemption from taxation*

#### ARTICLE 32

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save:

- (a) Indirect taxes incorporated in the price of goods or services;
- (b) Dues and taxes on private immovable property, situated in the territory of the receiving state, unless he holds it on behalf of his government for the purposes of the mission;
- (c) Estate, succession or inheritance duties levied by the receiving state, subject, however, to the provisions of Article 38 concerning estates left by members of the family of the diplomatic agent;
- (d) Dues and taxes on income having its source in the receiving state;
- (e) Charges levied for specific services rendered;
- (f) Subject to the provisions of Article 21, registration, court or record fees, mortgage dues and stamp duty.

### *Commentary*

(1) In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemption exists, subject to certain exceptions.

(2) The introduction to the article has been slightly changed, in keeping with the terminology used in Article 21. The dues and taxes covered in that article are only those levied on the premises as such.

(3) As an explanation of the term "indirect taxes" used in sub-paragraph (a), the words "incorporated in the price of goods or services" have been added.

(4) Sub-paragraph (b) has been modified to bring it into line with the redraft of Article 29, paragraph 1 (a).

(5) Article 31, paragraph 3, of the 1957 draft (Article 38, paragraph 3, of the present draft) has been amended in the sense that, in the event of the death of a member of the mission not a national of the receiving state, or of a member of his family, estate, succession or inheritance duties may be levied only on the immovable property situated in the receiving

state. The proviso in sub-paragraph (c) of this article is intended to take that amended provision into account.

(6) Sub-paragraph (d) applies to the income of the diplomatic agent which has its source in the receiving state. Income from immovable property held by the diplomatic agent on behalf of his government does not belong to him, and consequently he is not liable to dues and taxes on such income.

(7) In the French text of sub-paragraph (e) the word *impôt* has been added before the word "taxes." The exception provided for in this sub-paragraph calls for no explanation.

(8) Sub-paragraph (f) is new. The rule stated therein seems to be in conformity with practice.

### *Exemption from personal services and contributions*

#### ARTICLE 33

The diplomatic agent shall be exempt from all personal services or contributions.

#### *Commentary*

This article is new. It deals with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions.

### *Exemption from customs duties and inspection*

#### ARTICLE 34

1. The receiving state shall, in accordance with the regulations established by its legislation, grant exemption from customs duties on:

(a) Articles for the use of a diplomatic mission;

(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving state. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative.

#### *Commentary*

(1) Articles for the use of the mission are in practice exempted from customs duties, and this is generally regarded as a rule of international law.

(2) In general, customs duties are likewise not levied on articles intended for the personal use of the diplomatic agent or of members of his family belonging to his household (including articles intended for his

establishment). This exemption has been regarded as based on international comity. Since, however, the practice is so generally current, the Commission considers that it should be accepted as a rule of international law.

(3) Because these exemptions are open to abuses, states have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the import of articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving state must grant the exemption in question. To take account of this practice, the Commission amended the wording of the first sentence in paragraph 1, by referring to the regulations "established" by the legislation of the receiving state. *Ad hoc* action in each case is therefore not permissible.

(4) Goods imported by a diplomatic agent for the purpose of any business carried on by him cannot, of course, qualify for exemption.

(5) The expression "customs duties," as used in this article, means all duties and taxes chargeable by reason of import or export.

(6) While the Commission did not wish to prescribe exemption from inspection as an absolute right, it endeavoured to invest the exceptions proposed to the rule with all necessary safeguards.

(7) In framing the exception, the Commission referred not only to articles in the case of which exemption from customs duties exceptionally does not apply, but also to articles the import or export of which is prohibited by the laws of the receiving state, although without wishing to suggest any interference with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use.

(8) The diplomatic agent's personal baggage is that containing his personal effects. Very commonly, although not invariably, his personal baggage travels with him; but when he travels by air, part of his personal baggage may be sent separately by boat or rail.

### *Acquisition of nationality*

#### ARTICLE 35

Members of the mission, not being nationals of the receiving state, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving state, acquire the nationality of that state.

#### *Commentary*

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving state solely by the operation of the law of that state, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving state of

parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving state. The child should not automatically acquire the nationality of the receiving state solely by virtue of the fact that the law of that state would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legislation of the receiving state provides for such an option. The article covers, secondly, the acquisition of the receiving state's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving state marries a national of that state, the rule contained in this article would not prevent her from acquiring the nationality of that state, because by marrying, she would cease to be part of the household of the member of the mission.

### *Persons entitled to privileges and immunities*

#### ARTICLE 36

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 27 to 34.

2. Members of the service staff of the mission who are not nationals of the receiving state shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment.

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving state, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

#### *Commentary*

(1) This article corresponds to Article 28 of the 1957 draft. Paragraph 1 is unchanged. There is no change of substance in the former paragraphs 2 to 4, but the text has been rearranged in consequence of the Commission's decision to deal with all questions relating to the privileges and immunities due to nationals of the receiving state in Article 37. In this rearrangement the former paragraphs 3 and 4 have been amalgamated.

(2) It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by

heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of states in deciding which members of the staff of a mission shall enjoy privileges and immunities. Some states include members of the administrative and technical staff among the beneficiaries, and some even include members of the service staff. There are also differences in the privileges and immunities granted to the different groups. In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned.

(3) The solutions adopted for this problem will differ according to whether the privileges and immunities required for the exercise of the functions are considered in relation to the work of the individual official or, alternatively, in relation to the work of the mission as an organic whole.

(4) In view of the differences in state practice, the Commission had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any additional rights to be accorded should be decided by bilateral agreement; or to try to establish a general and uniform rule based on what would appear to be necessary and reasonable.

(5) A majority of the Commission favoured the latter course, believing that the rule proposed would represent a progressive step.

(6) The Commission differentiated between members of the administrative and technical staff on the one hand, and members of the service staff on the other.

(7) As regards persons belonging to the administrative and technical staff, it took the view that there were good grounds for granting them the same privileges and immunities as members of the diplomatic staff. The Commission considered several other proposals; for example, it was proposed that these categories should qualify for immunity from jurisdiction solely in respect of acts performed in the course of their duties, and that in all other respects the privileges and immunities to be accorded to them should be determined by the receiving state. By a majority, however, the Commission in 1957 decided that they should be put on the same footing as the diplomatic staff. In the light of observations received from several governments, the Commission reviewed the question at the present session and, by almost the same majority, confirmed its earlier decision.

(8) The reasons relied on may be summarized as follows. It is the function of the mission as an organic whole which should be taken into consideration, not the actual work done by each person. Many of the persons belonging to the services in question perform confidential tasks which, for the purposes of the mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff. An Ambassador's secretary or an archivist may be as much the repository of secret or confidential knowledge as members of the diplomatic staff. Such persons equally need protection of the same order against possible pressure by the receiving state.

(9) For these reasons, and because it would be difficult to distinguish



as between the various members or categories of the administrative and technical staff, the Commission recommends that the administrative and technical staff should be accorded not only immunity from jurisdiction in respect of official acts performed in the course of their duties but, in principle, all the privileges and immunities granted to the diplomatic staff.

(10) With regard to service staff, the Commission took the view that it would be sufficient for them to enjoy immunity only in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment (paragraph 2). States will, of course, remain free to accord additional privileges and immunities to persons in this category.

(11) In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals of the receiving state. The Commission did not feel it desirable to go farther and lay down a criterion for determining who should be regarded as a member of the family, nor did it desire to fix an age limit for children. The spouse and children under age, at least, are universally recognized as members of the family, but in some cases other relatives may also be regarded as qualifying as "members of the family" if they are part of the household. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties or special circumstances are necessary qualifications. Such special circumstances might exist where a relative kept house for an ambassador, although she was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect, to become a part of it.

(12) With regard to private servants of the head or members of the mission, a majority of the Commission took the view that they should not enjoy privileges and immunities as of right, except for exemption from dues and taxes on the emoluments they receive by reason of their employment. In the majority view, the mission's interest would be adequately safeguarded if the receiving state were under a duty to exercise its jurisdiction over their persons in such manner as to avoid undue interference with the conduct of the mission's business.

(13) In connexion with this article, the Commission considered what value as evidence could be attached to the lists of persons enjoying privileges and immunities which are normally submitted to the Ministry for Foreign Affairs. It took the view that such a list might constitute presumptive evidence that a person mentioned therein was entitled to privileges and immunities, but did not constitute final proof, just as absence from the list did not constitute conclusive proof that the person concerned was not so entitled.

*Diplomatic agents who are nationals of the receiving state*

## ARTICLE 37

1. A diplomatic agent who is a national of the receiving state shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions. He shall enjoy such other privileges and immunities as may be granted to him by the receiving state.

2. Other members of the staff of the mission and private servants who are nationals of the receiving state shall enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

*Commentary*

(1) Paragraph 1 of the article corresponds to Article 30 of the 1957 draft. It deals with the position of a *diplomatic agent* who is a national of the receiving state, but in a different form. Paragraph 2, which is new, deals with the position of the other members of the mission and with that of private servants, and reproduces the rules concerning such persons which were formerly embodied in Article 28, paragraphs 3 and 4, of the 1957 draft or referred to in the commentary to former Article 30 as an implied consequence of the rule there stated.

(2) With regard to the privileges and immunities of a diplomatic agent who is a national of the receiving state, practice is not uniform, and the opinion of writers is also divided. Some writers hold the view that a diplomatic agent who is a national of the receiving state should enjoy full privileges and immunities subject to any reservations which the receiving state may have made at the time of the *agrément*. Others are of the opinion that the diplomatic agent should enjoy only such privileges and immunities as have been expressly granted him by the receiving state.

(3) This latter opinion was supported by a minority of the Commission. The majority favoured an intermediate solution. It considered it essential for a diplomatic agent who is a national of the receiving state to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions, although certain members of the Commission urged that he ought to be granted more extensive privileges considered necessary for the satisfactory performance of his duties.

(4) The privileges and immunities to be enjoyed beyond the stated minimum by a diplomatic agent who is a national of the receiving state will depend on the decision of the receiving state.

(5) Attention is drawn to the fact that the phrase "diplomatic agent" includes, not only the head of the mission, but also members of the diplomatic staff.

(6) Under paragraph 2, "other" members of the mission (*i.e.*, other than diplomatic agents) and private servants who are nationals of the receiving state only enjoy such privileges and immunities as are granted to them by that state. However, as stated in the same paragraph, the jurisdiction which the receiving state may exercise over their persons must be exercised in such a manner as not to interfere unduly with the conduct of the business of the mission.

(7) The fact that the draft makes no mention of the position of the members of the families of any of the persons specified in the article implies that they enjoy only such privileges and immunities as are granted to them by the receiving state.

### *Duration of privileges and immunities*

#### ARTICLE 38

1. Every person entitled to diplomatic privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In the event of the death of a member of the mission not a national of the receiving state, or of a member of his family, the receiving state shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country, and the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall be levied only on immovable property situated in the receiving state.

#### *Commentary*

(1) The first two paragraphs of this article deal with the times of commencement and termination of entitlement, in the case of persons entitled to privileges and immunities in their own right. In the case of persons who derive their entitlement from such persons, other dates may apply, *viz.* the dates of commencement and termination of the relationship which constitutes the grounds of the entitlement.

(2) As regards paragraph 2, the question had been raised whether exemption from import duties should not cease immediately on the termination of functions. The Commission did not take that view. It was in any event clear that, as regards *export* duties, these should continue until the

person concerned had had time to make arrangements for his departure. Similarly, in the case of import duties also, there are cases calling for exemption, *e.g.* where goods have been ordered prior to any knowledge of appointment to another post.

(3) A provision was added to paragraph 3 to the effect that, in the event of the death of a member of the mission not a national of the receiving state, or of a member of his family, the receiving state may not levy estate, succession and inheritance duties, except on immovable property situated in that country.

### *Duties of third states*

#### ARTICLE 39

1. If a diplomatic agent passes through or is in the territory of a third state while proceeding to take up or to return to his post, or when returning to his own country, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in case of any members of his family enjoying diplomatic privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1, third states shall not hinder the passage of members of the administrative, technical or service staff of a mission, and of members of their families, through their territories.

3. Third states shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving state. They shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving state is bound to accord.

### *Commentary*

(1) In the course of diplomatic relations it may be necessary for a diplomatic agent or a diplomatic courier to pass through the territory of a third state. Several questions were raised on this subject during discussion in the Commission.

(2) The first question is whether the third state is under a duty to grant free passage. The view was expressed that it was in the interest of all states belonging to the community of nations that diplomatic relations between the various states would proceed in a normal manner, and that in general, therefore, the third state should grant free passage to the member of a mission and to the diplomatic courier. It was pointed out, on the other hand, that a state was entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to go further into this matter.

(3) Another question concerns the position of the member of the mission who is in the territory of a third state either in transit or for other

reasons, and who wishes to take up or return to his post or to go back to his country. Has he the right to avail himself of the privileges and immunities to which he is entitled in the receiving state, and to what extent may he avail himself of them? Opinions differ and practice provides no clear guide. The Commission felt it should adopt an intermediate position.

(4) The Commission proposes (paragraph 1) that the diplomatic agent should be accorded inviolability and such other privileges and immunities as may be required to ensure his transit or return. The same privileges and immunities should be extended to the members of the diplomatic agent's family, and the Commission accordingly amended the text proposed at the ninth session, which did not contain any provision to that effect.

(5) With regard to the members of the administrative, technical and service staff and their families, the Commission recommends that, in circumstances similar to those specified in paragraph 1 of the article, there should be an obligation on third states not to hinder the passage of such persons. Paragraph 2, which is new, lays down this rule.

(6) The second sentence of paragraph 3 reproduces the language of the corresponding provision (Article 32, paragraph 2) in the 1957 draft, *viz.* a third state through whose territory a diplomatic courier passes in transit shall accord him the same inviolability and protection as the receiving state. The Commission considers, however, that the third state should accord to official diplomatic correspondence and to other communications in transit the same freedom and protection as is accorded by the receiving state. Accordingly, a provision to that effect (which precedes the provision relating to the protection of the courier) has been inserted in paragraph 3 of the article.

### SECTION III. CONDUCT OF THE MISSION AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

#### ARTICLE 40

1. Without prejudice to their diplomatic privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.

2. Unless otherwise agreed, all official business with the receiving state entrusted to a diplomatic mission by its government, shall be conducted with or through the Ministry for Foreign Affairs of the receiving state.

3. The premises of a diplomatic mission must not be used in any manner incompatible with the functions of the mission as laid down in the present draft articles, or by other rules of general international law, or by any special agreements in force between the sending and the receiving state.

#### *Commentary*

(1) Paragraph 1, which remains unchanged, states in its first sentence the rule already mentioned, that in general it is the duty of the diplomatic

agent, and of all persons enjoying diplomatic privileges and immunities, to respect the laws and regulations of the receiving state. Immunity from jurisdiction implies merely that the agent may not be brought before the courts if he fails to fulfil his obligations. The duty naturally does not apply where the agent's privileges and immunities exempt him from it. Failure by a diplomatic agent to fulfil his obligations does not absolve the receiving state from its duty to respect the agent's immunity.

(2) The second sentence of paragraph 1 states the rule that persons enjoying diplomatic privileges and immunities must not interfere in the internal affairs of the receiving state; for example, they must not take part in political campaigns. The making of representations for the purpose of protecting the interests of the diplomatic agent's country or of its nationals in accordance with international law does not constitute interference in the internal affairs of the receiving state within the meaning of this provision.

(3) Paragraph 2 states that the Ministry for Foreign Affairs of the receiving state is the normal channel through which the diplomatic mission should conduct all official business entrusted to it by its government: nevertheless, by agreement (whether express or implied) between the two states, the mission may deal directly with other authorities of the receiving state, as specialist attachés, in particular, frequently do.

(4) Paragraph 3 stipulates that the premises of the mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this article does not render Article 20 (inviolability of the mission premises) inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission. The question of asylum is not dealt with in the draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them.

#### SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

##### *Modes of termination*

##### ARTICLE 41

The function of a diplomatic agent comes to an end, *inter alia*:

(a) If it was for a limited period, then on the expiry of that period, provided there has been no extension of it;

(b) On notification by the government of the sending state to the government of the receiving state that the diplomatic agent's function has come to an end (recall);

(c) On notification by the receiving state, given in accordance with Article 8, that it considers the diplomatic agent's function to be terminated.

*Commentary*

This article lists various examples of the ways in which a diplomatic agent's function may come to an end. The causes which may lead to termination under points (b) and (c) are extremely varied.

*Facilitation of departure*

## ARTICLE 42

The receiving state must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment, and must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

*Commentary*

The Commission thought necessary to make it clear that, naturally, only in case of need is the receiving state under a duty to place means of transport at the disposal of persons leaving the country.

*Protection of premises, archives and interests*

## ARTICLE 43

If diplomatic relations are broken off between two states, or if a mission is permanently or temporarily recalled:

(a) The receiving state must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) The sending state may entrust the custody of the premises of the mission, together with its property and archives, to the mission of a third state acceptable to the receiving state;

(c) The sending state may entrust the protection of its interests to the mission of a third state acceptable to the receiving state.

*Commentary*

With the exception of certain drafting changes (e.g. in sub-paragraph (c)), the article reproduces unchanged the terms of the corresponding article in the 1957 draft.

## SECTION V. NON-DISCRIMINATION

## ARTICLE 44

1. In the application of the present rules, the receiving state shall not discriminate as between states.

2. However, discrimination shall not be regarded as taking place:

(a) Where the receiving state applies one of the present rules restrictively because of a restrictive application of that rule to its mission in the sending state;

(b) Where the action of the receiving state consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules.

### *Commentary*

(1) It is stipulated in the draft that certain of its rules are to be applied without discrimination as between states (Article 10, paragraph 2; Article 15, paragraph 1), or uniformly (Article 16). It should not be inferred that these are the only cases in which the rule of non-discrimination is applicable. On the contrary, this is a general rule which follows from the equality of states. Article 44, which is new, lays down the rule expressly.

(2) In the article laying down the rule, the Commission was, however, at pains to refer to two cases in which, although an inequality of treatment is implied, no discrimination occurs, inasmuch as the treatment in question is justified by the rule of reciprocity which is very generally applicable in the matter of diplomatic relations.

(3) The first of these cases is that in which the receiving state applies restrictively one of the rules of the draft because the rule is so applied to its own mission in the sending state. It is assumed that the restrictive application in the sending state concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule; otherwise, there is an infringement of the rule and the action of the receiving state becomes an act of reprisal.

(4) The second case is that in which the receiving state grants, subject to reciprocity, privileges and immunities more extensive than those prescribed by the rules of the draft. It is only natural that the receiving state should be free, as regards the grant of benefits greater than those which it is obliged to grant, to make such grant conditional on receiving reciprocal treatment.

## SECTION VI. SETTLEMENT OF DISPUTES

### ARTICLE 45

Any dispute between states concerning the interpretation and application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, shall, at the request of either of the parties, be submitted to the International Court of Justice.

### *Commentary*

The Commission discussed whether a clause should be inserted in the draft concerning the settlement of disputes arising out of its interpretation



or application, and also where the clause should be placed and what form it should take. Opinion was divided. Some members considered that where, as in the present case, the Commission's task had consisted of codifying substantive rules of international law, it was unnecessary to deal with the question of their implementation. Others suggested that the clause should be included in a special protocol. A majority, however, thought that, if the present draft were submitted in the form of a convention, a provision governing the settlement of disputes would be necessary and that, for this purpose, it should stipulate that, in cases where other peaceful means of settlement proved ineffective, the dispute would be referred to the International Court of Justice. The article as drafted at the ninth session (Article 37) has been clarified by the addition of words stating that this can be done at the request of either of the parties.

## CHAPTER IV

### PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

#### I. STATE RESPONSIBILITY

54. The special rapporteur, Mr. F. V. García Amador, in accordance with the request of the Commission made during its ninth session that he should continue with his work on the subject, submitted his third report at the present session (A/CN.4/111). It was not possible, for want of time, to discuss the report. However, in Chapter V below an account is given of the planning of the future work of the Commission which includes, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

#### II. LAW OF TREATIES

55. Sir Gerald Fitzmaurice, the special rapporteur, having continued his work on this subject at the request of the Commission, presented at the present session his third report, dealing with the essential validity of treaties (A/CN.4/115). As in the case of state responsibility, lack of time did not permit the Commission to take up the subject, but the Commission's plans for future work are explained in Chapter V, and include, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

#### III. CONSULAR INTERCOURSE AND IMMUNITIES

56. Towards the end of the session the Commission began discussion of the report on this subject (A/CN.4/108), submitted by the special rapporteur, Mr. Jaroslav Zourek, at the previous session. After an exposé by the special rapporteur, and a general exchange of views on the subject as a whole, and also on the first article, the Commission deferred further consideration of the report until the next session. The special rapporteur will continue his work.

## CHAPTER V

## OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

## I. PLANNING OF FUTURE WORK OF THE COMMISSION

57. On account of certain hopes expressed in the General Assembly during its twelfth session in 1957, to the effect that on the completion of the draft on diplomatic intercourse and immunities it might be possible for the work on the related subject of consular intercourse and immunities to be accelerated, the Commission decided to take this subject up next, on the basis of the report of the special rapporteur, Mr. Zourek, contained in document A/CN.4/108. Accordingly, the Commission, in addition to devoting two meetings to a general discussion of the subject (see Chapter IV, Part III, above) decided to place it first on the agenda for its eleventh session in 1959 with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft for the comments of governments (see also paragraphs 61, 64 and 65 below). Other subjects which the Commission decided to place on its agenda for next year were the law of treaties and state responsibility, but no final decision was taken as to the order in which these subjects would be discussed, or as to the amount of time to be devoted to them respectively.

58. In paragraphs 26-29 of its report covering its ninth session in 1957<sup>30</sup> an account was given of a discussion regarding the methods of work of the Commission which it had held at that session, arising out of certain views expressed in the Sixth Committee of the Assembly at the latter's eleventh session in 1956. Although the conclusion then reached was that there were no immediate steps which the Commission could usefully take to accelerate its work, it was stated that the Commission proposed to keep the matter under review and to give it renewed consideration at its next session, in the light of experience of the working of the Commission with a membership of twenty-one.<sup>31</sup>

59. Accordingly, and also because the matter had been the subject of further observations in the Sixth Committee of the Assembly at its twelfth session in 1957, the Commission discussed it again during its present session on the basis of a paper<sup>32</sup> prepared by Mr. Zourek who, as last year's Chairman of the Commission, had attended the relevant meetings of the Sixth Committee. After examining the various methods by which the Commission's work might be accelerated, Mr. Zourek thought it possible to rely on only one of them as constituting a method that could be followed without prejudicing the quality of the Commission's work. This consisted in a

<sup>30</sup> Official Records of the General Assembly, 12th Sess., Supp. No. 9 (A/3623).

<sup>31</sup> At the eleventh session of the General Assembly in 1956, the membership of the Commission was increased from fifteen to twenty-one. The ninth session of the Commission in 1957 was the first to be held with this increased membership; the present session the second.

<sup>32</sup> A/CN.4/L.76 of 21 May 1958. As implied in paragraph 17 of this paper, however, the great majority of delegations in the Assembly did not seek to criticize the Commission's methods.

reorganization of methods of work in such a way that less would be done in the plenary meetings and more in committees or sub-commissions, of which greater use would be made; and the paper concluded by setting out a number of concrete proposals to that end.<sup>33</sup>

60. In addition to these proposals Mr. Zourek in an oral statement suggested that governments should be given more time to comment on first drafts produced by the Commission, also for the members to digest these comments and for the special rapporteur to make his recommendations concerning them. At present, the effective period which governments had in order to make comments, from the time when the Commission's report reached them to the date by which replies were supposed to be sent in, was only some four or five months; this period was precisely that during which the annual session of the General Assembly took place, when a number of the officials concerned would be absent in New York. The result was that often only a small number of governments offered any comments, and many of the comments arrived late—some too late to be pre-digested in writing either by the special rapporteur concerned or by the Secretariat before the Commission's session began. Mr. Zourek accordingly proposed that the Commission's present practice of completing a draft at one session for submission to governments, with a view to preparing a final draft at the immediately following session in the light of the comments of governments, and for submission to the General Assembly in the same year, should be modified, and that the Commission should only prepare its final draft at the second session following that in which the first draft had been prepared.

61. With regard to this last proposal, the Commission, while conscious that it would prolong the period before the end of which a final draft on

<sup>33</sup> "With a view to speeding up the work of the International Law Commission, while keeping it on a high scientific level, the following changes in the Commission's organization and methods of work might be considered in the light of past experience:

"(a) In the absence of a contrary decision by the Commission, any draft prepared by the special rapporteurs would be the subject of a general discussion in plenary meeting.

"(b) When the general discussion was concluded, the Commission would review the articles of the draft and the amendments submitted by members, so that they could have an opportunity of presenting their views. Votes would not be taken at that stage of the work unless the circumstances made it necessary to take a vote on a question of principle in order to simplify and facilitate the work.

"(c) After this preliminary discussion, the draft would be referred to a sub-commission so constituted as to include representatives of all the world's principal legal systems. The sub-commission, of which the special rapporteur would automatically be a member, should not consist of more than ten members.

"(d) The sub-commission would fully discuss the special rapporteur's proposals and the amendments thereto, and would prepare draft articles for the full Commission. In view of the importance of this work for the Commission itself, for the Governments of States Members of the United Nations and for academic circles, the meetings of the sub-commissions would be conducted in the same way as plenary meetings, i.e., with simultaneous interpretation and summary records.

"(e) The drafts prepared by the sub-commissions would be submitted to the full Commission for possible discussion and adoption.

"(f) The Commission would always be entitled to reserve a particularly important or urgent draft for discussion in plenary meeting only."

any given subject could be presented to the Assembly,<sup>34</sup> felt little doubt that its work tended to suffer because of defects in the process of obtaining and dealing with the comments of governments, and accordingly decided in principle to adopt this proposal. On this basis it decided that if, at its next session in 1959, it could complete a first draft on consular intercourse and immunities to be sent to governments for comment, it would not take that subject up again in order to prepare a final draft in the light of those comments until its thirteenth session in 1961, and would proceed with other subjects at its twelfth session in 1960.

62. As regards the other concrete proposals (see footnote 33) contained in Mr. Zourek's paper, the Commission, while considering that they ought certainly to be kept in mind and acted upon as occasion might require or render desirable, felt that this should be done on an *ad hoc* basis and that no definite decision was called for in advance to the effect that the Commission would always (or even usually) adopt this method of work. Such a method might on occasion be useful in the initial stages of drawing up a draft on a difficult or complex subject. On the other hand, the experience of the present session, during which the Commission had finalized no less than two complete drafts for presentation to the General Assembly, had shown that, during the later stages at any rate, the work could proceed quite sufficiently quickly in the full Commission, and that no real advantage would be gained by setting up sub-commissions. There was moreover always the danger that, except in cases obviously suitable for reference to a sub-commission, the discussions in the smaller body would merely be reopened in plenary meeting and the ground be gone over again with no real saving of time.

63. It was also pointed out that in any case the suggestion made in the second sentence of sub-paragraph (d) of Mr. Zourek's proposals—apart from budgetary and other implications of a practical character—was open to objection because it would tend to deprive any committee or sub-commission of precisely that informality and conversational atmosphere which enabled difficult or controversial points to be disposed of quickly. It would tend to reintroduce much of the deliberate character of the plenary meetings of the Commission, and this would not be offset by the smaller number of members involved.

64. However, subject to this, the Commission felt that the topic of consular intercourse and immunities (because of its similarity to that of diplomatic intercourse and immunities, which had now been debated at two sessions, and with which all members were thoroughly familiar) might well lend itself to the method of work proposed by Mr. Zourek. Accordingly, in view of its desire to complete a first draft if possible by the fifth week of its next session, the Commission decided that it would organize its work on that subject at its next session on the basis of Mr. Zourek's proposals, with the exception of that contained in the second sentence of

<sup>34</sup> However, while retarding the presentation of any individual draft, it need not, after a certain initial delay, hold up the orderly flow of drafts to the Assembly year by year, in so far as it is otherwise possible to achieve that.

sub-paragraph (d). It was also decided to ask all the members who might wish to propose amendments to the existing draft presented by the special rapporteur<sup>35</sup> to come to the next session prepared to put in their principal amendments in writing within a week, or at most ten days, of the opening of the session (this would not of course preclude the submission of further or consequential amendments at later stages.)

65. It was also decided that, in future, the Commission's Drafting Committee should be formally constituted as what it had long been in fact, namely, a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable to resolve, or which seemed likely to give rise to unduly protracted discussion. It was to such a committee that the method of work to be adopted next year in respect of consular intercourse and immunities would relate. This decision would not entail any alteration in the present arrangements for the Drafting Committee. If, however, the Commission at any time decided to make greater use of sub-commissions on points of substance, this might necessitate recourse to simultaneous interpretation and possibly summary records, thereby involving an administrative and budgetary problem calling for study by the Secretariat and an eventual decision by the Assembly.

66. For other ideas which were considered, but which were regarded as unsatisfactory, it will be sufficient to refer to paragraphs 22 and 23 of Mr. Zourek's paper above-mentioned and the remarks there made.<sup>36</sup> As a variant of the one contained in paragraph 22 (b), it was suggested in the course of the discussion that the length of the sessions should be increased from ten to twelve weeks, although what had been envisaged as necessary to compensate for the increase in membership had been a prolongation of the session proportionate to that increase—i.e., of four weeks.<sup>37</sup> But it was felt that even an increase of two weeks would give rise to some or all of the difficulties mentioned by Mr. Zourek. However, a related suggestion which was discussed and will be kept in mind was the possibility that the special rapporteurs for the various subjects to be taken [up] at a given session should hold a meeting with some members of the Commission a week or ten days before the opening of the session, in order to have a preliminary discussion and thereby to shorten the discussion in the Commission itself.

<sup>35</sup> A/CN.4/108.

<sup>36</sup> See footnote 32 above. As regards the idea of the Commission's working in two main sections, paragraph 23 of this paper stated "The suggestion that the International Law Commission should be split up into two or more sub-committees working on different subjects along parallel lines does not provide an adequate solution. If that suggestion were accepted, the Commission would cease to exist as a single organ and would be replaced by two or more sub-commissions working independently. Unity of views would not be assured and the sub-commissions might reach conflicting results. Moreover, such a reform would be contrary to the Commission's present Statute."

<sup>37</sup> The Commission did not however accept the view that the 40 percent increase in the membership of the Commission effected by the Assembly's decision in 1956 had resulted in a 40 percent increase in the time taken up by its proceedings.

67. The Commission also draws attention to the fact that, while during the main part of the session it holds one plenary meeting a day, experience has shown that towards the end of the session, when the draft report to the General Assembly is being finalized, two meetings are often needed. Provision should therefore be made in the budget for the servicing of approximately ten extra meetings during, but principally towards the end of, the session.

## II. REVIEW OF THE COMMISSION'S WORK DURING ITS FIRST TEN SESSIONS

68. At the conclusion of this, its tenth session, the Commission thought it might be useful to review briefly the work accomplished during that period, since this might have a bearing on the matters discussed in paragraphs 57 to 67 above. The chief points that seemed to emerge were as follows:

(a) In view of the great difficulty and complexity of any work of codification or progressive development,<sup>38</sup> the fact that good work could only be done by proceeding with deliberation, and also the necessity of producing in most cases a detailed commentary as well as a set of well-thought-out and well-drafted articles and a general report on the subject concerned, the Commission considered that the finalization *on the average* of one completed piece of work for presentation to the Assembly in each year constituted about as much as it would be possible or desirable to aim at consistently with maintaining the requisite standard of work. In fact the Commission had done better than this, having in its ten sessions produced no less than fifteen<sup>39</sup> or sixteen<sup>40</sup> final and completed pieces of work.

<sup>38</sup> It was pointed out that many national codifications had taken up periods of ten years or even much longer. Yet in the domestic field a homogeneous corpus of law was being dealt with by persons who were all of the same nationality and all had the same legal background. Bodies so constituted could conveniently split up into sections, each dealing more or less independently with different parts of the subject. This was not possible for the Commission, which was quite differently constituted and had a very different kind of subject-matter to deal with.

<sup>39</sup> These were:

1. Draft Declaration on Rights and Duties of States.
2. Ways and means for making the evidence of customary international law more readily available.
3. Formulation of the Nürnberg Principles.
4. Question of international criminal jurisdiction.
5. Draft Code of Offences against the Peace and Security of Mankind.
6. Question of defining aggression.
7. Reservations to multilateral conventions.
8. Draft on arbitral procedure.
9. Draft Convention on the Elimination of Future Statelessness.
10. Draft Convention on the Reduction of Future Statelessness.
- 11-14. Articles concerning the law of the sea comprising:
  - Régime of territorial waters;
  - Régime of the high seas;

The fact that some of these (*e.g.*, the reports on defining aggression, on reservations to multilateral conventions, and on ways and means of making international law more generally known) did not consist of or include a set of articles, was due to the fact that they concerned matters specially referred to the Commission by the Assembly for opinion, report or proposals, rather than for codification as such.

(b) A considerable amount of the time of the Commission had in fact been taken up with these and other special tasks referred to it by the Assembly, with the result that its own programme of codification, as drawn up at its first session in 1949,<sup>41</sup> had been delayed. During its last five sessions, however, *i.e.*, since and including 1954, the Commission had finally completed nine<sup>42</sup> pieces of codification or progressive development, of which eight<sup>43</sup> were covered by its own original selection of topics to be dealt with, and four<sup>44</sup> figured amongst the five topics<sup>45</sup> originally selected for

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Fisheries: Conservation of the living resources of the high seas;  
The continental shelf.

15. Draft on diplomatic intercourse and immunities.

The above list takes into account the fact that the Conference on the Law of the Sea adopted four distinct Conventions as comprising the law of the sea. Each is an independent subject.

<sup>40</sup> Sixteen, if account is taken of the fact that the draft on arbitral procedure presented to the Assembly in 1953 was, so far as the Commission was concerned, a final and completed text. In effect the Commission has presented two final texts on this subject.

<sup>41</sup> The report of the Commission on its first session contains, in Chapter II, paragraph 16, the following list of topics selected by the Commission for codification:

1. Recognition of States and Governments;
2. Succession of States and Governments;
3. Jurisdictional immunities of States and their property;
4. Jurisdiction with regard to crimes committed outside national territory;
5. Régime of the high seas;
6. Régime of territorial waters;
7. Nationality, including statelessness;
8. Treatment of aliens;
9. Right of asylum;
10. Law of treaties;
11. Diplomatic intercourse and immunities;
12. Consular intercourse and immunities;
13. State responsibility;
14. Arbitral procedure.

See Official Records of the General Assembly, 4th Sess., Supp. No. 10 (A/925), Ch. II, par. 16.

<sup>42</sup> Draft Code of Offences against the Peace and Security of Mankind (one);

Law of the sea: Régime of territorial waters, Régime of the high seas, Fisheries: Conservation of the living resources of the high seas, The continental shelf (four);

Elimination of future statelessness; Reduction of future statelessness (two); Arbitral procedure (one);

Diplomatic intercourse and immunities (one).

<sup>43</sup> *I.e.*, all but the Draft Code of Offences against the Peace and Security of Mankind.

<sup>44</sup> The régime of the high seas; fisheries; the continental shelf; and arbitral procedure.

<sup>45</sup> As in footnote 44, plus the law of treaties.

priority treatment. Of these nine completed pieces of work, four had already been taken up at an international conference<sup>46</sup> and two more would be similarly taken up in 1959.<sup>47</sup> Of the remaining three, one had in effect not so far been proceeded with by the Assembly,<sup>48</sup> while two were going to the Assembly in final form at its forthcoming session. The Commission's task was over when it presented final drafts. Any further action was for the Assembly. Such further action had sometimes been taken and sometimes not.

(c) The question arose whether, even if the Commission were to produce drafts more quickly, governments, and the Assembly itself, would be able to keep pace with them. As it was (see paragraphs 60 and 61 above), governments had difficulty in furnishing comments, and often it was only a small minority that did so. As regards the Assembly, it would no doubt always be possible to hold a general discussion each year in the Sixth Committee on any texts prepared by the Commission. But in many cases this did not suffice, and further action was required, such as holding an international conference which could be attended by the necessary experts on the subjects involved, who would not normally be present in the Sixth Committee. The already crowded condition of the international programme, however, would make it difficult to hold many conferences of a codificatory character. It was doubtful whether, on the average, such conferences could be held oftener than once a year, or more probably once in two years. For administrative and technical reasons, they could not usually be held concurrently with either the meetings of the Assembly or of the Commission itself. This meant that, in practice, the only time of the year at which such conferences could be held, unless they were very short, was between January and April. In these circumstances, the Commission came to the conclusion that it should adhere to its policy of taking enough time to ensure that any final draft it produced would be good, and such as could in substance be adopted by an international conference—a policy that had been fully vindicated by the results of the recent Conference on the Law of the Sea. Added to this, there was the important consideration that the whole of international law and international relations was now going through a period of adjustment. In such a situation speed was not necessarily the most important consideration. Time spent in endeavouring to reconcile different points of view and different types of outlooks and ideas was not time wasted. In the course of the years what would matter was the quality of the work, not whether a greater or lesser period had been spent in producing it.

69. The foregoing observations in no way imply that the Commission is not fully aware of the necessity of proceeding as fast as is reasonably possible with its work—and it intends to do so. But it has thought it useful to try and place the matter in its wider perspective.

<sup>46</sup> *I.e.*, those covering the law of the sea.

<sup>47</sup> Draft Convention on the Elimination of Future Statelessness and Draft Convention on the Reduction of Future Statelessness.

<sup>48</sup> *I.e.*, the Draft Code of Offences against the Peace and Security of Mankind.



## III. CO-OPERATION WITH OTHER BODIES

70. In 1956 the Commission adopted a resolution requesting the Secretary-General to authorize the Secretary of the Commission to attend the fourth meeting of the Inter-American Council of Jurists, scheduled to be held at Santiago, Chile, in 1958. At the next session in 1957, the Secretary informed the Commission of the postponement until 1959 of the meeting of the Inter-American Council.

71. During the present session the Commission had before it a joint proposal (A/CN.4/L.77) by Mr. R. J. Alfaro, Mr. G. Amado, and Mr. F. V. García Amador, which would renew the request to the Secretary-General in view of the convening of the fourth meeting of the Inter-American Council of Jurists early in 1959.

72. The Commission adopted this proposal unanimously in the following terms:

*"The International Law Commission,*

*"Recalling Article 26 of its Statute and the resolution adopted at its sixth, seventh and eighth sessions regarding co-operation with inter-American bodies and, in particular, that at its eighth session it requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, in the capacity of an observer, the fourth meeting of the Inter-American Council of Jurists to be held in Santiago, Chile, in 1958.*

*"Noting that this meeting has been postponed until early in 1959,*

*"Considering that, since the subject of state responsibility will be discussed at the eleventh session of the Commission and is also the principal item on the agenda for the fourth meeting of the Inter-American Council of Jurists, there exists again a real opportunity for co-operation between the International Law Commission and the Inter-American Council of Jurists,*

*"Decides:*

*"1. To request the Secretary-General to authorize the Secretary of the International Law Commission to attend, in the capacity of an observer for the Commission, the fourth meeting of the Inter-American Council of Jurists to be held early in 1959 at Santiago, Chile, and submit a report to the Commission at its next session regarding such matters discussed by the Council as are also on the agenda of the Commission;*

*"2. To communicate this decision to the Inter-American Council of Jurists and to express the hope that the Council may be able, for a similar purpose, to request its Secretary to attend the next session of the Commission."*

73. The Commission also had before it a communication received from the Asian-African Legal Consultative Committee informing it of the holding of a second session at Colombo, Ceylon, from 14 to 26 July 1958, during which session the Committee proposed to consider certain items also of interest to the Commission. In view of the closeness of the date of this

second session, the Commission was unable to consider the question of sending an observer. It authorized the Secretary to inform the Asian-African Legal Consultative Committee of this fact and, at the same time, to express its interest in the work of the Committee and its hope that the Committee would transmit to it such records and other documents as related to matters falling within the scope of the work of the Commission.

#### IV. CONTROL AND LIMITATION OF DOCUMENTATION

74. Resolution 1203 (XII) of the General Assembly concerning this question had been placed on the agenda of the Commission for the present session and was duly brought to the attention of the Commission. The Commission took note of the resolution.

#### V. DATE AND PLACE OF THE NEXT SESSION

75. The Commission decided to hold its eleventh session in Geneva from 20 April to 26 June 1959.

#### VI. REPRESENTATION AT THE THIRTEENTH SESSION OF THE GENERAL ASSEMBLY

76. The Commission decided that it should be represented at the next (thirteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabinod Pal.

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## THE UNITED STATES AND THE INTERNATIONAL COURT OF JUSTICE: A RE-EXAMINATION

BY HERBERT W. BRIGGS

*Editor-in-Chief*

In his State of the Union Message on January 9, 1959, President Eisenhower declared his purpose of intensifying efforts "to the end that the rule of law may replace the rule of force in the affairs of nations" and of making proposals for "a re-examination of our own relation to the International Court of Justice."<sup>1</sup> It is no secret that the tide of criticism has been rising<sup>2</sup> against the "Connally Amendment" reservation pursuant to which the United States excluded from its acceptance of the compulsory jurisdiction of the Court

(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America.<sup>3</sup>

<sup>1</sup> 40 Dept. of State Bulletin 118 (1959). See also statement by Secretary of State Dulles to the Senate Foreign Relations Committee, Jan. 14, 1959, where he said that "we envisage further steps to encourage the greater use of that Court." *Ibid.* 153.

<sup>2</sup> See, e.g., Loftus Becker, "Some Political Problems of the Legal Adviser," address before the American Society of International Law, April 26, 1958, 38 Dept. of State Bulletin 832 (1958); 1958 Proceedings, American Society of International Law 267; Attorney General William P. Rogers, "International Order under Law," address to the 48th Conference of the International Law Association, printed in 39 Dept. of State Bulletin 537 (1958).

On April 29, 1954, the *Institut de Droit International* unanimously adopted a *vœu* expressing the hope "that States which include in their declarations accepting the compulsory jurisdiction of the International Court of Justice a reservation in respect of matters of domestic jurisdiction will leave it to the Court to decide in each particular case whether the reservation is applicable." 45 *Annuaire de l'Institut de Droit International* 197, 300 (Tome II, 1954).

In the Introduction to his Annual Report for 1956-57, the U.N. Secretary General deplored "new and far-reaching reservations" which "may render the whole system of compulsory jurisdiction virtually illusory." General Assembly, 12th Sess., Official Records, Supp. No. 1A, p. 5 (1957).

The American Bar Association has opposed the Connally reservation ever since its adoption. See 32 A.B.A.J. 873-874 (1946); 33 *ibid.* 249, 430, 512 (1947). In August, 1958, the Report of the Special Committee on International Law Planning of the American Bar Association (Hon. Thomas E. Dewey, Chairman) stated, in part:

"The committee believes that the withdrawal of the United States reservation to the jurisdiction of the International Court, to the extent that it allows the United States unilaterally to determine which disputes lie essentially within its own jurisdiction, would be a most salutary step. It would be a demonstration of faith in the rule of law, and a persuasive example to others. We believe it would materially strengthen the position of the United States in the world community as a leader in efforts to achieve the goal of the settlement of all disputes by peaceful means."

<sup>3</sup> T.I.A.S., No. 1598; 1957-1958 I.C.J. Yearbook 212. Italics added.

Although revision of the Declaration of August 14, 1946, by which the United States accepted the Court's compulsory jurisdiction should lead to the elimination of the ambiguous multilateral treaty reservation as well as of the Connally Amendment reservation, the latter commands immediate attention. It may serve a useful purpose to pass in summary review the facts with regard to domestic jurisdiction reservations and the Court's behavior when confronted with pleas of domestic jurisdiction.<sup>4</sup>

#### DOMESTIC JURISDICTION RESERVATIONS

Most states accepting the compulsory jurisdiction of the Court have found it unnecessary to exclude from their acceptances disputes with regard to matters of domestic jurisdiction. Of thirty-nine states<sup>5</sup> currently accepting the compulsory jurisdiction of the International Court of Justice by declarations made pursuant to Article 36(2) of the Court's Statute, only thirteen<sup>6</sup> have included in their declarations reservations of disputes with regard to matters of domestic jurisdiction. Twenty-six states currently accepting the compulsory jurisdiction of the Court have never limited their acceptances by reservations of matters of domestic jurisdiction. Of the forty-five states at some time accepting the compulsory jurisdiction of the Permanent Court of International Justice under the Optional Clause, only eleven<sup>7</sup> ever included in their acceptances reservations of disputes with regard to matters of domestic jurisdiction.

Prior to 1929 no state accepting the compulsory jurisdiction of the Permanent Court of International Justice included in its declaration a

<sup>4</sup> The materials are discussed in more detail in the writer's lectures delivered at the Hague Academy of International Law in August, 1958, on "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice," which will shortly appear in 93 *Recueil des Cours* 223-367 (1958, in press).

See also the admirable reports of C. Wilfred Jenks, "Compétence obligatoire des instances judiciaires et arbitrales internationales," in 47 *Annuaire de l'Institut de Droit International* 34-322 (Tome I, 1957).

<sup>5</sup> Australia (1954), Belgium (1958), Bulgaria (1921), Cambodia (1957), Canada (1929), China (1946), Colombia (1937), Denmark (1956), Dominican Republic (1924/1933), El Salvador (1921/1930), Finland (1958), France (1947), Haiti (1921), Honduras (1954), Israel (1956), Japan (1958), Liberia (1952), Liechtenstein (1950), Luxembourg (1930), Mexico (1947), The Netherlands (1956), New Zealand (1940), Nicaragua (1929), Norway (1956), Pakistan (1957), Panama (1921), Paraguay (1933), Philippines (1947), Portugal (1955), The Sudan (1957), Sweden (1957), Switzerland (1948), Thailand (1929), Turkey (1958), Union of South Africa (1955), United Arab Republic (1957), United Kingdom (1958), United States of America (1946), Uruguay (1921). 1957-1958 I.C.J. Yearbook 192 ff., and current materials from United Nations Secretariat.

<sup>6</sup> Australia, Cambodia, Canada, France, Israel, Liberia, Mexico, New Zealand, Pakistan, The Sudan, Union of South Africa, United Kingdom, United States.

<sup>7</sup> Albania, Australia, Brazil, Canada, India, Iran, New Zealand, Rumania, Union of South Africa, United Kingdom, Yugoslavia. Four other states—Argentina, Egypt, Iraq and Poland—drafted declarations containing domestic jurisdiction reservations but the declarations never entered into force. Cf. P.C.I.J., Series E, No. 16, pp. 49, 345 ff. (1945); Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, pp. 682 ff. (1943).

domestic jurisdiction reservation. In that year, after mutual consultation, the United Kingdom, Australia, Canada, India, New Zealand and the Union of South Africa deposited declarations containing identically phrased reservations withholding from the compulsory jurisdiction of the Court "disputes with regard to questions which by international law fall exclusively within the jurisdiction" of the declarant state. In 1930 comparable reservations were made by Albania, Iran, Rumania and Yugoslavia, and in 1937, by Brazil.

The reason for this paucity of domestic jurisdiction reservations is clear: The Court's Statute does not extend the jurisdiction of the Court to disputes with regard to matters which by international law fall exclusively within the domestic jurisdiction of a state. By depositing a declaration accepting the compulsory jurisdiction of the Court in accordance with Article 36 (2), a state does not confer on the Court jurisdiction which is excluded by the Statute. Article 36(2) serves as a limitation on the jurisdiction of the Court, confining it, in relation to declarations made thereunder, to legal disputes comprised within the categories of international law disputes there listed. Non-legal disputes or legal disputes with regard to matters which by international law fall exclusively within the domestic jurisdiction of a state are not comprised within the categories set forth in Article 36(2).

#### THE COURT AND DOMESTIC JURISDICTION

The consistent jurisprudence of the Court provides an additional safeguard against its consideration of disputes with regard to matters of domestic jurisdiction. Although, in the *Electricity Company of Sofia and Bulgaria* case,<sup>8</sup> the *Norwegian Loans* case<sup>9</sup> and the *Right of Passage over Indian Territory* (Preliminary Objections) case,<sup>10</sup> the Court did not find it necessary to make pronouncements on arguments by respondents that legal disputes with regard to matters which by international law fall exclusively within the domestic jurisdiction of a state are not comprised within the categories set forth in Article 36(2), its views on the exclusion from its jurisdiction of such disputes are not in doubt.

Exclusive of the *Norwegian Loans* and *Interhandel* cases, in which the peremptory form of the domestic jurisdiction reservation was invoked, the Court has been confronted with pleas of domestic jurisdiction in four contentious cases—the *Losinger* (1936),<sup>11</sup> *Electricity Company of Sofia and Bulgaria* (1939),<sup>12</sup> *Anglo-Iranian Oil Company* (1951),<sup>13</sup> and *Right of Passage* (1957)<sup>14</sup> cases—and with regard to three advisory opinions—*Tunis-Morocco Nationality Decrees* (1923),<sup>15</sup> *Treatment of Polish Na-*

<sup>8</sup> P.C.I.J., Series A/B, No. 77, pp. 82-83 (1939).

<sup>9</sup> [1957] I.C.J. Rep. 9, 22.

<sup>10</sup> *Ibid.* 133-134.

<sup>11</sup> P.C.I.J., Series A/B, No. 67, p. 15 (1936).

<sup>12</sup> *Loc. cit.*

<sup>13</sup> [1951] I.C.J. Rep. 89, 92-93.

<sup>14</sup> *Loc. cit.*

<sup>15</sup> P.C.I.J., Series B, No. 4, pp. 7 ff. (1923).

*nationals in Danzig* (1932),<sup>16</sup> and *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania* (First Phase).<sup>17</sup>

Analysis of these opinions reveals that in all seven opinions the Court regarded the concept of domestic jurisdiction as comprising matters which *according to international law* are within the domestic jurisdiction of a state. If the dispute or question arose out of matters which were governed by treaty or other principles of international law and determination of the rights of the parties involved an examination of their obligations under international law, the matter ceased to be one exclusively within the domestic jurisdiction of a state and the plea of domestic jurisdiction was ill founded.

In six of the seven opinions the concept of domestic jurisdiction was that by which a matter had to be by international law *exclusively* within the domestic jurisdiction of a state in order to remove it from the jurisdiction of international tribunals or organs. In the advisory opinion on *Interpretation of Peace Treaties*, the Court declined to treat a matter alleged to be *essentially* within the domestic jurisdiction of states as differing from matters *exclusively* within domestic jurisdiction when the matter involved the interpretation of treaties.

In two advisory opinions—*Tunis-Morocco* and *Polish Nationals in Danzig*—the jurisdiction of the Court itself was not challenged. In the *Tunis-Morocco* opinion the Court found that the jurisdiction of the League of Nations Council was unaffected by a plea of domestic jurisdiction based upon matters which were, on a provisional view, governed by international law. In the *Polish Nationals in Danzig* opinion the Court did not discuss the issue in the language of domestic jurisdiction, but rejected a Polish contention that Poland could submit to compulsory international jurisdiction claims based on matters falling within the domestic jurisdiction of Danzig and involving no violation of the international obligations of Danzig. The fact that a dispute arose out of matters solely within the domestic jurisdiction of a state removed it from the scope of international obligations to submit to compulsory jurisdiction only questions of an international legal nature.

In five<sup>18</sup> of the seven opinions the jurisdiction of the Court was challenged on the plea of domestic jurisdiction, but in none of these cases did the Court regard the plea as barring its jurisdiction *in limine litis*. In the *Peace Treaties* opinion the plea was rejected as ill founded. In the *Electricity Company of Sofia and Bulgaria* case the plea was rejected as not possessing the character of a preliminary objection, since it went to the merits, but it could be re-argued as a defense on the merits. In the *Losinger* and *Right of Passage* cases the jurisdictional plea of domestic jurisdiction was joined to the merits for further hearings, since a pro-

<sup>16</sup> P.C.I.J., Series A/B, No. 44, p. 4 (1932).

<sup>17</sup> [1950] I.C.J. Rep. 65.

<sup>18</sup> In only three of these cases—the *Losinger*, *Anglo-Iranian Oil Co.*, and *Right of Passage* cases—was the jurisdictional plea founded on a reservation to a declaration accepting compulsory jurisdiction.



visional view of the cases suggested the possibility that the issues could be decided only on the basis of principles of international law. In the *Anglo-Iranian Oil Company* case the plea of domestic jurisdiction was rejected as a bar to the jurisdiction of the Court to indicate interim measures of protection, but the Court reserved the question of jurisdiction on the merits for further hearings.

The *Losinger* and *Electricity* cases were discontinued before a decision on the merits, the *Right of Passage* case is still pending on the merits; and in the *Anglo-Iranian Oil Company* case the Court later found that it lacked jurisdiction on grounds other than the plea of domestic jurisdiction.<sup>19</sup>

Certain conclusions are possible from this jurisprudence. First, reservations or pleas that the Court lacks jurisdiction with regard to matters which by international law fall either exclusively or essentially within the domestic jurisdiction of a state do not stop the Court *in limine litis* from determining its own competence when confronted with such a reservation or plea. Secondly, if the Court finds that a dispute relates to matters which according to international law fall exclusively within the domestic jurisdiction of a state, the Court will lack jurisdiction to decide the merits of the dispute.

The United Kingdom Government defended the domestic jurisdiction reservation included in its declaration of September 19, 1929, on the supererogatory ground that

this is merely an explicit recognition of a limitation on the jurisdiction of the Permanent Court which results from international law itself.<sup>20</sup>

Judge Manley O. Hudson has observed with regard to reservations excluding disputes relating to matters of domestic jurisdiction:

It is difficult to see what is accomplished by this exclusion; if a dispute relates to questions which fall within exclusively national jurisdiction, it does not fall within one of the classes enumerated in paragraph 2 of Article 36.<sup>21</sup>

Professor C. H. M. Waldock writes that a well-founded plea of domestic jurisdiction will serve as an effective defense on the merits even in the absence of a reservation of matters of domestic jurisdiction; and where the jurisdictional instrument contains an express or implied reservation of matters of domestic jurisdiction, "the defendant State may raise the issue of the reserved domain both as an objection to jurisdiction and as a substantive defence on the merits."<sup>22</sup>

Since Article 36(2) of the Court's Statute excludes by clear implication disputes relating to matters which by international law fall within the domestic jurisdiction of a state, question arises as to the need for

<sup>19</sup> [1952] I.C.J. Rep. 93.

<sup>20</sup> Memorandum on the Signature . . . of the Optional Clause . . . , Great Britain, Parl. Papers, Misc. No. 12 (1929), Cmd. 3452, p. 12.

<sup>21</sup> Hudson, *op. cit.* 471. Cf. J. H. W. Verzijl, "Affaire relative à Certains Emprunts Norvégiens," 4 *Nederlands Tijdschrift voor Internationaal Recht* 382 (1957).

<sup>22</sup> C. H. M. Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals," 31 *Brit. Year Bk. of Int. Law* 99, 115, 124, 140 (1954).

inserting domestic jurisdiction reservations in declarations accepting the Court's compulsory jurisdiction. As early as 1930, Professor Lauterpacht speculated whether the unstated purpose of such reservations might not be to permit declarant state to substitute itself for the Court in determining whether or not a matter fell by international law within the exclusive jurisdiction of declarant state.<sup>23</sup> The jurisprudence of the Court appears to lay at rest such a fear but, in its 1946 declaration accepting the compulsory jurisdiction of the Court, the United States explicitly reserves the right to make such determination.

#### THE PEREMPTORY DOMESTIC JURISDICTION RESERVATION

The history of the Connally Amendment is too well known to require more than a brief summary here. In the resolution originally introduced by Senator Wayne Morse on July 28, 1945, the proposed declaration accepting the compulsory jurisdiction of the Court was qualified by a reservation of "(b) disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United States"<sup>24</sup>—the identical formula then employed by the United Kingdom and other states reserving such questions. A year later, a new Morse resolution was introduced with bipartisan support. By this resolution the wording of the domestic jurisdiction reservation was changed to read: "(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." The changed phraseology, based on Article 2(7) of the United Nations Charter rather than on Article 15(8) of the League of Nations Covenant, omitted any reference to "questions which by international law fall exclusively" within such jurisdiction.

In this form, S. R. 196 survived public hearings<sup>25</sup> and was endorsed, without dissent, by the Senate Committee on Foreign Relations with the following statement:

The question of what is properly a matter of international law is, in case of dispute, appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction. It is plainly the intention of the Statute that such questions should be settled by the Court . . . [citing Article 36(6)]

The Committee Report continued that, although other states had reserved matters of domestic jurisdiction,

in no case did they reserve to themselves the right of decision. The committee therefore decided that a reservation of the right of decision as to what are matters essentially within domestic jurisdiction

<sup>23</sup> H. Lauterpacht, "The British Reservations to the Optional Clause," 10 *Economica* 187, 148-155 (1930).

<sup>24</sup> S. Res. 160. 91 Cong. Rec. 8164 (79th Cong., 1st Sess.).

<sup>25</sup> Compulsory Jurisdiction, International Court of Justice, Hearings before a subcommittee of the Committee on Foreign Relations, U. S. Senate, 79th Cong., 2nd Sess., on S. Res. 196, July 11, 12 and 15, 1946 (160 pp.).

would tend to defeat the purposes which it is hoped to achieve by means of the proposed declaration as well as the purpose of Article 36, paragraphs 2 and 6 of the Statute of the Court.<sup>26</sup>

Despite this clearly-reasoned statement, the Senate, on August 2, 1946, by a vote of 51 to 12 adopted the Connally Amendment: "as determined by the United States."<sup>27</sup>

The example set by the United States has since been followed by France (1947), Mexico (1947), Liberia (1952), Union of South Africa (1955), India (1956),<sup>28</sup> Pakistan (1957), and The Sudan (1957).

The peremptory domestic jurisdiction reservation "as determined by" declarant state has been invoked in two cases before the International Court of Justice. In the *Norwegian Loans* case,<sup>29</sup> although the Norwegian declaration accepting the Court's compulsory jurisdiction contained no domestic jurisdiction reservation, the Court permitted Norway to invoke, on the basis of reciprocity, the French reservation of "differences relating to matters which are essentially within the national jurisdiction as understood by" declarant state. Since the validity of the reservation was not questioned by the parties, nor argued before it, the Court declined jurisdiction on the basis of the questionable reservation, while stating that it was not prejudging the question "whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute." It is important to note that the invocation by Norway of the peremptory domestic jurisdiction reservation did not stop proceedings *in limine litis*. The Court joined Norway's preliminary objections to the merits;<sup>30</sup> and it was only after the case had been fully argued on the merits, with no issue being raised between the parties as to the validity of the peremptory reservation, that the Court allowed it without passing on its validity.

#### THE INTERHANDEL CASE

In the *Interhandel* case<sup>31</sup> the United States first invoked its peremptory domestic jurisdiction reservation as a bar to the Court's jurisdiction to consider the indication of interim measures of protection requested by Switzerland. By a so-called "preliminary objection" filed on October 11, 1957, the United States had informed the Court that since the United States had determined, pursuant to its domestic jurisdiction reservation, that the sale or disposition of the shares of General Aniline and Film Company "is a matter essentially within its domestic jurisdiction," the United States therefore declined "to submit the matter of the sale or

<sup>26</sup> International Court of Justice, Report of the Committee on Foreign Relations, U. S. Senate, No. 1885, 79th Cong., 2nd Sess., July 25, 1946, p. 5.

<sup>27</sup> 92 Cong. Rec. 10697 (79th Cong., 2nd Sess., Aug. 2, 1946).

<sup>28</sup> India later withdrew her entire declaration accepting compulsory jurisdiction of the Court.

<sup>29</sup> [1957] I.C.J. Rep. 9, 26-27.

<sup>30</sup> [1956] I.C.J. Rep. 73-74.

<sup>31</sup> Order of Oct. 24, 1957, on Request for the Indication of Interim Measures of Protection, [1957] I.C.J. Rep. 105; digested in 52 A.J.I.L. 320 (1958).

disposition of such shares to the jurisdiction of the Court." In his oral argument in October, 1957, Mr. Loftus Becker, Agent for the United States, contended:

This determination by the United States of America is not subject to review or approval by any tribunal. It operates to remove definitively from the jurisdiction of the Court the matter which it determines.

The peremptory character of the United States veto on the Court's jurisdiction was exploited by Mr. Becker in his argument that the

Court cannot be considered to have power to indicate provisional measures with respect to the very matter concerning which it is known conclusively that it has no jurisdiction.

The determination made by the United States under its domestic jurisdiction reservation, he argued, "conclusively divested this Court of the *prima facie* jurisdiction which it did possess prior to that determination," and the Court "no longer possessed any jurisdiction to indicate provisional measures on the subject matter of the determination."<sup>32</sup>

Despite this argument, the Court took jurisdiction to consider the indication of interim measures under Article 41 of its Statute; but, because the United States informed the Court that the U. S. Supreme Court had granted *certiorari* in proceedings by Interhandel in American courts, and the United States was not contemplating immediate sale of the shares, the International Court of Justice rejected for lack of urgency the Swiss request for indication of interim measures.

In the second phase of the *Interhandel* case, the United States again invoked its peremptory domestic jurisdiction reservation. On June 16, 1958, the United States deposited with the Registry of the Court four preliminary objections, of which the fourth (in the language of the United States submissions) reads as follows:

(4) *Fourth Preliminary Objection*

(a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline & Film Corporation (including the passing of good and clear title to any persons or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline & Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.<sup>33</sup>

<sup>32</sup> *Interhandel Case*, Oral Proceedings, Oct. 12 and 14, 1957, I.C.J. Distr. 57/168, pp. 18-20.

<sup>33</sup> *Interhandel Case*, Preliminary Objections of the Government of the United States of America, filed with the Court June 16, 1958, p. 26.

In support of the contention advanced in paragraph (a), the United States preliminary objections once again state that the determination made by the United States that a matter falls essentially within its domestic jurisdiction "is not subject to review or approval by any tribunal" and

Accordingly, the question of the sale or disposition of the shares of General Aniline & Film is not justiciable, and the United States respectfully declines to submit the matter of such disposition or sale to the jurisdiction of the Court. Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946), insofar as the determination of the issues would affect the sale or disposition of the shares.

However, the determination pursuant to paragraph (b) of the Conditions attached to this country's acceptance of the Court's compulsory jurisdiction is made only as regards the sale or disposition of the assets.<sup>34</sup>

In reply <sup>35</sup> the Swiss Government challenged the validity of the peremptory domestic jurisdiction reservation invoked by the United States, first, because it was incompatible with Article 36(6) of the Court's Statute by which "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court"; and, second, because the peremptory reservation was inconsistent with the acceptance of compulsory jurisdiction under Article 36(2) of the Statute. Subsidiarily, the Swiss Government questioned the legitimacy of perinitting a state which had accepted the compulsory jurisdiction of the Court to divide the subject matter of a dispute, which was alleged to fall within its domestic jurisdiction, into questions the Court is asked to reject on the basis of international law and questions which are arbitrarily and unilaterally declared to be outside the Court's jurisdiction.<sup>36</sup> Since the United States alleged, and the Swiss Government denied, that the subject matter of the dispute fell within the domestic jurisdiction of the United States, argued the Swiss Government, it was for the Court to decide this dispute as to its jurisdiction and to deny automatic effect to the United States reservation.

By the time oral proceedings were held at The Hague on the United States preliminary objections in November, 1958, the U. S. Supreme Court had made its decision, reversing dismissal of Interhandel's action in the U. S. courts and reopening the case.<sup>37</sup> In his oral arguments before the International Court of Justice, Mr. Loftus Becker, Agent for the United

<sup>34</sup> *Ibid.*, p. 19.

<sup>35</sup> Observations et Conclusions du Gouvernement de la Confédération Suisse sur les Exceptions Préliminaires du Gouvernement des États-Unis d'Amérique, filed with the Court Sept. 22, 1958, pp. 28-33; Interhandel Case, Oral Proceedings, Nov. 5 to 17, 1958, I.C.J. Distr. 58/185, pp. 103-110, 159 (oral argument of Prof. Paul Guggenheim, Swiss Co-Agent, Nov. 12 and 17, 1958). <sup>36</sup> *Ibid.*, I.C.J. Distr. 58/185, p. 105.

<sup>37</sup> *Société Internationale, etc., v. Rogers*, 357 U. S. 197 (June 16, 1958); 53 A.J.I.L. 177 (1959).

States, pointed out that the decision of the U. S. Supreme Court had made more important the third preliminary objection of the United States to the effect that the International Court of Justice lacked jurisdiction because *Interhandel* had not yet exhausted available local remedies, but had rendered "somewhat academic" and "somewhat moot" preliminary objection 4(a). Sale of *Interhandel*'s vested stock was prohibited as long as it was in litigation before United States courts. Therefore Mr. Becker declined to reply to Swiss arguments against the validity of the United States domestic jurisdiction reservation, but contented himself with assertions that the reservation "is valid," its invocation in the *Interhandel* case was "not arbitrary," and the United States maintained its preliminary objection 4(a) and asked the Court to honor it by declining jurisdiction on the sole ground that the United States had determined that the Court lacked jurisdiction.<sup>38</sup>

Since the United States did not withdraw its invocation of the peremptory domestic jurisdiction reservation, Professor Paul Guggenheim, Co-Agent of the Swiss Government, argued the invalidity of the reservation and of its invocation in the *Interhandel* case, and the Swiss Government requested the Court to reject or join to the merits the fourth preliminary objection of the United States.

#### ALTERNATIVES TO THE CONNALLY RESERVATION

The behavior of the United States in the *Interhandel* case reminds one of the observation made by Lawrence Preuss that to entrust to an interested party the determination whether or not a matter falls within its exclusive domestic jurisdiction "is to add to the risk of evasion that of error committed in good faith."<sup>39</sup>

The essence of the objection to the Connally Amendment reservation lies in its attempt to usurp for the United States the Court's own function of determining disputes as to its jurisdiction, by substituting the determination of a party in interest for that of an impartial judicial tribunal. The Court observed in the *Nottebohm* case that

Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.

This "rule of general international law" and "the judicial character of the Court" would suffice, said the Court, even if Article 36(6) were not

<sup>38</sup> Oral Proceedings, I.C.J. Distr. 58/185, pp. 3-4, 36, 137 (oral argument of Mr. Loftus Becker, U. S. Agent, Nov. 5, 6 and 14, 1958).

<sup>39</sup> Preuss, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction," 40 A.J.I.L. 720, 733 (1946). This article and the articles by Francis O. Wilcox, "The United States Accepts Compulsory Jurisdiction," 40 A.J.I.L. 699 (1946), and by Judge Manley O. Hudson, "The World Court: America's Declaration Accepting Jurisdiction," 32 A.B.A.J. 832-836, 895-897 (1946), contain most valuable information on U. S. acceptance of the compulsory jurisdiction of the Court.

explicit, in relation to parties to the Court's Statute, to confer on the Court the jurisdiction to decide disputes as to its own jurisdiction.<sup>40</sup>

It is high time, therefore, that the United States withdraw its peremptory domestic jurisdiction reservation. Assuming that we wish to accept the compulsory jurisdiction of the International Court of Justice in legal disputes concerning the questions of international law listed in Article 36(2) of the Statute—which we have in fact done—the reservation serves no useful purpose except that of evasion. Moreover, unless the Court finds the peremptory reservation invalid, it can be invoked against us when we are plaintiffs, under the condition of reciprocity contained in Article 36(2) of the Statute.<sup>41</sup>

In eliminating the Connally Amendment reservation, care should be taken not to fall into the facile error of attempting to incorporate in a new declaration a list of matters considered by the United States to fall essentially or exclusively within its domestic jurisdiction. The rule of law advocated by President Eisenhower would not be furthered by looking backwards forty years to the unconscionable 4th Lodge Reservation to the Covenant of the League of Nations which, after stating that the United States “reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction,” went on to declare

that all domestic and political questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children, and in opium and other dangerous drugs, and all other domestic questions, are solely within the jurisdiction of the United States and are not under this treaty to be submitted in any way either to arbitration or to the consideration . . . [of any League of Nations organ.]<sup>42</sup>

As David Hunter Miller suggested contemporaneously, the United States had already removed aspects of all seven listed categories from its exclusive domestic jurisdiction by concluding treaties on the questions designated as solely domestic.<sup>43</sup> The conception that a matter can be listed once and for all as falling solely within the domestic jurisdiction of a state is an over-simplification which disregards the relativity of the concept of domestic jurisdiction and flies in the face of the established jurisprudence of the Court.

Nor would the rule of law be served by excluding from our acceptance of compulsory jurisdiction a list of matters, such as immigration or tariffs, whether or not treaties had been concluded on the subjects, and without any attempt to label them as falling within our domestic jurisdiction. To the extent that such matters fall by international law within our domestic jurisdiction, the listing is unnecessary; and to the extent that we may have contracted international obligations with regard to the listed items, we

<sup>40</sup> [1953] I.C.J. Rep. 111, 119–120; digested in 48 A.J.I.L. 327 (1954). See also Georges Berlia, “Jurisprudence des Tribunaux Internationaux en ce qui concerne Leur Compétence,” 88 Hague Academy Recueil des Cours 105–157 (1955).

<sup>41</sup> *Cf.*, Norwegian Loans case, *loc. cit.*

<sup>42</sup> 59 Cong. Rec. (Pt. 5) 4599 (66th Cong., 2nd Sess., March 19, 1920).

<sup>43</sup> Cited by Preuss, *loc. cit.* 732.

would merely be denying ourselves the help of the Court in furthering the rule of law without thereby releasing ourselves from the international obligations we had contracted.

Another danger to be guarded against is the ill-conceived suggestion once made by Mr. John Foster Dulles to tamper with the law to be applied by the Court. In his influential Memorandum of July 10, 1946,<sup>44</sup> to a subcommittee of the Senate Committee on Foreign Relations, Mr. Dulles wrote that it would be unnecessary "to stipulate who decides what is domestic" if the proposed declaration accepting the compulsory jurisdiction of the Court contained a stipulation to the effect that the Court could not decide a case to which the United States was a party unless the law to be applied was based on a treaty to which the United States was a party or unless the parties agreed in advance what principles of international law should be applied by the Court. With cavalier disregard for the institutional developments of 75 years in the judicial settlement of international legal disputes, Mr. Dulles favored turning the clock back to the *Alabama Arbitration* of 1872 as a precedent, where the parties first negotiated a treaty establishing the law to be applied before going to court.

Senator Millikin took up the Dulles suggestion and introduced an amendment that acceptance of the compulsory jurisdiction of the Court by the United States

shall not apply to disputes where the law necessary for the decision is not found in existing treaties and conventions to which the United States is a party and where there has not been prior agreement by the United States as to the applicable principles of international law.<sup>45</sup>

Senator Wayne Morse pointed out to the Senate that the Dulles-Millikin proposal would have the effect of preventing the Court from applying its own Statute in cases to which the United States was a party. By limiting the Court to the application of treaties to which the United States was a party, the proposed Senate amendment sought, in effect, to render inapplicable to the United States subparagraphs *b*, *c*, and *d* of Article 38(1), and thus to prevent the Court from applying customary international law, the general principles of law recognized by civilized nations and judicial precedent.<sup>46</sup> Fortunately, the Senate decisively rejected the proposed Mil-

<sup>44</sup> "Memorandum of John Foster Dulles concerning Acceptance by the United States of the Compulsory Jurisdiction of the International Court of Justice, July 10, 1946," printed in Senate Hearings (cited in note 25 above) at pp. 43-45.

<sup>45</sup> 92 Cong. Rec. 10698 (79th Cong., 2nd Sess.).

<sup>46</sup> *Ibid.* 10702. The text of Art. 38 of the Court's Statute reads as follows:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."



likin amendment, which Judge Manley O. Hudson has characterized as "a ghost which stalked out of the Dulles Memorandum" and which "would have been utterly unworkable in practice."<sup>47</sup>

Equally retrograde are proposals by which the United States would withdraw completely its declaration accepting the compulsory jurisdiction of the Court under Article 36(2) and attempt to conclude a limited series of treaties accepting the compulsory jurisdiction of the Court for the limited purpose of the interpretation and application of certain treaties. The rule of law advocated by President Eisenhower would be ill served by such a throw-back to the mentality of the Hague Peace Conferences.

The jurisprudence of the Court, when confronted with a plea of domestic jurisdiction, is such as to inspire confidence that it will decline jurisdiction over the merits of any dispute the subject matter of which is, according to international law, exclusively within the domestic jurisdiction of a state. It may be doubted whether a revised United States declaration accepting the compulsory jurisdiction of the Court needs to contain any domestic jurisdiction reservation. Most states accepting the Court's compulsory jurisdiction appear to have found such a reservation supererogatory. It is interesting to note that Belgium, Finland and Japan in 1958 deposited declarations accepting the Court's compulsory jurisdiction without including domestic jurisdiction reservations.

However, if it will serve to allay nervousness, however ill founded, there can be no strong objection to a reservation excluding "disputes with regard to matters which according to international law fall exclusively within the domestic jurisdiction of the United States." This formula, currently followed, with unimportant verbal variations by Australia, Cambodia, Canada, New Zealand and the United Kingdom, is the basis of a consistent jurisprudence on the part of the Court and is in conformity with the Statute.

#### RESERVATION OF DISPUTES ENTRUSTED TO OTHER TRIBUNALS

Little purpose seems to be served by the reservation by which the United States excludes from its acceptance of the compulsory jurisdiction of the Court

(a) Disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

If the parties to a dispute which has not been submitted to the International Court of Justice entrust it to another tribunal, the reservation is unnecessary. If the parties to any case of which the Court has been seized agree to its discontinuance in order to submit it to another tribunal, no reservation is required for this purpose, since, by Article 68 of the Court's Rules, the Court "shall direct the removal of the case from the list." The only purpose served by such a reservation would appear to be that in which a party violates its prior agreement to submit certain matters to tribunals other than the Court and files an application against the United States be-

<sup>47</sup> Hudson, *loc. cit.* note 39, at 895-896.

fore the Court. Even in the absence of a reservation, the Court might feel constrained to allow a preliminary objection to its jurisdiction because of the violation of the prior agreement by applicant state.

It may be doubted whether the United States reservation—which has been followed only by Liberia and Pakistan <sup>48</sup>—would be applicable to situations in which the parties agreed to refer a dispute, not to another *tribunal*, but to the United Nations Security Council or to a commission of conciliation. Comparable reservations (with slight verbal variations) of fourteen other states <sup>49</sup> exclude from their acceptances of the compulsory jurisdiction of the Court “disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement,” a reservation which appears to have been picked up from bilateral treaties of arbitration and conciliation, in part to preserve special arbitral procedures and in part to safeguard the procedure of conciliation.<sup>50</sup>

Article 95 of the United Nations Charter provides that

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

No particular harm is done by the United States reservation which follows this phraseology, although, by Resolution 171C(II), adopted on November 14, 1947, the United Nations General Assembly expressed the view that, “preferably and as far as possible,” arbitration clauses in treaties should envision submission of disputes to the International Court of Justice.<sup>51</sup>

#### THE MULTILATERAL TREATY RESERVATION

Only Pakistan has copied the obscure reservation by which the United States purports to exclude from her acceptance of the compulsory jurisdiction of the Court

(c) Disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.

The origins of this lamentable reservation are found in the Dulles Memorandum of July 10, 1946, which observed:

2. *Reciprocity*.—Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court.

<sup>48</sup> However, the Japanese Declaration of Sept. 15, 1958, contains the following exclusion: “This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement.”

<sup>49</sup> Australia, Belgium, Cambodia, Canada, France, Israel, Luxembourg, Netherlands, New Zealand, The Sudan, Thailand, Turkey, Union of South Africa, United Kingdom.

<sup>50</sup> For brief discussions of this reservation, see Lauterpacht, 10 *Economica* 145-147 (1930); Hudson, *op. cit.* 469-470; Hambro, 25 *Brit. Year Bk. of Int. Law* 145-148 (1948); Vulcan, 18 *Acta Scandinavica Juris Gentium* 44-46 (1947-1948).

<sup>51</sup> U.N. General Assembly, 2nd Sess., Official Records, Resolutions, Sept. 16-Nov. 29, 1947 (Doc. A/519), p. 104.

*Comment:* The Court Statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only "in relation to any other State accepting the same obligation" (Art. 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation. Since the Court Statute uses the singular "any other State," it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of the several parties to such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Art. 94) requiring members to comply with decisions of the Court in cases to which they are a party.<sup>52</sup>

This incomprehensible statement, characterized by Judge Hudson as "a jumble of ideas,"<sup>53</sup> led the Senate Committee on Foreign Relations to observe that Article 59 of the Court's Statute, providing that the Court's decisions have "no binding force except between the parties and in respect of that particular case," removed all cause for doubt. The Committee added, however:

If the United States would prefer to deny jurisdiction without special agreement in disputes among several States, some of which have not declared to be bound, Article 36 (3) permits it to make its declaration conditional as to the reciprocity of several or certain States.<sup>54</sup>

To meet Mr. Dulles' objection, the Committee therefore proposed the text of the United States reservation quoted above, and the United States Senate, on motion of Senator Vandenberg, adopted the reservation without clarifying debate, and without understanding its meaning or its implications.<sup>55</sup> The language of the reservation betrays much confusion of thought. To this day no one is quite sure what it means. To the extent that the reservation requires that the United States "specially agree(s)" to the Court's jurisdiction, the special agreement will, as Judge Hudson observes, replace the declaration as the basis of the Court's jurisdiction, and the United States will be denying the compulsory jurisdiction of the Court in disputes arising from multilateral treaties. Whether the phrase, "affected by the decision," writes Judge Hudson, "applies to the *parties to the treaty*, or only to *the treaty itself*, the Court would lack jurisdiction under the American Declaration unless every party to the treaty is a party to the proceeding before the Court." And if the phrase requires that all parties bound by the decision must be parties to the case before the Court, the reservation becomes meaningless.<sup>56</sup> Other commentators tell us that the Senate did not intend by this reservation to nullify the effect of the United States declaration in relation to disputes arising under multilateral treaties.<sup>57</sup>

<sup>52</sup> *Loc. cit.* 44.

<sup>53</sup> 32 A.B.A.J. 836 (1946).

<sup>54</sup> Report (cited in note 26), p. 6.

<sup>55</sup> 92 Cong. Rec. 10618, 10621 (79th Cong., 2nd Sess., Aug. 1, 1946).

<sup>56</sup> Hudson, *loc. cit.* 836, 895.

<sup>57</sup> Wilcox, *loc. cit.* note 39, at pp. 714-716; Quincy Wright, 41 A.J.I.L. 445-452 (1947), and comment thereon by Hudson, 42 A.J.I.L. 12-13 (1948).

For a valuable analysis of the Statute and the practice of the Court, see Edvard Hambro, "The Interpretation of Multilateral Treaties by the International Court of Justice," 39 Grotius Society Transactions 235-255 (1963).

Since the record fails to support the view that either Mr. Dulles or the Senate had any clear grasp of the problem they vaguely envisaged, one is forced to inquire whether there is any problem relating to the Court and multilateral treaties which creates a danger against which the United States needs protection by a reservation. There are hundreds of multilateral treaties currently in force to which the United States is a party. Although the United States, pursuant to its declaration under Article 36(2) of the Statute, accepts the compulsory jurisdiction of the Court in all legal disputes concerning "(a) the interpretation of a treaty," it is, by Article 59 of the Statute, clearly not bound by a decision of the Court in a case to which the United States is not a party. It may, nevertheless, believe that its interests will be "affected" by a decision of the Court construing a multilateral treaty to which the United States, as well as the litigants actually before the Court, are parties. In such a case, the United States can fully protect its interests by intervening in the pending case.<sup>58</sup> The construction of the multilateral treaty given by the Court will then be binding on the United States, but, according to Article 59, only "between the parties and in respect of that particular case." It is not seen how this works injury to the United States merely because certain other parties to the multilateral treaty were not before the Court. Between them and the United States the Court's interpretation has no binding force. This may be inconvenient, but the Court cannot, under its Statute, require states to intervene in cases before it. Nor can the multilateral treaty reservation of the United States accomplish this purpose. Its only effects are to nullify United States acceptance of compulsory jurisdiction and sterilize the rule of law with regard to a large and important category of cases.

#### RESERVATIONS *RATIONE TEMPORIS*<sup>59</sup>

By its current declaration, the United States limits acceptance of the Court's compulsory jurisdiction to certain disputes "hereafter arising." One of the preliminary objections filed by the United States in the *Interhandel* case was to the effect that the Court lacked jurisdiction because the dispute was alleged to have arisen before August 26, 1946, the date of deposit of the United States declaration.

The reasons for excluding a dispute from the operation of the rule of law merely because it arose before a certain date are not obvious. The current declarations of seventeen states<sup>60</sup> contain no reservations limiting the juris-

<sup>58</sup> Art. 63 of the Statute of the International Court of Justice provides:

"1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

"2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

<sup>59</sup> For more detailed discussion, including an analysis of the Court's jurisprudence with reference to reservations *ratione temporis*, see the writer's Hague Academy lectures for 1958.

<sup>60</sup> Bulgaria, Cambodia, China, Denmark, Dominican Republic, Haiti, Honduras, Liechtenstein, Nicaragua, Norway, Panama, Paraguay, Philippines, Portugal, Switzerland, Thailand, Uruguay.

diction of the Court *ratione temporis*. On the other hand, twenty-two declarations<sup>61</sup> currently in force contain such reservations. All twenty-two of these declarations limit acceptance of the Court's compulsory jurisdiction to disputes arising after a certain date, and sixteen<sup>62</sup> of the declarations contain the further limitation that the situations or facts giving rise to the dispute must also be subsequent to that date. The exclusion date is determined by various *formulae*, frequently the date of entry into force of the declaration or (in case of renewals) of a prior declaration. Apparently only the Union of South Africa today follows the policy of excluding from each new declaration disputes for which jurisdiction had been accepted under the previous declaration.

It has been pointed out<sup>63</sup> that many of the great arbitrations of the past would not have come within the jurisdiction of the tribunals if past situations or facts had been excluded by reservations *ratione temporis*. The potential development of the system of compulsory jurisdiction is also limited by the fact that, because of the condition of reciprocity contained in Article 36(2) of the Court's Statute, reservations of disputes, situations or facts *ratione temporis* may become available as defenses even to states which have included no such reservations in their declarations.

It seems desirable that the United States should omit the reservation *ratione temporis* contained in the words "hereafter arising" when it deposits a new declaration. If, however, reasons are thought to exist for excluding certain past disputes from the operation of the rule of law, the new declaration should at least accept compulsory jurisdiction for legal disputes arising after August 26, 1946.

#### DATE OF TERMINATION

Paragraph 3 of Article 36 of the Statute of the International Court of Justice provides, in part, that declarations "may be made unconditionally . . . or for a certain time." Of declarations currently in force, ten specify no time limit for their duration.<sup>64</sup> The declarations of Thailand and Cambodia are currently in force for designated periods of ten years each, after which the declaration of Thailand will expire unless renewed and the Cambodian declaration will continue in force subject to denunciation on notice. The declarations of Belgium (1958) and Japan (1958) are currently in force for five-year periods, after which each continues in force subject to denunciation on notice. The declaration of Turkey is apparently for a five-year period, although it has twice been renewed retroactively after expiration. The declarations of Switzerland and Liechtenstein are terminable on

<sup>61</sup> Australia, Belgium, Canada, Colombia, El Salvador, Finland, France, Israel, Japan, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Pakistan, The Sudan, Sweden, Turkey, Union of South Africa, United Arab Republic, United Kingdom, United States.

<sup>62</sup> Australia, Belgium, Canada, Colombia, Finland, France, Israel, Japan, Luxembourg, Mexico, New Zealand, The Sudan, Sweden, Turkey, Union of South Africa, United Kingdom.

<sup>63</sup> Lauterpacht, 10 *Economica* 139-144.

<sup>64</sup> Bulgaria (1921), Colombia (1937), Dominican Republic (1924), El Salvador (1921), Haiti (1921), Nicaragua (1929), Panama (1921), Paraguay (1933), United Arab Republic (1957), Uruguay (1921).

one year's notice of denunciation. The declarations of the United States, China, and Mexico are now terminable on six months' notice given at any time. The declarations of Luxembourg (1930), The Netherlands (1956), Denmark (1956), Norway (1956), Sweden (1956) and Finland (1958), in force for five-year periods, are automatically renewable for five-year periods unless notice of termination is given not less than six months prior to the expiration of any five-year period. The declaration of Honduras (originally for six years) is also automatically renewable.

All of these declarations may reasonably be said to meet the requirement of the Statute of being made "unconditionally . . . or for a certain time." On the other hand, the declarations of Canada, New Zealand, The Philippines, France, Liberia, Australia, Union of South Africa, Portugal, Israel, the United Kingdom, Pakistan and The Sudan are currently terminable on notice; and the declarations of Cambodia, Belgium and Japan will become terminable on notice after the elapse of the time specified. This trend is unfortunate and has already been abused by states seeking to avoid being made respondents in particular cases.<sup>65</sup>

The provision of the current United States declaration that it is terminable on six months' notice is not undesirable; but the Scandinavian formula of automatic renewal for five-year periods unless denunciation is made not less than six months prior to the expiration of any five-year period is probably preferable.

#### A SUGGESTION

It is the considered judgment of the writer that the national and international interests of the United States would be fully protected and the rule of law in international affairs would be appreciably furthered if the United States, giving the required six months' notice, withdrew its declaration of August 14, 1946, and deposited a new declaration stipulating:

that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation;

*Provided*, that this declaration shall remain in force for a period of five years and shall be renewed by tacit agreement for further periods of five years unless it is denounced by notice received not less than six months prior to the expiration of any such five-year period.

<sup>65</sup> See C. H. M. Waldock, "Decline of the Optional Clause," 32 Brit. Year Bk. of Int. Law 244, 267 ff. (1955-1956).

## THE THIRTY-SEVENTH YEAR OF THE WORLD COURT\*

BY MANLEY O. HUDSON

The thirty-seventh year of the World Court—the thirteenth year of the International Court of Justice—has been partially devoid of exciting news. Aside from the meeting for swearing the new members of the Court, and for the election of officers of the Court, there was no meeting of the Court until September 25, 1958. That was too late for the usual procedure to be followed in the preparation of this article concerning the Court, which was to have been published in January, 1959.

### INDUCTION OF MEMBERS AND ELECTION OF OFFICERS

On April 16, 1958, the Court held a meeting for inducting the judges who were elected by the General Assembly on October 1, 1957.

Three members were re-elected as judges: Vice President Abdel Hamid Badawi, Judge Bohdan Winiarski, and Judge V. K. Wellington Koo. Their induction was a simple matter. In addition, the following members were elected by the General Assembly: Sir Percy Clayd Spender, and Mr. Jean Spiropoulos. Sir Percy Spender and Mr. Spiropoulos were given the oath of office on April 16, 1958.

On April 17, 1958, Judge Helge Klaestad was elected President, and Sir Muhammed Zafrulla Khan was elected Vice President, of the Court. These judges were eminently qualified to assume their new responsibilities.

### CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS (NETHERLANDS *v.* SWEDEN)

This is the first case before the International Court of Justice which has involved a question of international private law. It was begun by The Netherlands filing an application with the Court on July 10, 1957.

On May 5, 1954, the Child Welfare Board of Norrköping, Sweden, decided to place the infant, Marie Elisabeth Boll, under protective upbringing; this was reaffirmed on June 3, 1955. On June 2, 1954, the Amsterdam Cantonal Court (The Hague) appointed a deputy guardian. The Supreme Administrative Court of Sweden had held, by a judgment of February 21, 1956, that the measure adopted by the Child Welfare Board of Norrköping of June 3, 1955, should be upheld.

The Court had the assistance of M. Fredrik Julius Christian Sterzel (Sweden) and M. Johannes Offerhaus (Netherlands), who were appointed by the parties. It also had the aid of M. Riphaven and Professor Kisch

\* This is the thirty-seventh in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

on behalf of The Netherlands, and Mr. Dahlman, Professor Henri Rolin, and M. Petrén on behalf of Sweden. It heard the arguments from September 25 to 30 and October 1 to 4, 1958, and issued its Judgment on November 28, 1958.<sup>1</sup>

The Court had before it the following question:

did the Swedish authorities, by applying the measure of protective upbringing (*skyddsuppföstran*) to the Dutch infant, Marie Elisabeth Boll, fail to respect obligations resulting from the 1902 Convention on the guardianship of infants?

A comparison between the purpose of the 1902 Convention, and that of the Swedish law on the protection of children, shows that the purpose of the latter places it outside the field of the purposes of the Convention. Protective upbringing is not, as is guardianship, applied for a pre-ordained period during which it is maintained. The social problem of delinquent or merely misdirected young people, and of children whose health, mental state, or moral development is threatened, in short, of those ill adapted to social life, has often arisen. The 1902 Convention cannot, therefore, have given rise to obligations upon the signatory states in a field outside the matter with which it was concerned. Accordingly, the Court does not in the present case find any failure to observe that Convention on the part of Sweden.

#### ACCEPTANCE OF THE COURT'S COMPULSORY JURISDICTION

1. *Republic of the Sudan*. On December 30, 1957, Mr. Yacoub Osman, the Permanent Representative of the Sudan to the United Nations, signed a statement reading as follows:

I have the honour by direction of the Ministry of Foreign Affairs to declare, on behalf of the Government of the Republic of the Sudan, that in pursuance of paragraph 2 of Article 36 of the Statute of International Court of Justice, the Government of the Republic of the Sudan recognize as compulsory *ipso facto* and without special agreement, on condition of reciprocity, until such time as notice may be given to terminate this Declaration, the jurisdiction of the International Court of Justice in all legal disputes arising after the first day of January 1956 with regard to situations or facts subsequent to that date concerning:—

- (a) the interpretation of a treaty concluded or ratified by the Republic of the Sudan on or after the first day of January 1956;
- (b) any question of International Law;
- (c) the existence of any fact, which, if established, would constitute a breach of an international obligation; or
- (d) the nature or extent of the reparation to be made for the breach of an international obligation,

but excluding the following:—

- (i) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

<sup>1</sup> [1958] I.C.J. Rep. 55; reported below, p. 436.



- (ii) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of the Sudan as determined by the Government of the Republic of the Sudan;
- (iii) disputes arising out of events occurring during any period in which the Republic of the Sudan is engaged in hostilities as a belligerent.

This was received by the Secretariat of the United Nations on January 2, 1958.

2. *Belgium*. At Brussels, on April 3, 1958, Mr. V. Larock, Minister of Foreign Affairs of Belgium, signed a declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice, in the following terms:

I declare on behalf of the Belgian Government that I recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2 of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement.

This declaration is made subject to ratification. It shall take effect on the day of deposit of the instrument of ratification for a period of five years. Upon the expiry of that period, it shall continue to have effect until notice of its termination is given.

The declaration was deposited with the Secretary General of the United Nations on June 18, 1958.

3. *Finland*. On June 25, 1958, Mr. G. A. Gripenberg, Permanent Representative of Finland to the United Nations, signed an acceptance of the optional provision in paragraph 2 of Article 36 of the Statute of the International Court of Justice. The declaration was for a period of five years, renewable for further periods of five years unless it is denounced not later than six months before the expiry of any such period.

The declaration reads as follows:

On behalf of the Finnish Government, I hereby declare that I recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the International Court of Justice, in accordance with Article 36, paragraph 2 of the Statute of the Court, for a period of five years from 25 June 1958. This declaration shall be renewed by tacit agreement for further periods of the same duration, unless it is denounced not later than six months before the expiry of any such period. This declaration shall apply only to disputes arising in regard to situations or facts subsequent to 25 June 1958.

4. *Turkey*. In August, 1958, Mr. Seyfullah Esin, the Permanent Representative of Turkey to the United Nations, gave written notice, under Law No. 7153, that Law No. 5017 had been extended for five years, from May 23, 1957. It had previously been renewed on September 12, 1955, counting from May 22, 1952.

5. *Japan*. On September 15, 1958, Dr. Koto Matsudaira, the Permanent Representative of Japan to the United Nations, made the declaration to the Secretary General of the United Nations for five years, and thereafter until it shall have been terminated by a written notice. It was cast in the following terms:

I have the honour, by direction of the Minister for Foreign Affairs, to declare on behalf of the Government of Japan, that in conformity with paragraph 2 of Article 36 of the Statute of the International Court of Justice, Japan recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes which arise on and after the date of the present declaration with regard to situations or facts subsequent to the same date and which are not settled by other means of peaceful settlement.

This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement.

This declaration shall remain in force for a period of five years and thereafter until it may be terminated by a written notice.

6. *Great Britain*. On November 26, 1958, after enclosing a revocation of the acceptance of April 18, 1957, the British Government enclosed a new declaration to the Secretary General of the United Nations. The new declaration applies to all disputes arising after February 5, 1930; it is valid until such time as notice may be given to terminate the acceptance.

It bears the following import:

1. I have the honour, by direction of Her Majesty's Principal Secretary of State for Foreign Affairs, to declare on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland that they accept as compulsory *ipso facto* and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after the 5th of February, 1930, with regard to situations or facts subsequent to the same date, other than:

- (i) disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;
- (ii) disputes with the Government of any other country which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree;
- (iii) disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom;
- (iv) disputes arising out of events occurring between the 3rd of September, 1939, and the 2nd of September, 1945;
- (v) without prejudice to the operation of sub-paragraph (iv) above, disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent or military occupation in which

the Government of the United Kingdom are or have been involved;

- (vi) disputes concerning any question relating to or arising out of events occurring before the date of the present Declaration which, had they been the subject of proceedings brought before the International Court of Justice previous to that date, would have been excluded from the Court's compulsory jurisdiction under the second part of the Reservation numbered (v) in the previous United Kingdom Declaration dated April 18, 1957 namely that part which started with the words "... or relating to any question ..." and ended with the words "... dependent territories";
- (vii) disputes relating to any matter excluded from compulsory adjudication or arbitration under any treaty, convention or other international agreement or instrument to which the United Kingdom is a party;
- (viii) disputes in respect of which arbitral or judicial proceedings are taking, or have taken place, with any State which, at the date of the commencement of the proceedings, had not itself accepted the compulsory jurisdiction of the International Court of Justice; and
- (ix) disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

2. The Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added.

#### A NEW COURT ESTABLISHED

In October, 1958, a new Court of Justice of the European Communities was created by the states of the European Common Market. It has as its justices Mr. A. M. Donner (Netherlands), four justices of the former Court of the Coal and Steel Community, and two more men.

It is to be hoped that the jurisprudence of this Court, which relates to the Common Market, will be useful for the development of international law.

## VOTING ON IMPORTANT QUESTIONS IN THE UNITED NATIONS GENERAL ASSEMBLY

BY ERNEST L. KERLEY <sup>1</sup>

*Office of the Legal Adviser, Department of State*

At its 681st meeting on October 25, 1957, the Fourth Committee of the General Assembly adopted a resolution which provided in part as follows:

The Fourth Committee

....

*Requests* the Sixth Committee to consider the following points and to give an opinion thereon to the Fourth Committee:

(a) Which is the voting majority that is applicable to resolutions of the General Assembly on matters concerning Non-Self-Governing Territories in accordance with Chapter XI of the Charter of the United Nations?

(b) Considering that matters concerning Non-Self-Governing Territories are not enumerated in Article 18(2), would it be in accordance with the terms of the Charter to submit a resolution on Non-Self-Governing Territories to a two-thirds vote if an additional category to that effect has not been established beforehand for the Non-Self-Governing Territories in the terms of Article 18(3)?<sup>2</sup>

This resolution was the result of discussions in the Fourth Committee at its 675th and 679th to 681st meetings, in connection with the consideration of its agenda item on non-self-governing territories. On November 26, 1957, before the Sixth Committee had completed its discussion of the issues raised by the resolution, the agenda item on non-self-governing territories was voted on in plenary session of the General Assembly; one of the proposed resolutions was determined to be an important question and failed to receive the necessary two-thirds majority.<sup>3</sup> On December 2, 1957, the Sixth Committee, at its 544th meeting, adopted a resolution noting that the item in connection with which the Fourth Committee had requested its advice was no longer on the agenda of the General Assembly, and stating "that it is not opportune at the present session to reply to the request of the Fourth Committee."<sup>4</sup>

The significance of this incident lies not merely in the light which the discussions in the Fourth and Sixth Committees throw on the question of voting in the General Assembly, but also in the indication that as fundamental a question as the voting majority required to adopt resolutions in the General Assembly is as yet unsettled.

<sup>1</sup> The opinions expressed herein should not be attributed to the Department of State.

<sup>2</sup> U.N. Doc. No. A/C.4/L.501 (1957).

<sup>3</sup> U.N. General Assembly, 12th Sess., Official Records, Plenary Meetings, p. 517 (1957).

<sup>4</sup> U.N. Doc. No. A/C.6/L.417 (1957).

## ARTICLE 18

Article 18 of the Charter of the United Nations provides as follows:

1. Each member of the General Assembly shall have one vote.
2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.
3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Interpretation of Article 18 initially appears uncomplicated. The article divides the questions to be decided by the General Assembly into two classes: "important questions" and "other questions." The former are to be decided by a two-thirds majority; the latter, by a simple majority.

Article 18(2) contains a list of questions deemed important. This list is neither exhaustive nor illustrative, though it has been described by both terms. It could not be exhaustive; it does not even include a reference to newly-created categories, although Article 18(3) provides for the creation of "additional categories." It does not appear to be illustrative, since the questions listed display little by way of common characteristics from which a concept of "importance" could be induced for application to subsequent questions. The function of the list is merely to fix the importance of, and thus the voting majority required for, the listed questions, rather than to limit or guide the future determination of voting majorities.

Article 18(3) sets forth the voting majority required for decisions on "other questions," and provides for the creation of "additional categories of questions to be decided by a two-thirds majority." The purpose of the drafters of the article in specifically authorizing the creation of additional categories is not clear, although it may have been to prevent an interpretation of Article 18 to the effect that the creation of categories is an amendment to the list in Article 18(2), and thus an amendment to the Charter.<sup>5</sup>

<sup>5</sup> Such an interpretation was made nevertheless:

"The decision by which a new category of 'important questions' is added to those enumerated in paragraph 2 constitutes an amendment to Article 18, paragraph 2. The procedure of this amendment provided by paragraph 3, constitutes an exception to the provisions of Chapter XVIII regulating the amendment procedure. . . . Since Article 18, paragraph 3, authorizes the General Assembly only to increase the number of categories of important matters, not to reduce it, the amendment procedure of Chapter XVIII is required for the repeal of an amendment adopted under Article 18, paragraph 3." Kelsen, *Law of the United Nations* 183-184 (1951).

The assumption that the creation of additional categories of questions requiring a two-thirds majority involves an amendment to Art. 18(2) does not appear warranted.

While Article 18 does not specifically authorize the determination that individual questions are important, it does not prohibit such a determination, nor does it place on the term "other questions" any limitations which would operate to exclude from that group a determination of the importance of an individual resolution. The right of a majority of the General Assembly to decide "other questions" appears to be unrestricted as long, of course, as the question is within the powers of the General Assembly and accords with the purposes and principles of the United Nations.

Article 18(3) refers to "other" questions. While this could be interpreted to mean "other than those *listed* in Article 18(2)," such a construction would regard the list in Article 18(2) as exhaustive, and would thus conflict with the provision in Article 18(3) authorizing the creation of additional categories. It seems probable, therefore, that the phrase should be interpreted to mean "other than those *provided for* in Article 18(2)," that is, other than important questions.<sup>6</sup>

While the reference in Article 18(3) is to "categories of questions to be decided by a two-thirds majority" rather than "categories of important questions," it appears unlikely that any valid distinction can be drawn from this variation in wording.

The basis for the application of the two-thirds majority prescribed in Article 18(2) is "importance"; "other questions" under Article 18(3) require a simple majority. Thus, a decision to require a two-thirds vote on a question necessarily presupposes a determination that it is "important." Moreover, the reference in Article 18(3) to "additional categories" implies that the categories to be created are of the same class as those to which they are "additional," thus affirming the equivalence of the categories of important questions in Article 18(2) and the categories which may be created under Article 18(3).

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It does not follow that when a category requiring a two-thirds majority is set up by the General Assembly it becomes a part of the Charter. The Charter nowhere suggests that newly-created categories become a part of Art. 18, or that the decision to terminate the category would be other than an "other question" under Art. 18(3). At the Senate hearings on the United Nations Charter the ability of the General Assembly to terminate a category created under Art. 18(3) without reference to the procedure set out in Ch. XVIII was assumed both by the Senators and the representative of the Department of State. Hearings on the Charter of the United Nations Before the Senate Committee on Foreign Relations, 79th Cong., 1st Sess., pp. 257-258 (1945).

<sup>6</sup> The Rules of Procedure of the General Assembly support this interpretation. Rules 84, 85 and 87 reproduce, *mutatis mutandis*, the three paragraphs of Art. 18 of the Charter. Rule 87 reproduces Art. 18(3) as follows:

"Decisions of the General Assembly on questions other than those provided for in rule 85, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting." Rules of Procedure of the General Assembly, U.N. Doc. No. A/3660 at 15 (1957).

It is significant that the term "other questions" in Art. 18(3) of the Charter is transformed to "questions other than those *provided for* in rule 85" in Rule 87, rather than a phrase such as "other than those *listed* in rule 85." It is somewhat surprising to note that this wording has been cited by one delegate as evidence that the list in Art. 18(3) is exhaustive. U.N. General Assembly, 11th Sess., Official Records, Plenary Meetings, p. 1155 (1957).

In practice Article 18 has proved to be less clear and settled than might have been anticipated. "Importance" as a criterion for determining the voting majority required has proved unhappily imprecise. No new categories have been created; few have been proposed.<sup>7</sup> The practice of the General Assembly has been to determine whether individual resolutions, rather than categories, require a two-thirds majority. Most of the disagreement regarding voting in the General Assembly arises in connection with this practice.

Although Article 18 does not do so, since it uses the term "other questions" in Article 18(3), the necessary effect of categorizing one group of questions as "important" is to categorize the residual questions as "unimportant," especially where no elaboration of this criterion is given. On an absolute standard, the criterion of "importance" is completely unworkable. In the words of the delegate of India at the 52nd Plenary Meeting, "Every question that the Assembly discusses is important. We do not waste our time discussing unimportant questions."<sup>8</sup> Even on the relative standard which was undoubtedly intended by the drafters of the Charter, the criterion of importance presents serious difficulties. Due to the wide effect of almost every decision of the General Assembly, it is relatively easy for the proponents of a two-thirds majority to make a persuasive case.

In opposition, to urge the unimportance of a question might well be expected to offend not only those delegations having an interest in the matter being discussed, but the General Assembly as a whole, since it reflects directly on the significance of the work of that body. The frustration reflected in the Indian delegate's comment, that "if you are going to interpret that Article to mean that every question that is awkward, every question to which a majority or minority has some objection, comes under Article 18 [*sic*], I think the exception will become the rule,"<sup>9</sup> is understandable.

Confronted by a situation in which opposition within the system set out by Article 18 is tactically disadvantageous, many delegations have understandably attempted to restate the system. This restatement necessarily varies with the spokesman, but basically involves three arguments: (1) the criterion of "importance" applies only to the questions listed in Article 18(2), which is an exhaustive list; (2) the categories created under Article

<sup>7</sup> At the 52nd Plenary Meeting, during a discussion of a joint report of the 1st and 6th Committees on an agenda item entitled "Treatment of Indians in the Union of South Africa," the Argentine delegate intervened on a point of order to propose that "whenever there is a question of the General Assembly of the United Nations wishing to intervene in matters which, it is suspected, may be within the domestic jurisdiction of a state . . . a two-thirds majority shall be required." The President declined to put this proposal to a vote on the grounds that a "suggestion to create a new category of questions in which the General Assembly would intervene in the domestic affairs of a state . . . would be expressly contrary to the terms of the Charter." *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, pp. 1054-1056 (1946). See also pp. 331-332 below. Compare General Assembly Res. 844 (IX), U.N. Doc. No. A/2890 at 25-26 (1954).

<sup>8</sup> U.N. General Assembly, 1st Sess., 2nd Pt., Official Records, Plenary Meetings, p. 1050 (1946).

<sup>9</sup> *Ibid.*, p. 1342 (1946).

18(3) are not "important questions" but, in the specific language of that paragraph, "questions to be decided by a two-thirds majority"; (3) since Article 18(3) refers only to the creation of categories, the decision to require a two-thirds majority can be taken only with regard to categories of questions, rather than to individual resolutions. It is necessary to study these arguments in detail.

#### "IMPORTANCE" AS THE CRITERION

With reference to Article 18, Kelsen has commented as follows:

As to the voting procedure in the General Assembly, the Charter distinguishes between "important questions" (Article 18, paragraph 2), and "other questions" (paragraph 3) which, since they are not labelled "important" must be considered unimportant. This is not a very fortunate terminology. If the General Assembly is dealing with a question at all, this question can hardly be considered as unimportant. The intention was to differentiate decisions which require a two-thirds majority and decisions which require only a simple majority. Since paragraph 2 enumerates the matters on which decisions must be made by a two-thirds majority it was superfluous to qualify these matters as "important." It had sufficed to say: Decisions on the following questions shall be made by a two-thirds majority, etc.<sup>10</sup>

It is clear that Kelsen's comments are a criticism of the wording of Article 18, rather than an interpretation of it. It is precisely the provision that questions to be decided upon by a two-thirds majority *are* qualified by the adjective "important" that Kelsen criticizes. Yet this statement has been cited as authority for an interpretation of Article 18 which would distinguish between "important questions" and "questions to be decided by a two-thirds majority."

At the Eleventh Session of the General Assembly the delegate of Iraq stated:

[A]s Professor Hans Kelsen said, everything that is considered by this world organization is important, and the distinction appearing in Article 18 was not due to a desire to differentiate between important and unimportant questions, but rather "to differentiate decisions which require a two-thirds majority and decisions which require only a simple majority." Therefore, a decision taken in accordance with Article 18, paragraph 3, will not and cannot be a decision on the relative importance of single questions; it is a decision on whether additional categories of questions other than those specifically mentioned in paragraph 2 of Article 18 shall be subjected to the two-thirds majority rule. . . .

[B]y deciding not to invoke the two-thirds majority rule, the Assembly would not be pronouncing itself on the importance of the question under discussion, but would merely be determining whether or not an additional category should come under the two-thirds majority rule.<sup>11</sup>

<sup>10</sup> Kelsen, *op. cit.* note 5 above, at 180-181.

<sup>11</sup> U.N. General Assembly, 11th Sess., Official Records, Plenary Meetings, p. 1158 (1957).



While this argument has been not infrequently made,<sup>12</sup> it is not persuasive. As was previously pointed out, Article 18 distinguishes between "decisions . . . on important questions" and "decisions on other questions"; the term "other" indicates that the class of questions to be voted on by a simple majority is residual, encompassing all that has not been withdrawn. If a question is to be withdrawn from that residual class, it must be as an "important question" under Article 18(2). Moreover, the categories of questions requiring a two-thirds majority whose creation is authorized by Article 18(3) are termed "additional" categories, thus indicating their equivalence to the categories listed in Article 18(2), to which they are "additional."

The argument that the list of questions in Article 18(2) is exhaustive, is a corollary of the argument that categories created under Article 18(3) are not categories of "important" questions. This argument is somewhat difficult to maintain with regard to the English text of Article 18(2), which precedes the list with the words "These questions shall *include*" (emphasis added), although it has been attempted;<sup>13</sup> but has been made repeatedly with reference to the French text,<sup>14</sup> which merely provides "*Sont considérées comme questions importantes: . . .*"<sup>15</sup> Since the Russian,<sup>16</sup> Spanish<sup>17</sup> and Chinese<sup>18</sup> texts also use equivalents of the English text, this argument is understandably not made except with reference to the French text. At the Eighth Session of the General Assembly the Yugoslav delegate attempted to resolve the asserted discrepancy between the two texts on the basis of the "greater precision" of the French text:

Article 18 of the Charter states that on important questions the vote will be by a two-thirds majority, and then it gives an exhaustive enumeration of those questions which are important . . . The English text of the Charter may have misled the representative of the United Kingdom, because paragraph 2 of Article 18 says: "These questions shall include"—and then comes an enumeration. But I should like to pay tribute once again to the French language from this rostrum. The French text of the Charter is an official text—and if, in a legal document which is valid in two or more languages, one leaves open a doubt and another is precise, then the interpretation has

<sup>12</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1059 (1946); 8th Sess., Plenary Meetings, pp. 306-307, 317 (1953); 11th Sess., Plenary Meetings, pp. 1154, 1158, 1166 (1957).

<sup>13</sup> Statement of the delegate of India, U.N. General Assembly, 1st Sess., 2nd Pt., Official Records, Plenary Meetings, p. 1050 (1946); statement of the delegate of Haiti, *ibid.*, 2d Sess., Plenary Meetings, p. 607 (1947).

<sup>14</sup> U.N. General Assembly, 8th Sess., Official Records, Plenary Meetings, p. 317 (1953); *ibid.*, 11th Sess., Plenary Meetings, pp. 1154, 1157, 1163-1164 (1957).

<sup>15</sup> Art. 111 of the Charter provides in part: "The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic . . ."

<sup>16</sup> *Vkluchaiut*—include. Müller, Russian-English Dictionary 77 (3d ed., 1944).

<sup>17</sup> *Comprenderán*—comprise, include. Appleton, Revised Spanish Dictionary 128 (4th ed., Cuyas, 1953).

<sup>18</sup> *Pao K'uo*—including. Mathews, Chinese-English Dictionary 521, 682 (rev. American ed., 1943).

to be taken from the more precise text. This is a legal concept which I suppose nobody in this Assembly will contest.<sup>19</sup>

Subsequent statements of this argument have not varied substantially from it.<sup>20</sup> In reply, it has been urged that "it is an elementary principle of law that, so far as a principle of construction is concerned, when a general provision is followed by a specification of cases, that specification is merely illustrative."<sup>21</sup>

Earlier in this study the conclusion was stated that the list of questions in Article 18(2) is neither exhaustive nor illustrative; it merely serves permanently to establish the voting majority required for the questions specified. The French text reflects this purpose; it appears in fact to carry no inference whatever regarding the exhaustiveness of the list of questions in Article 18(2). In this respect the French text might be considered less "precise" than the other texts, which contain the implication that the list is not exhaustive. However, it is submitted that any proposed interpretation of Article 18 on the basis of "precision," or maxims of interpretation regarding general provisions and specifications, must yield to the interpretation based on the purpose and structure of the article which has already been stated.

To restate: The determination of the voting majority required to decide a question in the General Assembly requires an initial determination whether an "important question" or an "other question" is involved. While "importance" is not a totally satisfactory criterion for determining the voting majority required, it is specified by the Charter.

#### WHAT IS A "QUESTION"?

If "importance" is the criterion which determines the voting majority required in the General Assembly under Article 18, to what is that criterion applied? The term "question" in Article 18 can be interpreted to mean the agenda item, in which case the "decision" is the resolution adopted; the term can also be interpreted to mean the resolution, in which case the "decision" is the disposition made of the resolution, that is, whether it is adopted or rejected. The importance of this distinction is substantial, since the importance of the agenda item and the resolution would not necessarily coincide.

Both points of view were put forward on the occasion when the Assembly first considered the use of a two-thirds majority. At the First Session of the General Assembly, during that organ's consideration of the complaint by India that persons of Indian descent were subjected to discrimination in the Union of South Africa, the General Assembly had before it a resolution which called upon the parties to settle their disputes peacefully, as well as an amendment proposed by the Union of South Africa which would have sought from the International Court of Justice an advisory opinion

<sup>19</sup> U.N. General Assembly, 8th Sess., Official Records, Plenary Meetings, p. 317 (1953).

<sup>20</sup> *Ibid.*, 11th Sess., Plenary Meetings, pp. 1154, 1157, 1163-1164 (1957).

<sup>21</sup> *Ibid.* 1162.

whether the General Assembly had jurisdiction to consider this question in view of the prohibition of Article 2(7) of the Charter against interference in matters essentially within the domestic jurisdiction of states. Before the voting on these proposals, the President stated:

The question which we have to decide is not whether the decision we are about to take is an important question, but rather whether the question which we have discussed is an important question.<sup>22</sup>

The question, as initially put to the Assembly by the President, was whether "you consider that the question we have been discussing is an important question in the sense of Article 18, paragraph 2."<sup>23</sup> The delegate of the Union of Soviet Socialist Republics disagreed:

It has already been said here that a question may be very important, but that the decision taken on that question may be of less, or even no, importance; for example, the question whether a particular proposal should be submitted to the Assembly may be of great importance; but in taking a decision regarding the day on which a meeting will be held to discuss this important question it is not at all necessary that this decision be declared important or to vote upon it with the same majority as on the question itself.<sup>24</sup>

Without replying to this argument the President then put the question to a vote in the following form: "Does the Assembly consider it necessary to apply the two-thirds majority rule to the decision which will be taken on the question referred to in document A/205?"<sup>25</sup> The document referred to was a joint report of the Fourth and Sixth Committees, which contained both the discussion of those committees on this agenda item and the proposed resolution. The decision of the Assembly to require a two-thirds majority in this instance<sup>26</sup> must thus be considered ambiguous with regard to the meaning of the term "question" in Article 18.

It is possible that this question was involved in a confused situation which arose in connection with the report of the Fourth Committee on non-self-governing territories in 1953. That report contained seven resolutions proposed for adoption by the General Assembly. Prior to the vote on the first resolution, the Mexican delegate expressed a "request that any questions relating to Non-Self-Governing Territories may always be decided by a simple majority."<sup>27</sup> The President put this request to a vote in the following words: "The motion is to the effect that the draft resolution may be carried by a simple majority."<sup>28</sup> The motion was carried by 30 votes to 26.<sup>29</sup> The first five resolutions were adopted by large majorities. Prior to the voting on the sixth resolution, the delegate of New Zealand requested the President to regard the sixth and seventh resolutions as raising important questions. When the President declined, stating that the status of these resolutions had been determined by the earlier vote,

<sup>22</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1058 (1946).

<sup>23</sup> *Ibid.*, 1059.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 1060.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, 8th Sess., Plenary Meetings, p. 308 (1953).

<sup>28</sup> *Ibid.*, 309.

<sup>29</sup> *Ibid.*

several delegations asserted that they had understood that vote to be applicable only to the first resolution.<sup>30</sup> The President then put to a vote the question whether the previous decision had been applicable only to the first resolution; this question was answered in the negative by 34 votes to 21, with 4 abstentions.<sup>31</sup> The sixth and seventh resolutions were then adopted by simple majorities, the latter receiving less than a two-thirds majority.<sup>32</sup> At the beginning of the following meeting of the General Assembly, the President stated in part as follows:

A reading of the verbatim record will confirm that the question of the voting procedure yesterday was related only to the draft resolutions actually before the Assembly. . . .<sup>33</sup>

While the Mexican delegate clearly intended the creation of a permanent category of questions to be decided by a simple majority, the decision, as interpreted by the President and, subsequently, by the Assembly itself, had the effect of determining the importance, or rather the lack thereof, of the entire agenda item for that session only. The result can thus be explained either as the creation of a temporary category of "other questions" or the decision that the agenda item was the question whose importance was determined. The latter would appear to be the more reasonable interpretation.

If the agenda item is the question whose importance is determined, it logically follows that all resolutions and amendments under it are decisions requiring a two-thirds vote. The fact that a two-thirds majority was not required on all resolutions and amendments under an agenda item indicates that the General Assembly did not, in determining the importance of a question, consider the term "question" to refer to the agenda item. On this basis, it cannot be said that the General Assembly has uniformly construed the term "question" to denote the agenda item rather than the individual resolutions. At the First Session, the President ruled that the amendment to a resolution also required a two-thirds majority.<sup>34</sup> Later during the same session, however, the President ruled to the contrary. In connection with this voting on a resolution recommending regional conferences of the administering authorities of non-self-governing territories,<sup>35</sup> to which amendments by China<sup>36</sup> and Cuba<sup>37</sup> had been proposed, the President ruled that the resolution, but not the amendments to it, required a two-thirds majority.<sup>38</sup> On objection being raised, the President put to a vote the question whether the resolution required a two-thirds majority; the General Assembly decided in the affirmative by 25 votes to 24, with 4 abstentions.<sup>39</sup> The resolution, having been amended by a simple majority,<sup>40</sup> was adopted by a two-thirds majority.<sup>41</sup>

<sup>30</sup> *Ibid.* 312, 313, 314, 315-316.

<sup>31</sup> *Ibid.* 316.

<sup>32</sup> *Ibid.* 319-320.

<sup>33</sup> *Ibid.* 323.

<sup>34</sup> Pages 330-331 above.

<sup>35</sup> U.N. Doc. Nos. A/251 and A/251/ Add. 1 at 1 (1946).

<sup>36</sup> U.N. General Assembly, 1st Sess., 2nd Pt., Official Records, Plenary Meetings, pp. 1348-1349 (1946).

<sup>37</sup> *Ibid.* 1352.

<sup>38</sup> *Ibid.* 1355.

<sup>39</sup> *Ibid.* 1355-1356.

<sup>40</sup> *Ibid.* 1356.

<sup>41</sup> *Ibid.* 1356-1357.

At its Fifth Session the General Assembly added Rule 84A to its Rules of Procedure. This rule requires a two-thirds majority for "amendments to proposals relating to important questions."<sup>42</sup> Not only is such a rule consistent in theory with the interpretation of Article 18, which construes the term "question" to refer to the agenda item, but also its wording contains this implication, that it distinguishes between the "question" and the "proposal" relating to it. The two-thirds majority was subsequently applied to amendments in several instances.<sup>43</sup> However, it was not applied during the General Assembly's consideration of the Morocco question at its Seventh Session, where an amendment, although in fact receiving more than two-thirds of the votes cast, was adopted by a simple majority, since the President applied the two-thirds majority requirement only to the resolution as amended.<sup>44</sup>

While not completely uniform, the usual practice in the General Assembly has been not to require the same voting majority on all resolutions relating to the same agenda item. At the Second Session, five resolutions were proposed to the General Assembly by the Fourth Committee in connection with the item on the transmission of information regarding non-self-governing territories. The first four were adopted without comment with regard to the voting majority required.<sup>45</sup> The fifth, on the decision of the General Assembly, was determined to require a two-thirds majority, and was not adopted.<sup>46</sup> Similar action occurred at the Sixth,<sup>47</sup> Seventh,<sup>48</sup> and Eleventh<sup>49</sup> Sessions.

At its Third Session, the General Assembly, after the President had indicated his intention of regarding the disposal of the former Italian colonies as an important question,<sup>50</sup> rejected all but one of the three resolutions before it.<sup>51</sup> Two more resolutions were then proposed. In reply to a question concerning the voting majority required for the adoption of one of the new resolutions, the President expressed the view that a two-thirds vote was not required. When this view was challenged, the President indicated he would rule after the vote.<sup>52</sup> Since one of the resolutions was rejected, and the other adopted by more than a two-thirds majority,<sup>53</sup> no ruling on the voting majority required was given. It is thus not clear whether the General Assembly would have supported the President's ruling.

At the Seventh Session, however, the President commented, in connection with the agenda item on the treatment of Indians in the Union of South

<sup>42</sup> *Ibid.*, 5th Sess., Plenary Meetings, p. 290 (1950).

<sup>43</sup> *Ibid.*, 7th Sess., Plenary Meetings, pp. 413, 449-451 (1952); *ibid.*, 10th Sess., Plenary Meetings, pp. 404-405 (1955).

<sup>44</sup> *Ibid.*, 7th Sess., Plenary Meetings, pp. 425-426 (1952).

<sup>45</sup> *Ibid.*, 2nd Sess., Plenary Meetings, pp. 709, 719, 732 (1947).

<sup>46</sup> *Ibid.* 743.

<sup>47</sup> *Ibid.*, 6th Sess., Plenary Meetings, pp. 456-469 (1952).

<sup>48</sup> *Ibid.*, 7th Sess., Plenary Meetings, pp. 343-355 (1952).

<sup>49</sup> *Ibid.*, 11th Sess., Plenary Meetings, pp. 1166-1179 (1957).

<sup>50</sup> *Ibid.*, 3d Sess., 2nd Pt., Plenary Meetings, p. 583 (1949).

<sup>51</sup> *Ibid.* 595-598.

<sup>52</sup> *Ibid.* 607.

<sup>53</sup> *Ibid.* 608.

Africa, that while the General Assembly would decide the majority required, the "practice in respect of *this item* at previous sessions" had been to require a two-thirds majority.<sup>54</sup> Only one resolution was involved. At the same meeting the President, with regard to an agenda item on race conflict in the Union of South Africa resulting from the *apartheid* policy of the Government of the Union of South Africa, referred to the previous item and held the three resolutions under that agenda item to be important questions.<sup>55</sup> At the Tenth Session the President commented, with regard to this same agenda item, that a two-thirds vote would be required "in respect of all voting on *this item*."<sup>56</sup> Only one resolution and one amendment were involved.

It thus appears that the practice of the General Assembly, while generally construing the term "question" to refer to the individual resolution rather than the agenda item, has not been altogether consistent on this matter. This practice is, however, so closely related to the question of "categories," as the term is used in Article 18(3), that analysis will be undertaken in connection with the latter question.

#### CATEGORIES

One of the two issues raised by the request for an opinion which the Fourth Committee addressed to the Sixth Committee at the Twelfth Session of the General Assembly was whether it would be "in accordance with the terms of the Charter to submit a resolution . . . to a two-thirds vote if an additional category to that effect [had] not been established beforehand."<sup>57</sup> While it might initially be supposed that this would be a matter of little importance, since a category may be set up by the same simple majority which is required to determine the importance of individual questions, two considerations add significance to the question of the creation of categories. First, the complexity of the political factors involved in the determination of the importance of a question would deter some delegations from making a decision other than on the basis of a present factual situation; thus it could be anticipated that delegations prepared to vote in favor of the importance of an individual question would abstain or vote against the creation of a category, even though both dealt with the same subject matter. Second, a result of the processes of the General Assembly, in which most matters are considered at length in committee and then, in the final days of the session, given relatively brief treatment in the plenary meeting, is that the question of the voting majority required to adopt a resolution is raised at a time when the Assembly has little time for prolonged study, and when further committee action to study issues raised by the creation of a category would be almost impossible. At the Eighth Session, twelve days before it closed, the delegate of Mexico commented:

<sup>54</sup> *Ibid.*, 7th Sess., Plenary Meetings, p. 330 (1952). Emphasis added.

<sup>55</sup> *Ibid.* 333.

<sup>56</sup> *Ibid.*, 10th Sess., Plenary Meetings, p. 404 (1955). Emphasis added.

<sup>57</sup> Page 324 above. As stated in the request of the 4th Committee, the issue was raised only with regard to non-self-governing territories. However, the issue raised is generally applicable.

If any delegation wished to propose that the questions mentioned in Chapter XI should be decided by a two-thirds majority, it would in fact be proposing the determination of a new category. The determination of a new category of questions to be decided by a two-thirds majority vote would undoubtedly be a subject for discussion by this Assembly. But that question is not on our agenda, and if anyone wishes to propose it, he will assuredly have to wait until the next session or, if he attaches sufficient importance to it, he can try, by using the machinery provided by the rules of procedure, to have the matter accepted for discussion at the present session.<sup>58</sup>

While it is obvious that discussion would necessarily attend the creation of a category, it would appear that the creation of a category could, in many cases, be done without proposing a separate agenda item. The agenda item could, if a majority of the Assembly considered it necessary,<sup>59</sup> be amended to include the creation of a related category, but such a procedure probably would not often be necessary. If the category was within the subject matter of the agenda item, its creation would be a procedural decision taken in connection with the voting on that agenda item. It is interesting to note that in the statement just quoted, in which the need to create a separate agenda item was asserted, the delegate also proposed the creation of a permanent category of questions to be decided by a simple majority, without proposing that a separate agenda item be created to study this proposal.<sup>60</sup>

The allegation that importance may be determined only with reference to a category of questions was initially raised during the 52nd Plenary Meeting of the General Assembly, when the delegate of Saudi Arabia urged, in connection with the voting on the resolutions dealing with the treatment of Indians in the Union of South Africa, that "when the Charter was drafted, there was no thought of putting individual questions before us."<sup>61</sup> This assertion was not reinforced by any specific reference to the drafting history of the Charter. The same allegation was made at some length in plenary meeting during the Eleventh Session,<sup>62</sup> and in the Fourth Committee<sup>63</sup> at the Twelfth Session. Few, if any, new arguments were adduced. The statement of the Mexican delegate in the Fourth Committee is reported in part as follows:

It was indisputable that so long as the General Assembly did not establish additional categories, there was nothing in the Charter itself which authorized the Assembly to require a two-thirds majority.<sup>64</sup>

By way of disputing the indisputable, it has already been suggested that the determination of the importance of an individual resolution is an

<sup>58</sup> U.N. General Assembly, 8th Sess., Official Records, Plenary Meetings, p. 307 (1953).

<sup>59</sup> Rule 22 of the Rules of Procedure of the General Assembly provides as follows:

"Items on the agenda may be amended or deleted by the General Assembly by a majority of the Members present and voting." U.N. Doc. No. A/3660 at 5 (1957).

<sup>60</sup> U.N. General Assembly, 8th Sess., Official Records, Plenary Meetings, p. 308 (1953).

<sup>61</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1052 (1946).

<sup>62</sup> *Ibid.*, 11th Sess., Plenary Meetings, pp. 1155, 1163-1164, 1166 (1957).

<sup>63</sup> *Ibid.*, 12th Sess., 4th Committee, pp. 155, 156 (1957).

<sup>64</sup> *Ibid.* 153.

"other question" under Article 18(3). The reference to the creation of additional categories in Article 18(3) cannot be construed as exhausting the phrase "other questions" in that paragraph. In the absence of a prohibition to the contrary, the capacity of the General Assembly to decide "other questions" by a simple majority under Article 18, clearly authorizes the General Assembly to determine the importance of an individual question, should the Assembly consider it appropriate to do so.

The argument that only categories may be determined to be important would undoubtedly be more persuasive if the questions listed in Article 18(2) were all categories.<sup>65</sup> However, it has been suggested that not all the listed questions are categories,<sup>66</sup> and it is clear, at least, that the range of decisions possible on some of the questions listed is very limited, *e.g.*, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, and the expulsion of Members.

This argument would also be more persuasive if it appeared that the term "category" was used in a special, rather than a general, sense. Nothing in the drafting history of Article 18 suggests that the term "category" is a term of art. Nor do the questions listed in Article 18(2) imply any special meaning attached by the drafters to the term "category." The argument that only categories of questions may be determined to be important appears to interpret the term "categories" to denote only large, permanent groups of questions. Such an interpretation reflects, it is submitted, an unsophisticated concept of the term "category." A category need not be of broad scope, nor need it be permanent. A category is simply a class or division; its scope is limited by the criterion by which it is determined. A category may be subdivided by the introduction of additional criteria. The same units may be categorized differently, of course, if different criteria are used.

A category of questions created under Article 18(3) need not be a broad one. Sufficient criteria could be used to determine the category so that only one resolution would be reasonably likely to fall within its scope; fewer criteria could be employed so that an entire agenda item would be encompassed. Equally possible would be a category which would cut across several agenda items by dealing with certain aspects which might appear in any agenda item, *e.g.*, the proposal of the delegate of Argentina that resolutions raising the question whether the domestic affairs of a state are being violated should require a two-thirds majority.<sup>66</sup>

Since the General Assembly acts, not in a vacuum, but in a changing context of events, chronology would undoubtedly be a criterion of substantial importance, and a category might well be limited to a stated or implied period of time, *e.g.*, for one session of the General Assembly, for the dura-

<sup>65</sup> *Ibid.*, 8th Sess., Plenary Meetings, p. 306 (1953).

<sup>66</sup> See p. 327, note 7, above.



tion of an economic recession, during the existence of hostilities in a geographic region.

The indefinite scope of a category is reflected in the wording of Article 18, which is a potential source of confusion. At the Twelfth Session of the General Assembly the statement of the delegate of Guatemala noted this confusion:

Differences of interpretation had arisen with regard to the words "determination of additional categories" in paragraph 3, particularly concerning the following points: First, did an "additional category" mean a genus of questions, covering various specific matters, or did it refer to one specific question, even though it belonged to a genus of similar questions; so, which were genera and which were species? Secondly, did the use of the words "including the determination of additional categories of questions to be decided by a two-thirds majority" in paragraph 3, and in particular the use of the word "additional," imply that the questions enumerated in paragraph 2 were really "categories of questions?" The word "additional" could only refer to the list of questions in paragraph 2, for if there were no such list there would be nothing "additional" to determine.<sup>67</sup>

The reference to "additional" categories in Article 18(3) does indeed imply that the questions listed in Article 18(2) are categories of questions; Article 18(2) clearly refers to the list as composed of questions. This paradox demonstrates that the search for nuances of meaning in the close analysis of the wording of an article often proves less productive than a study of its purpose and structure, and suggests that the asserted distinction between "questions" and "categories of questions" may well prove unworkable when an attempt is made to apply it.

The questions listed in Article 18(2), like any other question determined to be important, are categories, since they denote, with varying degrees of precision, classes of possible General Assembly action. Some of the classes, *e.g.*, budgetary questions, are relatively broad; others are less broad, *e.g.*, elections of Members to various offices and the admission of new Members. Whether a proposed resolution fell within a category constituted by a listed question has frequently been implicit in discussions in the General Assembly,<sup>68</sup> and was discussed openly at its Sixth Session in connection with one of the less broad categories, the admission of new Members.<sup>69</sup> As will be indicated later, the form in which the preliminary question was put to the Assembly precludes ascertaining whether the Assembly determined these questions to be included within the list or not. The fact that discussion arose in connection with one of the less broad questions, the admission of new Members, is noteworthy, however.

#### PROCEDURE

It follows from what has been said that the practice of the General Assembly on this question has been correct in substance. Has it been

<sup>67</sup> U.N. General Assembly, 12th Sess., Official Records, 4th Committee, p. 163 (1957).

<sup>68</sup> *Ibid.*, 2nd Sess., Plenary Meetings, pp. 580, 640-641 (1947); *ibid.*, 3d Sess., 2nd Pt., Plenary Meetings, p. 583 (1949).

<sup>69</sup> *Ibid.*, 6th Sess., Plenary Meetings, pp. 468-469, 473 (1952).

correct in form? While some Assembly Presidents have refused to rule on the importance of a question, choosing instead to put the question directly to the General Assembly,<sup>70</sup> the practice more frequently followed has been for the President to rule on the question<sup>71</sup> and, in cases where his ruling was challenged, to put the question to a vote.<sup>72</sup> In a few instances the President refused to rule on the question of importance until after the resolution itself had been voted on, correctly surmising that the resolution would be adopted by a large enough majority so that a ruling on the majority required would not be sought.<sup>73</sup>

Should the President rule on the importance of a question before the Assembly? In most cases it appears that the President, in ruling on the importance of a question, has done so not as the presiding officer ruling on a question of procedure, but in reflection of a sense of agreement within the General Assembly. In one case the ruling of the President specifically indicated that he was ruling on this basis;<sup>74</sup> in the other cases indicated above, the fact that the President, when challenged, called for a vote on the question of importance rather than on his ruling as a point of order, suggests that the President's ruling was on the latter basis. On one occasion, when the President proposed to put his ruling to a vote on a point of order, he was dissuaded by the plea of a delegate.<sup>75</sup>

Whether or not a question is important is technically not a question to be ruled on by the President. Article 18 makes it clear that this question is one for the General Assembly. However, presiding officers in organs and sub-organs of the United Nations, in the interests of expediting business, not infrequently rule even on matters of substance, where no objection is anticipated. While such a practice may exercise a slight influence on the course of events, since inertia militates against any delegation calling for a vote, this would not appear too great a price to pay for prompt procedure, especially since, as has already been indicated, the problem of voting in the General Assembly is usually decided during the closing days of the session. Serious objections would have to be made, however, to the procedure of putting the ruling of the President to a vote on a point of order. Not only would such a practice reflect a misconception

<sup>70</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1060 (1946); 2nd Sess., Plenary Meetings, pp. 666, 748 (1947); 8th Sess., Plenary Meetings, p. 309 (1953); 11th Sess., Plenary Meetings, p. 1166 (1957).

<sup>71</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1927 (1946), in which the ruling of the President was erroneously reported, and subsequently corrected at the 2nd Sess., Plenary Meetings, pp. 601-602, 641-642 (1947); *ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1355 (1946); 2nd Sess., Plenary Meetings, pp. 641-642 (1947); 3d Sess., 2nd Pt., Plenary Meetings, p. 583 (1949); 6th Sess., Plenary Meetings, p. 476 (1952); 7th Sess., Plenary Meetings, pp. 333, 355, 377, 413, 426, 449 (1952); 9th Sess., Plenary Meetings, pp. 248, 490 (1954); 10th Sess., Plenary Meetings, p. 404 (1955).

<sup>72</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, pp. 1355-1356 (1946); 2nd Sess., Plenary Meetings, p. 648 (1947); 6th Sess., Plenary Meetings, p. 476 (1952).

<sup>73</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, pp. 1367-1369 (1946); 6th Sess., Plenary Meetings, p. 355 (1952).

<sup>74</sup> *Ibid.*, 7th Sess., Plenary Meetings, p. 330 (1952).

<sup>75</sup> *Ibid.*, 2nd Sess., Plenary Meetings, pp. 641-648 (1947).

tion of Article 18, but it would require those delegations not believing the question to be important to assume a rôle of opposition to the President, which many delegations are reluctant to assume. As has been indicated, on the one occasion in which the President proposed to put his ruling to a vote on a point of order, he was dissuaded from doing so.

When the question is put to the Assembly, what form should it assume? The form used at the Eighth Session, when the President said, "The motion is to the effect that the draft resolution may be carried by a simple majority,"<sup>76</sup> does not comport with Article 18. Since a question is an "other question" requiring a simple majority vote until its status as an "important question" has been determined, it is superfluous to put this question to a vote.

Alternatively, the question could be phrased, as it was at the First Session, "Does the Assembly consider it necessary to apply the two-thirds majority rule to the decision . . .,"<sup>77</sup> or as it was at the Second Session, "[W]e will have to decide whether this is a matter of importance requiring a two-thirds majority. . . ."<sup>78</sup> These versions are theoretically equivalent. Since, as has been indicated, the basis for requiring a two-thirds majority is the importance of the question, there is in theory no difference between asking whether a question is important or whether a question requires a two-thirds majority for a decision. Both versions of the question subordinate a theoretical distinction, in that they would be voted affirmatively both by delegations which considered the question to be within the list in Article 18(2) and by delegations which considered the question not within the list but thought it appropriate to designate the question as important under Article 18(3). Since the function of Article 18 is to determine the voting majority required rather than to draw abstract distinctions regarding the basis of the importance of questions, this effect is in harmony with the purpose of Article 18. However, it is possible that in practice the effects of these versions might differ in the case of a delegation which subscribed to the view that importance is not relevant in determining the voting majority to be applied to questions not included within the list in Article 18(2). Such a delegation might be inclined to vote against the proposition that a question was important, but in favor of the proposition that it required a two-thirds majority. While it is unlikely that a delegation would construe the issue before it so literally that its vote would differ on the basis of the wording of the question, this possibility does suggest that, since the issue before the Assembly is the voting majority to be employed rather than the importance of the question, the question is more advisedly put on that basis.

#### CONCLUSION

Article 18 sets up a two-thirds majority requirement for decisions on "important questions," which include those listed in Article 18(2) and

<sup>76</sup> *Ibid.*, 8th Sess., Plenary Meetings, p. 309 (1953).

<sup>77</sup> *Ibid.*, 1st Sess., 2nd Pt., Plenary Meetings, p. 1060 (1946).

<sup>78</sup> *Ibid.*, 2nd Sess., Plenary Meetings, p. 666 (1947).

those subsequently determined to be important, this determination being an "other question" under Article 18(3); it also sets up a simple majority requirement for decisions on "other questions," that is, on questions not considered important. While the interpretation of the term "question" is not clear on the basis of the text of Article 18, the practice of the General Assembly appears to interpret the term "question," by and large, to denote the individual resolution on which the vote is to be taken.

The criterion of importance is unclear, and imposes on the opponents of a two-thirds majority a tactical disadvantage. Opponents of a two-thirds majority have attempted to avoid this disadvantage by interpreting the provisions of Article 18 to the effect that the criterion of importance refers only to the questions listed in Article 18(2), and that the determination to require a two-thirds majority on an unlisted question can be made only if a category is created.

While the latter interpretation appears unsupportable, in the General Assembly repetition frequently adds weight to slight arguments. The right of the General Assembly, under Article 18, to determine the voting majority required for an individual resolution on the basis of its importance is strongly opposed by some delegations at the present time. The equally significant questions of the scope of the questions listed in Article 18(2), and the legality of creating closely defined, carefully limited categories have thus far received little attention.

# INTERPRETATION BY PUBLIC INTERNATIONAL ORGANIZATIONS OF THEIR BASIC INSTRUMENTS \*

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## I. INTRODUCTION

The operation of public international organizations and the development of that sector of substantive international law which such organizations administer require that an effective mechanism exist for the authoritative interpretation of their basic instruments.<sup>1</sup> Controversies in respect to interpretation of the basic instrument of an international organization may arise between the organization and its members, and between the member countries themselves. One may state according to experience that the realization that there is a workable mechanism which is able to settle controversies without delay reduces the number of disagreements. Every international organization is, of course, interpreting its basic instrument in its daily routine work. In this sense the application of the provisions of the basic instruments is co-extensive with their interpretation. Differences of opinion arising in the course of the routine application of the basic instruments can be settled frequently by informal discussion and consultation, and therefore do not require final interpretation and do not constitute a controversy in the sense here considered.

Following the example of the League of Nations Covenant, the United Nations Charter does not contain provisions for the authoritative interpretation of this basic instrument.<sup>2</sup> The General Assembly in 1947 recommended certain measures which might contribute toward clarifying the meaning of the provisions of the Charter, including the suggestion that its own organs and the Specialized Agencies might take advantage of advisory opinions of the International Court of Justice.<sup>3</sup> However, this procedure does not result in "final" interpretations of the Charter.

\* The article reflects the personal views of the author.

<sup>1</sup> See C. Wilfred Jenks, "The Status of International Organizations in Relation to the International Court of Justice," *Problems of Public and Private International Law*, 32 *Grotius Society Transactions* (1946) 1-41 (London, 1947); and Pollux, "The Interpretation of the Charter," 23 *Brit. Year Bk. of Int. Law* 54 ff. (1946).

<sup>2</sup> During the San Francisco Conference this question was considered from various aspects and it was decided not to include a provision on authoritative interpretation in the Charter. Doc. 750, IV/2/B/1, of June 2, 1945, on the Interpretation of the Charter, reprinted in U.N. General Assembly, 2nd Sess., Official Records, Vol. II, pp. 1563-1564. See also Leland Goodrich and Edvard Hambro, *Charter of the United Nations* 547 ff. (Boston, 1949).

<sup>3</sup> In a resolution of Nov. 14, 1947 (No. 171-III), the General Assembly decided that: "Considering: that it is a responsibility of the United Nations to encourage the progressive development of international law; *Considering*: that it is of paramount im-

The present study discusses the machinery for the final interpretation of the basic instruments of three intergovernmental financial organizations established under international agreements: the International Monetary Fund, the International Bank for Reconstruction and Development, and its affiliate, the International Finance Corporation.<sup>4</sup> Although the study is concerned primarily with the International Monetary Fund, its considerations apply, *mutatis mutandis*, to the two other organizations.

The Articles of Agreement of the Fund and of the Bank entered into force on December 27, 1945; those of the IFC on July 20, 1956. The Boards of Governors of the Fund and Bank consist of governors appointed by each member country. The Fund and the Bank have eighteen executive directors each; five are appointed, one each by the members having the largest quotas (United States, United Kingdom, China, France and India), and the remaining thirteen are elected by the governors representing the other members.<sup>5</sup> Governors of the Bank from countries which are also members of the IFC are Governors of the IFC. The Board of Executive Directors of the IFC is composed of the Executive Directors of the Bank who represent at least one government which is also a member of the IFC. Each member of the Fund (and, *mutatis mutandis*, of the Bank and IFC) has a "subscription quota," expressed in U. S. dollars. Quotas determine the voting power of each member. Each Executive Director is entitled to cast the number of votes of the member or members by which he was appointed or elected. The Managing Director of the Fund, the President of the Bank, and the President of the IFC are the Chairmen of the respective Executive Directors. The Executive Directors function as a board and are frequently referred to as the Executive Board of the respective

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portance that the interpretation of the Charter of the United Nations and the constitutions of the specialized agencies should be based on recognized principles of international law; *Considering*: that the International Court of Justice is the principal judicial organ of the United Nations; *Considering*: that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation, *Recommends*: that organs of the United Nations and the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, including points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialized agencies, and, if duly authorized according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for an advisory opinion."

<sup>4</sup> Hereinafter the International Monetary Fund will be referred to as "the Fund" or "IMF," the International Bank for Reconstruction and Development as "the Bank" or "IBRD," and the International Finance Corporation as "IFC." Their basic instruments will be referred to as Fund Agreement, Bank Agreement, and IFC Agreement, respectively.

<sup>5</sup> Under certain circumstances, members, the holdings of whose currencies by the Fund have, on the average over the preceding two years, been reduced below their quotas, are entitled to appoint an executive director in the Fund. An executive director was appointed under this title for the first time beginning Nov. 1, 1958 (Art. XII, Sec. 3(c) of the Fund Agreement), by Canada.

institutions. All three Agreements are "lawmaking treaties" which, *inter alia*, establish general rules for future international conduct of a large number of nations, create new international institutions and contain the declaration of their members concerning their understanding of the law in certain sectors of international financial relations.

The United States Bretton Woods Agreement Act (59 Stat. 512), which authorized the President of the United States to accept membership for the United States in the Fund and Bank, was enacted on July 31, 1945. The United States has been a member of the Fund and the Bank since December 27, 1945. From the point of view of this study, it is noteworthy that the Bretton Woods Agreement Act itself contains provisions under which the first representatives of the United States in the two organizations, immediately after assuming their functions, were required to request an official interpretation by the Bank as to its authority to make or guarantee certain loans,<sup>6</sup> and by the Bank as to its authority to use its resources for certain purposes.<sup>7</sup> These provisions show the great significance attributed by the Congress of the United States to authoritative interpretation for governing future policies of the Fund and the Bank.

When compared with the arrangements of other public international organizations, the machinery for final interpretation of the basic instruments of these three organizations is remarkable and unusual: *first*, because the function of authoritative interpretation rests with the ordinary executive organs of these institutions and not with any tribunal external to them; *second*, because the exercise of the interpretative function is not limited to decisions on actual disagreements, but is used also to *resolve doubts* in inter-

<sup>6</sup> Sec. 12 of the U. S. Bretton Woods Agreement Act reads:

"The governor and executive director of the Bank appointed by the United States are hereby directed to obtain promptly an official interpretation by the Bank as to its authority to make or guarantee loans for programs of economic reconstruction and the reconstruction of monetary systems, including long-term stabilization loans. If the Bank does not interpret its powers to include the making or guaranteeing of such loans, the governor of the Bank representing the United States is hereby directed to propose promptly and support an amendment to the Articles of Agreement for the purpose of explicitly authorizing the Bank, after consultation with the Fund, to make or guarantee such loans. The President is hereby authorized and directed to accept an amendment to that effect on behalf of the United States."

<sup>7</sup> Sec. 13 of the U. S. Bretton Woods Agreement Act is as follows:

"(a) The governor and executive director of the Fund appointed by the United States are hereby directed to obtain promptly an official interpretation by the Fund as to whether its authority to use its resources extends beyond current monetary stabilization operations to afford temporary assistance to members in connection with seasonal, cyclical, and emergency fluctuations in the balance of payments of any member for current transactions, and whether it has authority to use its resources to provide facilities for relief, reconstruction, or armaments, or to meet a large or sustained outflow of capital on the part of any member.

"(b) If the interpretation by the Fund answers in the affirmative any of the questions stated in subsection (a), the governor of the Fund representing the United States is hereby directed to propose promptly and support an amendment to the Articles of Agreement for the purpose of expressly negating such interpretation. The President is hereby authorized and directed to accept an amendment to that effect on behalf of the United States."

pretation and thus to *prevent* controversies and to assure the uniform application of operative arrangements; *third*, because the executive organs have *exclusive* jurisdiction to decide on questions of interpretation of the instrument that may arise between the organization and its members or between members themselves; and *fourth*, because the persons exercising the interpretative function represent *interested parties* and their votes are weighted according to certain defined criteria.

These arrangements for final interpretation by non-judicial bodies were the result of a give-and-take process carried out in a series of complex international negotiations. The negotiations preceding Bretton Woods and at Bretton Woods were undertaken mainly by monetary experts. They wished to keep decision-making on delicate policy issues involving interpretation in the hands of financial experts. They also wished to create a framework within which the principal policies of the institutions could be evolved with due consideration to the balance of interests indicated by the different quotas. Furthermore, they aimed at the creation of a constitutional framework which would not preclude the adjustment of policies to changing political and economic circumstances. They believed that all these purposes would be impaired if the function of final interpretation was handed over to an external judicial authority. To be sure, at the time of Bretton Woods, the great Powers (including the Soviet Union, which later reconsidered its position and did not join the Fund and Bank) satisfied their fears of having their positions outweighed by the action of other nations by including in the Articles of Agreement provisions on the right of the Fund and Bank members with the five largest quotas to appoint their executive directors, a weighted voting system,<sup>8</sup> and a mechanism of authoritative interpretation by the executive organs of the two institutions. This approach may be contrasted with the position taken by the great Powers when, in accepting the United Nations Charter, they insisted on the veto in the Security Council. It may also be contrasted with the United States acceptance of the compulsory jurisdiction of the International Court of Justice in 1946, which was accompanied by the so-called Connally Amendment reserving the right of the United States to decide which issues fall within its domestic jurisdiction.

## II. COMMENTS ON THE PROVISION ON INTERPRETATION

Article XVIII of the Fund Agreement (dealing in its subparagraphs (a) and (b) with interpretation, and in (c) with arbitration) is as follows:

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any

<sup>8</sup> See Elizabeth McIntyre, "Weighted Voting in International Organizations," 8 Int. Organization 484 ff. (1954), and Stanley D. Metzger, "Settlement of International Disputes by Non-Judicial Methods," 48 A.J.I.L. 408 ff. (1954). See also suggestions for an interesting form of a weighted voting system in the U.N. General Assembly in Grenville Clark and Louis B. Sohn, *World Peace through World Law passim* (Cambridge, Mass., 1958). Literature on the weighted voting system is listed in Louis B. Sohn, *Cases on United Nations Law* 221 (Brooklyn, 1956).



members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director it shall be entitled to representation in accordance with Article XII, Section 3(j).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

(c) Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Fund, another by the member or withdrawing member and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Fund. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

It is revealing to note the difference between the topics dealt with in subparagraphs (a) and (b) on the one hand and (c) on the other. Whereas, under subparagraphs (a) and (b), the executive organs of the Fund deal with "any question of interpretation," under subparagraph (c) arbitration tribunals deal only with "disagreements." The exercise of the interpretative function aims at determining the meaning of the provisions of the Agreement; the arbitration procedure is supposed to result in an arbitral award settling a specific controversy. Subparagraphs (a) and (b) apply to actual members of the Fund and to the time period while the Fund is in operation; subparagraph (c) applies only to members that have *withdrawn* or to issues arising during the period of liquidation of the Fund. The interpretative procedures can be invoked by any member on any question of interpretation; the arbitration procedure can be invoked solely by the Fund and by countries which are involved in a specific arbitrable controversy with the Fund.

The provisions of Article IX of the Bank Agreement (Interpretation) and Article VIII of the IFC Agreement (Interpretation and Arbitration) are substantially the same as the provisions of Article XVIII of the Fund Agreement. No detailed rules or regulations have been issued by the three organizations concerning the application of these articles. The Fund and Bank have designated, in pursuance of subparagraph (c), the President of the International Court of Justice as the authority which appoints an umpire of the arbitration tribunal.<sup>9</sup>

The Fund enjoys immunity from every form of judicial process in the territories of its members. It can, of course, waive its immunity for the purpose of any proceedings, or it can waive it by the terms of any con-

<sup>9</sup> See Sec. 23 of the By-Laws of the Fund and Sec. 22 of the By-Laws of the Bank. Art. VIII, subpar. (c), of the IFC Agreement contains a provision to the same effect.

tract (Article IX, Section 3, of the Fund Agreement). The Bank and the IFC enjoy a somewhat limited immunity from legal process (Article VII, Section 3, of the Bank Agreement and Article VI, Section 3, of the IFC Agreement.<sup>10</sup> Whereas the Bank and the IFC, in their loan, guarantee and similar agreements with their members, customarily agree on an arbitration clause in respect to those specific transactions, the Fund, in its customary financial transactions with its members, would not resort to settlement procedures other than those provided for in Article XVIII of the Fund Agreement.

The United Nations General Assembly authorized the Fund, Bank and the IFC (the IFC through the Bank) to request from the International Court of Justice advisory opinions if, within the scope of their activities, any legal questions should arise other than questions relating to the relationship of these organizations to the United Nations and to Specialized Agencies.<sup>11</sup> Apart from very uncommon and refined questions which may arise in the application of certain provisions of the Convention on Privileges and Immunities of the Specialized Agencies,<sup>12</sup> it is difficult to conceive of cases in which the three organizations would resort to requesting the advisory opinion of the International Court of Justice on questions of interpretation. The internal procedure of interpretation discussed in this study is obligatory and cannot be affected by the organizations' right to request advisory opinions.

<sup>10</sup> The relevant provisions are as follows:

Art. IX, Sec. 3, of Fund Agreement: "*Immunity from judicial process.* The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

Art. VII, Sec. 3, of Bank Agreement: "*Position of the Bank with regard to judicial process.* Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

Art. VI, Sec. 3, of the IFC Agreement is in substance identical with the provision of Art. VII, Sec. 3, of the Bank Agreement.

<sup>11</sup> See resolutions of the General Assembly of Nov. 15, 1947, A/349 and A/519, and resolution of Feb. 20, 1957, A/3529, Rev. I. The authority to ask advisory opinions is incorporated in the agreement of the Fund and Bank on their relationship with the U.N. The relationship between the U.N. and the IFC is governed by the Agreement of the Bank with the U.N.

<sup>12</sup> Sec. 32 of the Convention on Privileges and Immunities of Specialized Agencies (Res. A, 179/II), adopted by the U.N. General Assembly on Nov. 21, 1947, deals with the settling of controversies arising out of the interpretation and application of the Convention by requesting an advisory opinion from the International Court of Justice. In Annexes dealing with special problems of the Fund and Bank, the provision of Sec. 32 is strongly qualified. These Annexes make it explicit that the only controversies submitted to the I.C.J. would be those which relate to a small fragment of immunities and privileges derived exclusively from the Convention and not to the main body of immunities and privileges derived from the Articles of Agreement.

None of the three organizations adopted a method similar to that of the Administrative Tribunal of the United Nations for settling disagreements arising out of staff relations. The chief administrative officers of the three institutions, under the general control of their executive boards, decide on staff affairs. Even if there were a tribunal, it seems doubtful that its operation would affect the authority of the Fund to decide on questions of interpretation in relation to its members.

### III. INTERPRETATIVE PROCEDURE

Article XVIII, subparagraph (a), of the Fund Agreement states that "any question of interpretation . . . shall be submitted to the Executive Directors for their decision." The word "any" seems to indicate that there are no limitations of a substantive nature on the questions; consequently, they could not be restricted to a narrow region of explanation of terms. The provision states only that the questions "shall be submitted" to the Executive Directors; presumably, the person who would actually submit such questions to the Executive Directors is the Managing Director. The wording of Article XVIII, subparagraph (a), implies that the Executive Directors do not have the discretion to refuse action on a request for interpretation submitted by a member. When a member presents a request for interpretation because of a disagreement with the position of the Fund concerning the member's obligations under the Fund Agreement, the Fund will presumably not take action on the basis of its preliminary position which gave rise to the member's request for interpretation.

The wording of Article XVIII, subparagraph (a), seems to authorize any member, whether or not it would be directly affected by the decision, to request a formal interpretation of the meaning of the provisions of the Agreement. Moreover, subparagraph (b) seems to authorize any member to appeal to the Board of Governors in respect to any interpretative decision of the Executive Directors. The right of appeal is not limited to members directly affected by the decision. The right to ask authoritative interpretation on questions which do not directly concern the member and the right to appeal any decision may be considered a modern form of *actio popularis* (an action on behalf of the community of members). A member may be uncertain of its obligations and ask the Fund's views in regard to a specific situation, actual or potential. If it disagrees with the advice given by the Fund, it may request a formal interpretation. Article XVIII implies the right of a member to obtain at any time a formal statement about the Fund's policies in any matter set forth in the Agreement. The right to obtain an explicit position on policy may be of practical value for the member and of great psychological importance. Conversely, the provision that a member may submit any question of interpretation to the executive organ of the Fund at any time may justify a presumption that a member is satisfied with the Fund's position if it does not request formal interpretations on Fund actions and policies and if it does not appeal to the Board of Governors against formal interpretations by the Executive Directors.

Not only may any Fund member submit questions on interpretation

which arise between it and the Fund or between it and other members, but the terms of Article XVIII, subparagraph (a), do not exclude the Executive Board and the Board of Governors from initiating an interpretative procedure.

A request for interpretation may specify the provision, passage, or term that is to be interpreted. Also, a decision may be requested as to whether the Fund has the authority to take certain actions under the Agreement or to take them in a specified way. Generally speaking, any question which relates to Fund actions and policies is a proper subject for interpretation. Raising "academic" questions of interpretation and decisions on them would not be proper under Article XVIII. The term "questions of interpretation" allows, however, the member to present, and the Executive Directors to decide, issues which would not be as fully matured as a case in a court of law. The question presented must be of such a nature that the matter to be resolved has an effect upon a member's activity or obligations, past, present, or proposed. An interpretative decision may show that a member has violated in the past one of its obligations. A decision may conclusively advise the member on the legality of proposed courses of action and be a means of collaboration with the Fund. The actual interpretative decisions of the Fund, reproduced below, show the variety of questions raised and the various tenors of the interpretative pronouncements. On two occasions, questions of interpretation of substantially similar content were raised in the Fund and in the Bank (term of appointed executive directors, decision of May 8, 1946; privileged treatment of communications, decision of February 20, 1950). The two executive boards were guided by similar considerations and the decisions were almost identical.

The Board of Governors is required to decide on any appeal on interpretation referred to it by the Executive Directors. No time limitation on the referral is stated in the Agreement. Even questions relating to provisions of the Agreement which deal with the jurisdiction and procedure of the Board of Governors have to be decided in the first instance by the Executive Directors. Admittedly, it is not certain that this literal approach would be applied.<sup>18</sup>

The provision of Article XVIII(a) requires that those members which are not entitled to appoint executive directors but which may be particularly affected by the interpretation shall be permitted to be represented at the meetings of the Executive Directors. There is no doubt that a member particularly affected will have every opportunity to explain its position and to present facts to the Executive Directors. There are no other provisions that guarantee a fair hearing to a member, and apparently, for all practical purposes, no other provisions are necessary.

<sup>18</sup> Art. XII, Sec. 2(b), of the Fund Agreement specifies that the Board of Governors may not delegate to the Executive Directors the power to "decide appeals from interpretations of this agreement given by the Executive Directors." But the provision does not prescribe that the Executive Directors should not interpret those provisions of the Agreement which deal with the jurisdiction and procedure of the Board of Governors. One could argue that this limitation seems to be implicit in the structure of the Fund.

The interpretative function of the Executive Directors and the Board of Governors applies only to actual members of the Fund and not to members that have withdrawn.<sup>14</sup> As soon as a member withdraws from the Fund, it is no longer subject to the provisions of subparagraphs (a) and (b), but is subject to subparagraph (c) which applies to "disagreements" and provides for their settlement by an arbitration tribunal. The possibility of a member withdrawing because of dissatisfaction with an interpretation was considered by Professor Wilhelm Keilhau, the *rapporteur* of Committee 4 of Commission I (Form and Status of the Fund) of the Bretton Woods Conference, in a report submitted to the Plenary Meeting. His report is the only document significant for the legislative history of the interpretative provision of Article XVIII. The following excerpt is from his report:

I should only like to draw the attention of the members to the nature of the problem which we have tried to solve by the provisos in Article XII, Section 1, (a), (b) and (c) (Document No. 198, to substitute for page 46a). This problem consisted in keeping disputes concerning the interpretation of the Agreement between the Fund and any member country, within the setup of the Fund itself, but, at the same time, to secure for the member in question privileges of fair treatment. I think that members, when they read our proposals, will acknowledge that we have succeeded in finding a workable solution. If a conflict should end in the withdrawal of the member country, or disputes between member countries and the Fund should arise after its possible liquidation, we have drafted rules of arbitration.<sup>15</sup>

#### IV. SUBSTANTIVE LAW TO BE APPLIED

Two fundamental principles of interpretation, *i.e.*, that effect is to be given to the intention of the parties which have concluded the Agreement, and that the agreed arrangements must be made effective rather than ineffective, govern the interpretative functions of the Fund. The explicit intentions of the parties which concluded the Fund Agreement are set forth in Article I of the Agreement, listing the purposes of the Fund (*e.g.*, that the Fund should constitute a permanent institution which provides the machinery for consultation and collaboration on international monetary problems; that the Fund shall facilitate the balanced growth of international trade). Article I of the Agreement expressly requires the Fund to be guided in all its decisions by the purposes specified in the Agreement.<sup>16</sup> There is no doubt that this requirement applies to decisions on interpretation. The Bank and IFC Agreements also contain an article on their purposes which is to guide them in all their decisions.

<sup>14</sup> Art. XV, Sec. 1, reads as follows: "*Right of members to withdraw.* Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received."

<sup>15</sup> Proceedings and Documents of the U.N. Monetary and Financial Conference, Doc. 255, Vol. I, p. 428 (U. S. Dept. of State Publication No. 2866, Washington, 1948).

<sup>16</sup> The last sentence of this article reads as follows: "The Fund shall be guided in all its decisions by the purposes set forth in this Article."

In the course of its operations, the Fund has developed a large number of principles and policies which are contained in many thousands of documents. These principles and policies, which are continuously adjusted to changing circumstances, are known to the Executive Directors and to the staff, and to a lesser extent to the members. They constitute the internal law of the Fund which would be applied in interpretative decisions. Since these principles and policies are developed in the light of, and in pursuance of, the purposes of the Fund, set forth in Article I, their application is justified as substantive law in the course of interpretation. This internal law of the Fund, of course, can be made subject to formal review by a member's raising specific principles and policies as questions of interpretation.

The Fund Agreement contains substantive rules of interpretation in Article XIX (Explanation of Terms) specifying legal definitions of certain expressions (*e.g.*, a member's monetary reserves, a member's official holdings, a member's holdings of convertible currencies, payments for current transactions). These definitions serve as guidance in interpreting the provisions of the Agreement.<sup>17</sup>

Those persons who decide on questions of interpretation are acting within the domain of the law of nations and are bound by the provisions of public international law. The assumptions upon which the binding force of that body of rules upon members of the community of nations (and their representatives) and their relation to a public international organization are based, need not be discussed here. The very fact that the Articles of Agreement of the Fund can stipulate provisions of international conduct and that the persons exercising interpretative functions are authorized to act in that capacity is based on general international law.

The question may be asked whether the interpretative power includes the right to determine the limits of the interpretative power, and whether it extends to interpretation of provisions relative to amendments of the Agreement (Article XVII). The answer to this question is in the affirmative, subject, of course, to the fact that matters touching on *compétence de la compétence* frequently border on political aspects and involve problematical elements of *ultra vires* action.

A question of interpretation of the provisions of the Agreement may arise, *inter alia*, (a) in connection with any decision and action of the Fund, whether it relates to general policies or specific situations; (b) in connection with any action of a member where the member's rights and obligations under the Articles of Agreement are involved; and (c) in connection with *contemplated* actions or situations to which the provisions of the Agreement are supposed to apply. Interpretations envisaged by Article XVIII, subparagraph (a), relate to questions arising between the Fund and a member, or between members of the Fund. No examples are needed to illustrate the first category of questions. An illustration of the second

<sup>17</sup> The Agreements of the Bank and the IFC do not contain an equivalent provision on "Explanation of Terms."

category is offered by the case below, in which one member represented to another, and the latter disagreed, that certain actions were a violation of the Fund Agreement.

In the *Case Concerning Rights of Nationals of the U. S. A. in Morocco* (*France v. United States of America*), which was decided by the International Court of Justice on August 27, 1952,<sup>18</sup> France, on the one hand, and the United States, on the other, interpreted differently several provisions of the Fund Agreement (especially Article VII, Section 3, and Article XIV, Section 2). These differences concerned the consistency of certain French exchange measures, issued for the territory of Morocco, with Fund policies and with the Articles of Agreement of the Fund. France considered restrictions on the payments for imports concerning Morocco (affecting United States nationals) as consistent, and the United States considered them inconsistent, with the obligations of France under the Fund Agreement. Both France and the United States expressly recognized in their pleadings that only the Fund is the competent authority to render an authoritative interpretation of the provisions of the Fund Agreement. However, neither France nor the United States made a request to the Fund for a formal interpretation. The International Court of Justice decided the case without reference to the questions raised concerning legality of the French exchange measures.<sup>19</sup> A few significant sentences from the pleadings may throw light on the positions of the parties concerning interpretative functions of the Fund. They also illustrate the differences in opinion between members on questions of interpretation of the Fund Agreement:

(a) Mr. Reuter (France) on July 17, 1952:

... l'interprétation proposée par le Gouvernement des États-Unis conduirait à distinguer, parmi les États ou territoires auxquels s'applique le statut, deux catégories, les uns qui bénéficient pleinement des règles posées dans les accords, les autres qui seraient en quelque sorte des adhérents mineurs. Certaines règles s'appliqueraient à eux, d'autres règles non.

Rien dans le texte des accords, ni dans la pratique du Fonds monétaire international ne vient appuyer cette analyse; en vertu de l'article 18 des statuts, l'organisme directeur du Fonds est compétent pour interpréter le statut à l'égard des parties; . . .<sup>20</sup>

<sup>18</sup> [1952] I.C.J. Rep. 176; digested in 47 A.J.I.L. 136 (1953).

<sup>19</sup> The decision contains the following statement:

"The Government of France has submitted various contentions purporting to demonstrate the legality of exchange control. The Court does not consider it necessary to pronounce upon these contentions. Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of December 30, 1948, have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination cannot be justified by considerations relating to exchange control." [1952] I.C.J. Rep. 186.

An interesting aspect which might be considered in regard to this statement is the question whether or not France was authorized to institute and adapt (at that time) discriminatory exchange restrictions on imports under Art. XIV, Sec. 2, of the Fund Agreement.

<sup>20</sup> 2 I.C.J. Pleadings 200.

(b) Mr. Fisher (U. S. A.) on July 22, 1952:

Now, the discussion here, in this dispute, of the interpretation of Articles of Agreement of the Fund, of what the Directors meant when they made such a decision, shows the wisdom of the requirement of the Articles of Agreement of the Fund itself, which imposes on the French Government, as the party which is attempting to justify action on the basis of these Articles of Agreement, the burden of proceeding in accordance with these Articles to obtain an authoritative interpretation. In this connection, the attention of the Court is respectfully drawn to Article XVIII, which requires that: "Any question of interpretation of the provisions of this Agreement arising . . . between any members of the Fund shall be submitted to the Executive Directors for their decision." Now, this provision is mandatory on members. A right of appeal to the Board of Governors is provided. There has been no compliance with this requirement. The suggestion that the treaty rights of the United States have been abrogated by action taken under the Articles of Agreement of the International Monetary Fund should therefore be rejected.<sup>21</sup>

(c) Mr. Gros (France) on July 24, 1952:

. . . Le Fonds monétaire international est pleinement compétent pour apprécier si une législation des changes est conforme ou non au statut. Le Fonds monétaire est saisi de toute mesure de contrôle des importations à but financier. Il n'a opposé aucune objection à la législation chérifienne des changes. Celle-ci est donc régulière; ce n'est pas aux autorités chérifiennes à solliciter une interprétation des statuts aux termes de l'article XVIII, mais bien au Gouvernement des États-Unis qui, dans le cadre des statuts du Fonds, est demandeur . . .  
 . . . Alors que les États-Unis pouvaient invoquer des règles de droit positif devant l'institution internationale compétente, le Fonds monétaire, ils ne l'ont pas fait. . . .<sup>22</sup>

#### V. BINDING FORCE OF FORMAL INTERPRETATIONS

The interpretative decisions of the Executive Directors rendered pursuant to Article XVIII, subparagraph (a), of the Fund Agreement are binding upon the Fund and the members concerned subject to any member's proposing that the decision be referred for review to the Board of Governors. If a proposal is made to refer the matter to the Board of Governors, the Fund, so far as it deems necessary, may act on the basis of the decision of the Executive Directors until the Board of Governors decides otherwise.

If the operative part of the interpretative decision concerns one specified factual situation and only one or more specified members, the binding force of the decision is limited to that specific situation. A member would fail to fulfill its obligations under the Fund Agreement if it should act in violation of an obligation specified in the interpretative decision.<sup>23</sup> The decision rendered for an individual case becomes, of course, part of the

<sup>21</sup> *Ibid.* 261.

<sup>22</sup> *Ibid.* 308-309.

<sup>23</sup> Art. XV, Sec. 2(a) and (b), of the Fund Agreement reads as follows:

"*Compulsory withdrawal.* (a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources



internal customary law of the Fund, and presumably is followed in later informal and formal interpretations. If the decision concerns general Fund policies and not the settling of one specified contentious case, all members are bound by the interpretative decision, i.e., by the construction given to the interpreted provision by the Executive Directors. The Fund is bound to act in its routine work in accordance with the formal interpretation, which constitutes the law of the Fund. Any member may request at any time reconsideration (*ex nunc*) of an interpretative decision.

The Fund enforces its interpretative decisions in the same way as the provisions of the Agreement. In case of violations, the Fund may proceed in accordance with Article XV, Section 2(a) and (b), of the Agreement, or it may exercise pressure on the member to abide by Fund decisions in other more informal ways.

The binding effect of the Fund's interpretative decisions concerns primarily the government of an individual member country, since, according to traditional concepts, the government is responsible for carrying out the country's international obligations under the Fund Agreement. However, certain Fund obligations (e.g., the obligations concerning immunities and privileges of the Fund) are of such a nature that they can be made effective only through domestic legislative implementation, through local courts or administrative authorities. There seems to be little doubt that those obligations which require action by domestic authorities must be carried out by those authorities in a manner which is consistent with the provisions of the Fund Agreement.<sup>24</sup> Proper compliance with a provision of the Agreement in a manner which is inconsistent with an authoritative interpretation would be a contradiction in terms. In one of its most important interpretative decisions the Fund determined that proper compliance with a specified provision (Article VIII, Section 2(b), on the unenforceability of certain exchange contracts) requires a member to make that provision of the Agreement part of its national law, and that proper compliance with that provision presupposes effective co-operation by its national courts and administrative agencies (Decision 446-4 of June 10, 1949, discussed below).

In countries like Germany, where the Fund Agreement as a whole was accorded the force of law, no question arises about the binding force of Article XVIII upon the municipal authorities.<sup>25</sup> Nor does it arise in a

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of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1.

"(b) If, after the expiration of a reasonable period the member persists in its failure to fulfill any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power."

<sup>24</sup> Under Art. XX, Sec. 2(a), of the Fund Agreement, members undertake to accept the Agreement in accordance with their law and to take all steps necessary to enable their governments to carry out all their obligations under the Agreement.

<sup>25</sup> Art. 5 of the German Statute of July 28, 1952, concerning adherence of Germany to the Fund and Bank, contains the following provision: "The two Agreements mentioned in Article I [Fund and Bank] are published below with the force of law."

country in which the force of law would be expressly given (in the municipal sphere) to the provision of Article XVIII of the Fund Agreement. Since most member countries have not formally declared that Article XVIII of the Fund Agreement has the force of law in their territories, the binding force of the interpretative decisions of the Fund upon domestic authorities has to be considered in the same way as that of the provisions of the Fund Agreement.<sup>26</sup>

The courts of the United States, insofar as this writer is aware, have never dealt directly with the binding force of Fund interpretations. The position of the United States Congress on the interpretative power of the Fund can be judged from the fact that in the Bretton Woods Agreements Act (1945) certain actions were requested by Congress from the representatives of the United States in the Fund and Bank on the basis of the interpretative power. Congress did not expressly accord to Article XVIII the force of law, although such position in the legal system of the United States was expressly given in that Statute to the provisions of Article VIII, Section 2(b) (Unenforceability of Exchange Contracts), and Article IX (Immunities and Privileges).

A Federal agency of the United States, the Federal Communications Commission, expressly recognized the binding force in the territories of the United States of an interpretative decision of the Fund and Bank.<sup>27</sup> Its decision of March 23, 1953, deals with the question whether the interpretation given by the Fund on February 20, 1950,<sup>28</sup> and by the Bank on February 17, 1950, to the term "treatment," which appears in the provisions of Article IX, Section 7, of the Fund Agreement and Article VII, Section 7, of the Bank Agreement, is binding upon the United States and upon the Federal Communications Commission.<sup>29</sup> The following excerpts from the conclusions of the decision are characteristic of its tenor:

2. The basic question, therefore, which we must determine in this proceeding is whether the term "treatment," as used in the Articles of the Bank and Fund, relates to rate matters as contended by the complainants or is confined to other matters such as priorities and freedom from censorship as contended by the defendants. In making this determination it should be clear that the issue presented to us is not whether, as a matter of communications policy, the Bank or Fund should be authorized to secure lower government rates, where such

<sup>26</sup> See Bernard S. Meyer, "Recognition of Exchange Controls after the International Monetary Fund Agreement," 62 *Yale Law Journal* 888-885 (1953); Joseph Gold, "The Interpretation by the International Monetary Fund of its Articles of Agreement," 8 *Int. and Comp. Law Q.* 256-276 (1954).

<sup>27</sup> The International Bank for Reconstruction and Development and the International Monetary Fund, Complainants, *v.* All America Cables and Radio, Inc., The Commercial Cable Company, Mackay Radio and Telegraph Company, Inc., RCA Communications, Inc., The Western Union Telegraph Company, Defendants, Docket No. 9362, FCC 53-306.

<sup>28</sup> The interpretative decision is reproduced below.

<sup>29</sup> Art. IX, Sec. 7, of the Fund Agreement, and Art. VII, Sec. 7, of the Bank Agreement read as follows:

"The official communications of the Fund [Bank] shall be accorded by members the same treatment as the official communications of other members."

rates are in existence, but rather whether as a matter of fact the Bank and the Fund have already been authorized to receive such rates by binding international agreements as confirmed by the Bretton Woods Agreements Act. . . .

3. We believe that the question as to the application of the term "treatment" in the Bank and Fund Articles to rates has been conclusively determined by the Bank and Fund Executive Directors' interpretation, by unanimous vote, that the language in question applies to rates charged for official communications of the Bank and the Fund. Under the terms of the Bank and Fund Articles of Agreement, this interpretation, in effect, is final. This procedure for issuing interpretations binding member governments does indeed appear novel; but it also appears to point the way toward speedy, uniform and final interpretations. This procedure is not only an integral part of the Bank and Fund Articles, which have been accepted by the United States, but its use was specifically invoked with respect to questions of interpretation by Sections 12 and 13 of the Bretton Woods Agreements Act; and the United States Congress, by directing that an amendment of the Articles be sought if the requested interpretations were not satisfactory, appears to have recognized in these two Sections that the United States is bound by the results of the interpretations. The United States Government is therefore bound by the Executive Directors' interpretation of the term "treatment" and is under an international obligation to act in conformity therewith.

. . . . .

10. Our conclusion as to the obligation of the United States Government to act in conformity with the Executive Directors' interpretation was reached independently of the communications from the Department of State. However, the view of the State Department that the United States is under an international obligation to act in conformity with the Executive Directors' interpretation is entitled to great weight and constitutes an additional basis for our conclusion.

. . . . .

13. The Bank and Fund privilege for communications is enforceable without further legislative action. We do not have here the question which has been the subject of many court decisions and legal treatises, namely, whether an executive agreement or treaty is self-executing or requires domestic legislative implementation, since by the terms of the Bretton Woods Agreements Act the privilege for communications is specifically given full force and effect in the United States and its territories and possessions. It is immaterial that the Communications Act of 1934 was not expressly amended by the Bretton Woods Agreements Act. In this respect, the privilege for communications is not unique—through the Bretton Woods Act, numerous privileges and immunities are conferred upon the Bank and Fund as well as upon their officers and employees but no existing statutes are amended or clarified to implement these privileges and immunities. The Communications Act and the Bretton Woods Act can and should be read together.

The record of the proceeding before the Federal Communications Commission includes two letters from the U. S. Department of State, both signed by the Deputy Legal Adviser, Jack B. Tate, containing the following paragraphs:

(a) Letter of June 2, 1950:

By virtue of its membership in the Fund and Bank, the United States is obliged to conform to the provisions of the respective Articles of Agreement, including the provisions of the respective Articles relating to interpretation of the Articles. As a consequence, the United States is obliged to carry out the Articles of Agreement as interpreted in accordance with the provisions of the Articles. Since the United States does not intend to require that the interpretations under reference be referred to the respective Boards of Governors, the United States is under an international obligation to act in conformity with the interpretations issued by the respective Executive Directors of the Fund and Bank.

(b) Letter of January 25, 1951 (this letter refers to a letter of the Department of State, of December 6, 1946, signed by Mr. Garrison Norton, and to the letter of June 2, 1950, above quoted):

Due note has been made of the text of the letters referred to, particularly that of December 6, 1946, from this Department to the Acting Chairman of the Federal Communications Commission. Insofar as there might be a difference of views implied between that letter, signed by Mr. Garrison Norton as Director of the Office of Transport and Communications of this Department and the letter of June 2, 1950, mentioned above, signed by Mr. Tate as Deputy Legal Adviser, it may be helpful to point out that the letter of December 6, 1946, was more general in scope and referred to language which appears in the provisions of Section 2(d) of the International Organizations Immunities Act, approved December 29, 1945 (59 U. S. Stat. at Large 669) which are similar to the provisions in Article IX, Section 7 of the Articles of Agreement of the International Bank for Reconstruction and Development. The entry of the United States into these organizations was specifically approved by Congress under the Bretton Woods Agreements Act, approved July 31, 1945 (59 U. S. Stat. at Large 512).

This Department's letter of June 2, 1950, referred to the provisions in those Articles of Agreement, an international agreement between the United States and other nations. After the letter of December 6, 1946 was written, the provisions of that Agreement were interpreted by the authority specifically provided for in the Agreement for its interpretation. Reference is made to the provisions of Article XVIII of the Articles of Agreement. Since that authority held to the view that the Articles of the Agreement of the Bank and the Fund relate to the treatment to be accorded to official communications, including governmental privileges with respect to rates, this Department is of the opinion that the United States Government is committed to support that interpretation.

To the extent that there may be found any inconsistency between the letter of June 2, 1950, signed by Mr. Tate, and the earlier letter, dated December 6, 1946, signed by Mr. Norton, the letter of June 2, 1950, must be deemed to have superseded the latter as far as the Bank and the Fund are concerned.

## VI. INTERPRETATIVE DECISIONS

A genuine controversy between the Fund and a member has been decided through authoritative interpretation in only one case; all other interpreta-

tions have concerned substantially the resolving of doubts, the establishment of general policies and uniform procedures.

The form and content of the individual interpretative decisions of the Fund differ considerably, and the interpretative pronouncements, if compared with each other, are uneven. Some of them contain *obiter dicta* and the *ratio decidendi*, others express a principle in a laconic and compressed way. Some of them confirm non-controversial principles of the Agreement, others clarify rigid, conflicting, or obscure provisions. Some of the decisions specify the provisions which they intend to clarify, others do not specify them and interpret the Agreement *in toto*. Most of the interpretative decisions indicate in their introductory part that they are rendered pursuant to Article XVIII, subparagraph (a), of the Fund Agreement. However, there are decisions which do not contain such reference.<sup>30</sup>

In the twelve years of its existence the Fund has rendered and published nine interpretative decisions.<sup>31</sup> Their content is reproduced in this chapter.

<sup>30</sup> E.g., the "conclusions" on capital controls, rendered on July 25, 1956, and published in the Fund's Annual Report 1957, do not contain such reference. Their nature as an interpretative decision may be assumed from its material content and from the reference to the conclusions in the Annual Report (p. 127) which reads as follows: "Last year the Board undertook a discussion of certain problems connected with capital controls, and in this connection considered the *interpretation* of Article VI, Section 3, of the Fund's Articles of Agreement. While *no policy* decision on the Fund's position to capital movements was formulated, *it was concluded* that under the Articles of Agreement members are free to regulate capital movements for any reason, due regard being paid to other related provisions of the Fund Agreement, and members may exercise such controls as are necessary for this purpose, including the making of arrangements with other members, without prior Fund approval. The conclusions adopted are contained in Appendix VII." (Emphasis supplied.)

<sup>31</sup> List of Fund Decisions and their publication:

1. Term of appointed executive directors (Interpretation of the provisions of Art. XII, Sec. 3(b) (i) and 3(f)). Executive Board Decision of May 8, 1946, No. 2-1. Published in First Annual Meeting of the Board of Governors, Report of the Executive Directors and Summary Proceedings, 1946, p. 107.

2. Changes of par value in connection with threatening unemployment (Interpretation applies to Art. I, subpars. (ii) and (v) and to Art. IV, Sec. 5 (f)). Executive Board Decision of Sept. 26, 1946, No. 71-2. Published *op. cit.* 105-106.

3. Use of Fund resources limited to temporary assistance (No reference to specified provisions, interpretation applies presumably to Art. V, Sec. 3, and Art. XIV, Sec. 1). Executive Board Decision of Sept. 26, 1946, No. 71-2. Published *op. cit.* 106.

4. Unenforceability of certain exchange contracts (Interpretation of Art. VIII, Sec. 2(b)). Executive Board Decision of June 10, 1949, No. 446-4. Published in Annual Report for 1949, pp. 82-83.

5. Privileged treatment of Fund communications (Interpretation of Art. IX, Sec. 7). Executive Board Decision of Feb. 20, 1950, No. 534-3. Published in Annual Report for 1950, pp. 118-119.

6. Conditions for compulsory withdrawal of a member (Interpretation of Art. XV, Sec. 2). Executive Board Decision of Aug. 11, 1954, No. 344 (54/47) and confirming Decision of Board of Governors of Sept. 28, 1954, Res. No. 9-7. Published in Summary Proceedings of the Board of Governors' Meeting 1954, pp. 112-113.

7. Extent of drawing rights (Interpretation of Art. V, Sec. 3 (a) (iii)). Executive Board Decision of Aug. 24, 1955, No. 451 (55/52). Published in Annual Report for 1956, p. 135.

8. Investment of Fund Assets (Interpretation of Art. IV, Sec. 8(a), and of other

In the first year of its existence (1946), the Executive Board rendered three interpretations. The first, rendered on May 8, 1946, concerned a request by India for interpretation of two provisions of the Agreement. The purpose of the request was to have confirmed the right of the five members with the largest quota to appoint and maintain in office an executive director without prejudice to the rights of a subsequently admitted member to appoint an executive director if it has one of the five largest quotas. The decision of the Executive Directors (No. 2-1) follows:

It was unanimously agreed that Sections 3(b)(i) and 3(f) of Article XII should be interpreted to the effect that any member having one of the five largest quotas at the time of a regular election, or at a date between regular elections, shall be entitled to appoint an executive director who will hold office until the next regular election without prejudice to the right of a subsequently admitted member to appoint a director if it has one of the five largest quotas.

Thus, by this decision (expressed in the abstract) India was assured that it would have an *appointed* executive director even if in the interval until the next regular election a member with a larger quota should enter the Fund.<sup>32</sup> The Bank interpreted its Agreement at the same time to the same effect.

The second interpretative decision of the Fund (No. 71-2) contains in its introductory part the substance of a question raised by the United Kingdom. Resolution 5 of the Board of Governors, by which the Executive Directors, upon the suggestion of the United Kingdom, were invited to render the interpretation, specifies that Article IV, Section 5(f), and Article I, items (ii) and (v), of the Fund Agreement are to be interpreted.<sup>33</sup> The interpretative decision follows:

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provisions of the Agreement not specified). Executive Board Decision of Jan. 25, 1956, No. 488(56/5). Published in Annual Report for 1956, pp. 147-148.

9. Controls on Capital Transfers (Interpretation of Art. VI, Sec. 3). Executive Board Decision of July 25, 1956, No. 541 (56/39). Published in Annual Report for 1957, p. 162.

<sup>32</sup> The relevant parts of the interpreted provisions of the Fund Agreement are the following:

Art. XII, Sec. 3(b)(i): "(b) There shall not be less than twelve directors who need not be governors, and of whom (i) five shall be appointed by the five members having the largest quotas; . . ."

Art. XII, Sec. 3(f): "Directors shall continue in office until their successors are appointed or elected . . ."

<sup>33</sup> The relevant part of Art. IV, Sec. 5(f), reads:

"The Fund shall concur in a proposed change [of the par value] which is within the terms of (c) (ii) or (c) (iii) above if it is satisfied that the change is necessary to correct a fundamental disequilibrium. In particular, provided it is so satisfied, it shall not object to a proposed change because of the domestic social or political policies of the member proposing the change."

Items (ii) and (v) of Art. I read:

"The purposes of the International Monetary Fund are:

...  
 "(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment

The Government of the United Kingdom has stated its intention to maintain full employment and has requested an interpretation of the Articles of Agreement as to whether steps necessary to protect a member from unemployment of a chronic or persistent character, arising from pressure on its balance of payments, shall be measures necessary to correct a fundamental disequilibrium.

The Executive Directors interpret the Articles of Agreement to mean that steps which are necessary to protect a member from pressure on its balance of payments, are among the measures necessary to correct a fundamental disequilibrium; and that the Fund will be required to determine, in the light of all relevant circumstances, whether in its opinion the proposed change is necessary to correct the fundamental disequilibrium.

The third interpretation was also in response to a resolution of the Board of Governors and was requested by the United States Government, pursuant to Section 13 of the U. S. Bretton Woods Agreements Act.<sup>34</sup> The United States Government wished to receive an interpretation by the Fund "as to whether its authority to use its resources extends beyond current monetary stabilization operations . . ." The Executive Board's interpretation of September 12, 1946, reads as follows:

The Executive Directors of the International Monetary Fund interpret the Articles of Agreement to mean that authority to use the resources of the Fund is limited to use in accordance with its purposes to give temporary assistance in financing balance of payments deficits on current account for monetary stabilization operations.

Neither the question raised by the United States nor the interpretative decision of the Fund specifies the provisions of the Agreement whose meaning was sought. Presumably the provisions of Article V, Section 3, and Article XIV, Section 1, dealing with the conditions governing the use of the Fund's resources were the subject of the question and answer.

The fourth interpretation was adopted by the Executive Directors to clarify and make workable one of the most complex provisions of the Fund Agreement, which requires members to assist each other in a specified way in the application of their exchange regulations by giving them extraterritorial effect. The text of the interpreted provision of Article VIII, Section 2(b), is reproduced in the interpreted decision which follows:

The Board of Executive Directors of the International Monetary Fund has interpreted, under Article XVIII of the Articles of Agreement, the first sentence of Article VIII, Section 2(b), which provision reads as follows:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that

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and real income and to the development of the productive resources of all members as primary objectives of economic policy.

"(v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."

<sup>34</sup> See footnote 7 above.

member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.

The meaning and effect of this provision are as follows:

1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their non-performance.

2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (*ordre public*) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance.

The fifth interpretation was rendered by the Executive Directors to clarify the meaning of Article IX, Section 7,<sup>35</sup> dealing with the privilege to be granted by members to the Fund concerning Fund communications.<sup>36</sup> The questions raised are contained in the decision.

The questions of interpretation were presented by the United States and answered by the Fund and Bank in a procedure connected with the tariff revision of private U. S. cable companies in 1949. The revised tariff did not make it possible for the Fund and Bank to continue sending messages after July 1, 1949, at privileged rates as they had been doing until then. The Fund and Bank filed a complaint with the Federal Communications Commission referring to their right to privileged treatment. In the opinion of the cable companies the Fund and Bank privilege did not apply to rates, but to other aspects of the administration of communications. The interpretative decision (No. 534-3) clarifies in the form of questions and answers various aspects of the issues involved. The interpretative decisions of the Fund and Bank in this matter are in substance identical.

<sup>35</sup> The provision of Art. IX, Sec. 7, is quoted in footnote 29.

<sup>36</sup> The procedure before the Federal Communications Commission is discussed above in Part V of this study.



WHEREAS the Executive Director for the United States has raised certain questions of interpretation of the provisions of Section 7 of Article IX of the Articles of Agreement of the Fund as to the treatment to be accorded by a member of the International Monetary Fund to official communications of the Fund, which questions of interpretation are set forth below;

WHEREAS the said Executive Director has requested that the Executive Directors, in accordance with Article XVIII of said Articles, decide such questions of interpretation;

Now THEREFORE, the Executive Directors hereby decide such questions of interpretation as follows:

Question No. 1: .

Does Section 7 of Article IX of the Articles of Agreement of the Fund apply to rates charged for official communications of the Fund?

Decision on Question No. 1:

Yes. Section 7 of Article IX applies to rates charged for official communications of the Fund.

Question No. 2:

If a member exercises regulatory powers over the rates charged for communications, is it relieved of the obligation of Section 7, Article IX, by reason of the fact that the facilities for transmitting communications are privately owned or operated or both?

Decision on Question No. 2:

No. A member which exercises regulatory powers over the rates charged for communications is not relieved of its obligation under Section 7 of Article IX by reason of the fact that the facilities for transmitting such communications are privately owned or operated or both.

Question No. 3:

Is the member's obligation under Section 7 of Article IX satisfied if official communications of the Fund may be sent only at rates which exceed the rates accorded the official communications of other members in comparable situations? For example, would the obligation of member "a", under Section 7 of Article IX, be satisfied if the rate charged the Fund for its official communications from the territory of member "a" to the territory of member "b" exceeds the rate charged member "b" for its official communications from the territory of "a" to that of "b"?

Decision on Question No. 3:

No. The obligation of a member under Section 7 of Article IX is not satisfied if official communications of the Fund may be sent only at rates which exceed the rates accorded the official communications of other members in comparable situations. For example, the obligation of member "a", under Section 7 of Article IX, would not be satisfied if the rate charged the Fund for its official communications from the territory of member "a" to the territory of member "b" exceeds the rate charged member "b" for its official communications from the territory of "a" to that of "b".

The sixth interpretation of the Executive Directors rendered on August 11, 1954, concerned a controversial case between the Fund, on the one hand, and a member country (Czechoslovakia), on the other. The Executive Directors were about to recommend to the Board of Governors on the basis of Article XV, Section 2(b), of the Agreement<sup>37</sup> that Czechoslovakia be requested to withdraw from the Fund because in their judgment Czechoslovakia persisted in its failure to fulfill its obligations in respect to supplying required information concerning its economic and monetary situation and to consult the Fund on its restrictions on current payments. In the opinion of Czechoslovakia the conditions required by Article XV, Section 2(b), for such recommendation to the Board of Governors were not present. The proposed recommendation of the Executive Directors was based on a construction of Article XV, Section 2(b), which Czechoslovakia considered inconsistent with general international law. The detailed material on this issue is printed in the *Summary Proceedings, Annual Meeting, 1954, of the International Monetary Fund*. Czechoslovakia raised both in the proceedings before the Executive Directors and in the proceedings on its appeal by the Board of Governors, a number of interesting points of general international law which are dealt with in that publication. At a meeting of the Executive Board on July 23, 1954, the representative of Czechoslovakia summarized the interpretation of his government (which was considered by the Fund as the "questions of interpretation" dealt with under Article XVIII, subparagraphs (a) and (b)) as follows:

First, that an action under Article XV, Section 2(b) is permissible only when an action under Article XV, Section 2, paragraph (a)—an action contemplated as a sanction—has been taken.

Second, that a decision on ineligibility taken on the grounds of the factual situation only cannot be considered as an action under Article XV, Section 2, paragraph (a) to the effect that further action, namely, an action under Article XV, Section 2(b), would be permissible.

Third, that in Article XV, Section 2, paragraph (b) the words "after the expiration of a reasonable period" are to be construed so as to mean the expiration of a period prescribed in connection with the action taken under Article XV, Section 2(a), which action together with the expiration of the period prescribed are inevitable prerequisites for further action under Article XV, Section 2(b).

Fourth, that "failure to fulfill the member's obligations under the Agreement" both in Article XV, Section 2(a) and in Article XV, Section 2(b), means non-fulfillment of the provisions of the Articles of Agreement without justification recognized by international law and not a mere lack of fulfillment as, for example, impossibility to fulfill, etc.

Fifth, that, therefore, any action under Article XV, Section 2, paragraph (a), first sentence, or Article XV, Section 2, paragraph (b) is permissible only on the ground of a finding that the member failed to fulfill its obligations without having a legal justification. And that our interpretation is that reasons of national security are a valid justification.

<sup>37</sup> For text of Art. XV, Sec. 2, see note 23 above.

Sixth, that in Article XV, Section 2, paragraph (c) the words "an adequate opportunity for stating its case" mean that the member is given an adequate opportunity for stating all the facts as well as all the legal reasons justifying the non-fulfillment of its obligations, and that, therefore, Article XV, Section 2, paragraph (c) means that no action under Article XV, Section 2, paragraph (a) or Article XV, Section 2, paragraph (b) is permissible without deliberation of those facts and legal arguments by the appropriate organ of the International Monetary Fund.

And last, that the fact that a member of the Fund has been declared ineligible to use the resources of the Fund cannot be by itself considered as fulfillment of one of the unavoidable conditions for an action under Article XV, Section 2, paragraph (b).

The interpretative decision of August 11, 1954, of the Executive Directors (confirmed by the Board of Governors on September 28, 1954) follows:

In response to the request of the Government of Czechoslovakia, and after having considered the arguments put forward by that Government, the Executive Directors, acting pursuant to Article XVIII(a) of the Fund Agreement, interpret Article XV, Section 2 as follows:

Action may be taken by the Fund to require a member to withdraw when the following conditions have been met:

1. The member has been declared ineligible to use the resources of the Fund pursuant to Article XV, Section 2(a);
2. A reasonable time has passed since the member was declared ineligible to use the resources of the Fund pursuant to Article XV, Section 2(a), whether or not a fixed period of time had been prescribed in connection with such action, and the member persists in failing to fulfill its obligations;
3. The member has been informed in reasonable time of the complaint against it and given an adequate opportunity to state, both orally and in writing, any fact or legal argument relevant to the issue before the Fund.

The seventh interpretative decision of the Executive Board was rendered on August 24, 1955, and concerned the extent of drawing rights of members in accordance with Article V, Section 3(a)(iii). Article V, Section 3, of the Fund Agreement specifies the conditions governing the use of the Fund's resources, *i.e.*, the conditions under which a member may purchase from the Fund foreign currency in exchange for its own currency. One of the conditions, specified in Section 3(a)(iii) is that the purchase should not cause the Fund's holdings of the purchasing member's currency to increase by more than 25 percent of its quota during the period of twelve months ending on the date of the purchase. The Fund's interpretation clarifies how the member's drawing right shall be determined, *i.e.*, how the 25 percent should be calculated, in view of purchase and repurchase transactions which took place in the preceding twelve-month period.

No particular member requested this decision; it was initiated by the Executive Directors upon suggestion of the Management. The decision

was helpful in resolving an ambiguous provision of a highly technical character in the Fund Agreement. The interpretative decision follows:

The Executive Board, acting pursuant to Article XVIII(a) of the Fund Agreement, interprets the quantitative limit of twenty-five per cent of quota in relation to drawing rights under Article V, Section 3(a) (iii) as follows:

Where the Fund's holdings of a member's currency are not less than seventy-five per cent of its quota, and to the extent that such holdings would not be increased above two hundred per cent of its quota, the purchases which the member may make during a period of twelve months ending on the date of a proposed purchase shall be determined as follows:

(a) The total purchases shall not exceed twenty-five per cent of its quota;

(b) Provided that, if the member has made purchases during the period, it may then purchase an amount equal to the difference between twenty-five per cent of its quota and the total of such purchases adjusted on the basis that a repurchase by the member or sale of its currency during the period is deducted from a previous, but not subsequent, purchase or purchases during the period.

The eighth interpretative decision, adopted by the Executive Directors on January 25, 1956, deals with the problem whether the Fund is authorized to raise income by investing part of its gold assets, and if so, under what conditions. The preamble to the decision explains why the raising of revenue has been necessary. The Articles of Agreement do not authorize the Fund to raise income in this way nor do they expressly preclude the Fund from such transactions. This interpretative decision of the Executive Directors is the best and most pertinent example of the exercise of quasi-legislative authority based on powers construed on the basis of Article XVIII(a). The decision follows:

The Executive Board, observing that the Fund has had and may continue to have an excess of expenditure over income and that the greater part of the Fund's administrative expenditure has been and will continue to be in United States dollars, considers that in the interest of good administration and conservation of the Fund's resources it would be appropriate to raise income towards meeting the deficit by the investment of a portion of the Fund's gold in a manner which will enable the Fund to reacquire gold at any time and will maintain the gold value of the investment.

In view of the foregoing and noting the willingness of the United States to consent to investment by the Fund in United States Treasury bills, the Executive Board takes the following decisions:

I. The Executive Board, acting pursuant to Article XVIII(a) of the Articles of Agreement, interprets the Articles of Agreement to permit the investment described in the present decisions, namely, sale of a portion of the Fund's gold to the United States for the purpose of investment of the proceeds in United States Treasury bills having not more than ninety-three days to run, subject to the following conditions:

- (1) The amount of gold to be sold for investment:
    - (a) will not be such as to limit the ability of the Fund to make its resources available to members in accordance with the Articles of Agreement; and
    - (b) will be such as to produce an amount of income reasonably related to the purpose of the investment;
  - (2) Whenever the Fund decides to reacquire gold after the sale or maturity of any United States Treasury bills invested in, it will be able to reacquire the same amount of gold as was sold for investment in such bills; and the United States, at the request of the Fund, will sell the said amount of gold to the Fund for U. S. dollars at the United States selling price at the time of the sale to the Fund;
  - (3) In any computations for the purpose of applying the provisions of the Articles of Agreement the Fund will treat the following assets as representing gold and not as holdings of United States currency:
    - (a) the dollar proceeds of the sale of gold before investment in United States Treasury bills; and
    - (b) the United States Treasury bills invested in; and
    - (c) the dollar proceeds resulting from the sale or maturity of any such bills before the purchase of gold therewith.
- II. (1) The Executive Board, acting pursuant to Article XVIII(a) of the Articles of Agreement, interprets Article IV, Section 8(a) to require the United States to maintain the gold value of the assets set forth in paragraph I(3)(a), (b) and (c) above, notwithstanding changes in the par or foreign exchange value of the currency of the United States. This obligation of the United States shall be fully discharged by its maintaining the gold value of the dollar proceeds resulting from the sale of the gold or from the sale or maturity of the U. S. Treasury bills purchased therewith.
- (2) For the purposes of paragraphs I and II of these decisions the dollar proceeds resulting from the sale or maturity of the U. S. Treasury bills invested in shall not include the income of the investment.

The ninth interpretative decision (called "conclusions"), adopted by the Board on July 25, 1956, deals with the interpretation of the provision of Article VI, Section 3, concerning capital controls.<sup>38</sup> The purpose of the interpretation is to resolve doubts as to whether a member may use any exchange measure (*e.g.*, discriminatory currency arrangements) for the purpose of capital controls, which measures, if applied for other purposes (specifically, for the purpose of limiting current transactions), would be subject to Fund approval. The decision reads as follows:

<sup>38</sup> Art. VI, Sec. 3, follows:

"*Controls of capital transfers.* Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b), and in Article XIV, Section 2."

Subject to the provisions of Article VI, Section 3 concerning payments for current transactions and undue delay in transfers of funds in settlement of commitments:

- (a) Members are free to adopt a policy of regulating capital movements for any reason, due regard being paid to the general purposes of the Fund and without prejudice to the provisions of Article VI, Section 1.
- (b) They may, for that purpose, exercise such controls as are necessary, including making such arrangements as may be reasonably needed with other countries, without approval of the Fund.

The IBRD has issued ten decisions interpreting its Articles of Agreement.<sup>39</sup> The IFC has not issued interpretative decisions. All decisions of the Bank are of a technical nature. The first decision of the Bank, of May 9, 1946, on the term of office of appointed executive directors, is in substance identical with the Fund's first interpretative decision of May 8, 1946. The eighth decision of the Bank, of February 17, 1950, on privilege for communications, is in substance identical with the Fund's decision of February 20, 1950. Both decisions were rendered in response to identical problems. All interpretative decisions specify the interpreted provisions of the Bank Agreement except the decision of September 20, 1946, on the authority of the Bank to make certain guarantee loans. This decision interprets the Articles of Agreement of the Bank *in toto* in response to a question raised by the United States in its Bretton Woods Agreement Act.<sup>40</sup>

<sup>39</sup> The decisions are contained in a pamphlet issued under the date July 12, 1954, *Decisions of Executive Directors under Article IX of the Articles of Agreement on Questions of Interpretation of the Articles of Agreement*. Several decisions were transmitted to the Board of Governors for their information; *e.g.*, the Decisions of May 23, 1950, and June 14, 1951, are contained in pp. 42-43 of the Summary Proceedings of the Sixth Annual Meeting, Sept. 10-14, 1951, of the Bank. No formal interpretation has been issued by the Bank since June 14, 1951.

<sup>40</sup> The ten interpretative decisions are listed below:

1. Right of the five largest subscribers to appoint an Executive Director without prejudice to the right of a subsequently admitted member to appoint a Director if it has one of the five largest subscriptions. Interpretation of Art. V, Sec. 4(b) (i) and 4(d), of May 9, 1946.
2. Power of the United States to control the use of United States dollars paid to the Bank in lieu of gold pursuant to Article II, Section 7 (i). Interpretation of Art. IV, Sec. 2 (a), of June 20, 1946.
3. Authority of the Bank to make or guarantee loans for programs of Economic Reconstruction and the Reconstruction of Monetary Systems, including long-term stabilization loans. Interpretation of the Articles of Agreement, of Sept. 20, 1946.
4. Calls on the 80% of capital subscriptions of members subject to call only to meet obligations of Bank. Interpretation of Art. IV, Sec. 1(a) (ii) and (iii), of April 2, 1947.
5. Use of currencies received by Bank on account of principal of loans made out of borrowed funds. Interpretation of Art. IV, Sec. 2(c), of June 18, 1947.
6. Maintenance of value of certain currency holdings of the Bank. Interpretation of Art. II, Sec. 9(a), of April 28, 1948.
7. Guarantees. Interpretation of Art. IV, Sec. 5(c), of July 8, 1948.
8. Privilege for communication. Interpretation of Art. VII, Sec. 7, of Feb. 17, 1950.

VII. THE PRINCIPLE: *NEMO JUDEX IN RE SUA*

The Articles of Agreement do not provide "judicial" redress in the traditional sense for controversies arising from differences in interpretation of the provisions of the Agreement between a member and the Fund or between members of the Fund.<sup>41</sup> It would be far-fetched to imply from the absence of "judicial redress" and the unavoidable balancing of interests which is inherent in the interpretative machinery of the Fund, that the rule of law, especially the principles of good faith and reasonableness, was not intended to apply in the rendering of interpretative decisions. It would also be far-fetched to state that for the purposes of international monetary administration the interpretative system of the Fund is a perfect substitute for an independent judicial agency. As mentioned above, the situation at the time of the drafting of the Fund Agreement was that international co-operation in the monetary field was considered a delicate new experiment and the founders (or certain founders) of the Fund did not wish to adopt a traditional method of judicial control. The drafters realized that this method, especially when operating within the framework of a weighted voting system, gives unequal positions to individual decision-makers and that it is conceivable that a dispute would be decided by the votes of interested parties.

With this background, it might be of interest to examine the Fund's method of settling controversies in the light of the principle that no one should be judge in his own cause. The first question which presents itself is the present status of this principle in international law.

The Permanent Court of International Justice, in its Twelfth Advisory Opinion relating to the *Interpretation of the Treaty of Lausanne (Iraq Boundary)*,<sup>42</sup> considered the question whether that principle is a part of international law, and its effect on the functioning of such bodies as the Council of the League of Nations in rendering decisions. In a boundary dispute between Great Britain and Turkey the Council of the League of

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9. Maintenance of value of 18% currencies loaned by the Bank. Interpretation of Art. II, Sec. 9(a) and (b), of May 23, 1950.

10. Portfolio Sales. Interpretation of Art. II, Sec. 9 and Art. IV, Sec. 2(b), of June 14, 1951.

The introductory sentence of the decision of July 8, 1948, listed under No. 7, is here reproduced to indicate the content of that decision. It reads:

"WHEREAS the Bank is considering a possible sale of securities in which it will have invested and, in order to facilitate their sale, the Bank proposes to guarantee such securities in accordance with the provisions of Section 8 of Article IV of the Articles of Agreement of the Bank, and a question has arisen with regard to the interpretation of the provisions of said Articles relating to guarantees by the Bank."

<sup>41</sup> The desirability of establishing institutional arrangements to that effect is considered in a resolution of the Institute of International Law adopted at its Session at Amsterdam, Sept. 25, 1957, recommending the institution of "Judicial Redress against the Decisions of International Organs." 47 *Annuaire de l'Institut de Droit International* 488 (Tome II, 1957); 52 *A.J.I.L.* 105-106 (1958). The characteristics of an independent and "truly judicial organ" are considered in the Advisory Opinion of the I.C.J., *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, [1954] *I.C.J. Rep.* 47.

<sup>42</sup> *P.C.I.J.*, Series B, No. 12 (1925).

Nations was called upon to take a substantive decision which required unanimity according to Article V of the Covenant. The provision of Article V, interpreted by the Court, follows:

Except where otherwise expressly provided in this Covenant . . . decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

When the decision was taken in the Council of the League, complete unanimity was not achieved because of the objection of one nation (Turkey) represented in the Council. Turkey happened to be a party to the dispute under consideration. The question posed to the Court was whether the validity of the Council's "unanimous" decision is affected by the dissenting vote of an interested party. The Court concluded that "the well known rule that no one can be judge in his own suit holds good." In the opinion of the Court, based on this principle, the votes of the contesting parties (Great Britain and Turkey) should not be counted for the purpose of ascertaining unanimity of the Council.

Sir Hersch Lauterpacht considers the opinion of the Court a bold piece of judicial legislation, correct, and of unusual importance.<sup>43</sup> According to Bin Cheng, the principle, *Nemo iudex in re sua*, is generally recognized in public international law and its application extends beyond purely judicial procedure.<sup>44</sup> It seems that the principle is recognized in almost all national legal systems.<sup>45</sup>

If it is accepted that the principle, *Nemo iudex in re sua*, is comprised with or without qualifications in public international law, the question arises whether the principle would preclude the enactment in the Fund Agreement of provisions which are inconsistent with that principle. The answer is in the negative. It could hardly be stated that the rule, *Nemo iudex in re sua*, constitutes a principle of international law of a mandatory nature (*jus cogens*) which would preclude treaty provisions inconsistent with the principle.<sup>46</sup>

<sup>43</sup> The Development of International Law by the International Court 160-161 (London, 1958).

<sup>44</sup> See especially Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 297 ff. (London, 1953).

<sup>45</sup> When discussing the draft regulations for the establishment of an International Court of Arbitral Justice, the existence of this principle as a general rule of law was confirmed and emphasized especially by the U. S. and British representatives. The Report on the Proceedings contains the following statement:

"It is familiar doctrine that a man should not be judge and advocate in his own case and this provision obtains in all systems of national jurisprudence." 1 Proceedings of the Hague Peace Conference, Ninth Meeting (October 16, 1907), Annexes, p. 362 (Translation of the Official Texts) (New York, 1920).

<sup>46</sup> The question whether international public law contains provisions of a mandatory nature at all or whether it comprises only provisions of the nature of *jus dispositivum* (optional law, *nachgiebiges Recht*) which applies only in the absence of treaty law, is unsettled. Paul Guggenheim (Traité de Droit international public (Geneva, 1953), Vol. 1, p. 57) is of the opinion that international public law does not contain any provisions of a mandatory nature. There do not exist, in his opinion, limitations on the substantive content of international agreements. Guggenheim recognizes, however, that



One may briefly consider in this connection the degree of independent action in decision-making in the field of interpretation. Are persons (executive directors, governors, and their alternates) who take decisions on questions of interpretation responsible to their national governments, and to what extent are they subject to instructions by their governments? The answers to these questions must be considered from various aspects. Under Article IX, Section 8, of the Agreement (immunities and privileges of officers and employees), executive directors and governors and their alternates are immune from legal process with respect to acts performed by them in their official capacity (except when the Fund waives the privilege). This immunity applies also *vis-à-vis* their own governments and, no doubt, applies to their actions taken in interpreting the Agreement. Another aspect is the following: Governors and *appointed* executive directors serve subject to the pleasure of the governments appointing them. This fact makes them indirectly subject to instructions by their governments. Elected executive directors are somewhat less subject to instructions than appointed directors, since they cannot be recalled during the two-year term of their office. One may presume that in practice they follow the instructions of the governments of which they are nationals, and, if practicable, also the instructions of other governments which elected them. Such instructions might be given to them, of course, also in regard to interpretative decisions. A third aspect is the following: Whereas the Articles of Agreement require members to respect the international status of the Managing Director and staff members (Article XII, Section 4(c)), no such undertaking applies to the status of executive directors, governors and their alternates. No fund regulation requires an executive director (or his alternate) to affirm that he will discharge his responsibility in accordance with the Fund Agreement. Such affirmation is prescribed by internal regulations only for the Managing Director and staff members (Rule N-10).

The question arises as to whether a government would act consistently with the Articles of Agreement by giving instructions to an executive director or alternate to the effect that he should act in his interpretative function in a manner inconsistent with the Fund Agreement or with international law. The answer is that such instructions would be in violation

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customary international law (in questions in which treaty law does not apply) is binding upon a state whether or not that state consents (p. 49). Alfred Verdross (*Völkerrecht* (3rd ed., Vienna, 1955), pp. 77-79) deals with the problem of *jus cogens*. In his opinion the prevailing majority of the provisions of international law comprise *jus dispositivum* (*nachgiebiges Recht*). However, he specifies a number of provisions of international law (e.g., on the freedom of the high seas, on the principle of good faith in international intercourse, on the status of states) which have the nature of mandatory law (*jus cogens*). According to E. de Vattel, *Le Droit des Gens* (Introduction), that section of the law of nations which is derived from natural law constitutes the "necessary" law of nations and nations are bound to observe it. "Since this law is not subject to change and the obligations which it imposes are necessary and indispensable, nations cannot alter it by agreement, nor individually or mutually release themselves from it." (Quoted by Hans Kelsen, *Principles of International Law* 344 (New York, 1952). See also Georg Schwarzenberger, *International Law* 352-353, 485-486, *et passim* (3rd ed., London, 1957).

of the member's obligations under the Fund Agreement and inconsistent with the principle of good faith. This conclusion is derived from the Agreement as a whole, its position within the framework of international law, and from the provision of the Agreement that nations joining the Fund must take the necessary steps under their laws to carry out their obligations under the Fund Agreement (Article XX, Section 2(a)). However, the conclusion is too general in nature and lacking in practical sanctions, and is far from effectively ensuring independent status to persons exercising interpretative functions.

#### VIII. CONCLUSIONS

Deciding on questions of interpretation, whether for the purpose of settling a controversy, or for resolving doubts, or for securing a uniform practice, should not by definition involve "lawmaking." In considering "judge-made law" in national governments, the fiction is used that the new general rule derived from a decision is no more than the formulation and application of an *existing* legal provision. In the Fund, however, interpretation often involves lawmaking, and this on a much broader basis than that on which judicial lawmaking operates in the framework of a modern national government. Article XVIII, subparagraphs (a) and (b), were intended to be the basis for a quasi-legislative power which operates in the form of authoritative interpretative decisions. Since it is considered probable that, in rendering formal interpretations pursuant to Article XVIII, the Executive Directors will not substantially depart from positions taken by them in prior routine decisions (which were not taken with reference to Article XVIII), the interpretative authority under Article XVIII indirectly reinforces the weight and dignity of "informal" decisions of a quasi-legislative nature; however, these "informal" interpretations are challengeable under Article XVIII.

The question whether the kind of machinery and the method of balancing of interests discussed in this study works satisfactorily in international public financial organizations deserves further exploration. Further consideration should also be given to the question whether it would be useful to apply the interpretative procedure more frequently to clarify certain important concepts and practices and to establish uniform procedures in the field of international monetary co-operation. Clarity and uniformity might contribute to the development of international monetary law and to more effective international collaboration.

No interpretative decision issued thus far has been concerned with complaints of members that international action of the Fund interferes with matters essentially within the domestic jurisdiction of a member. This absence of complaints is important, since the Fund's actions frequently concern delicate problems of national economic policy. The absence of conflict in this sector may be attributable to the existence of effective machinery on consultation and collaboration between the Fund and its members. The existence of an effective machinery for rendering without delay authoritative interpretations may also have contributed to this desirable result.

## PROTECTION OF PRIVATE FOREIGN INVESTMENT BY MULTILATERAL CONVENTION

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Since the end of the first World War—an event widely considered to mark a turning point in the development of international law—several suggestions have been made to negotiate a multilateral treaty aimed at the protection of private foreign investment. In the post-World-War II period this movement has been particularly evident. The latest, and perhaps most important, of such efforts was announced in late 1957 by the Society to Advance the Protection of Foreign Investments,<sup>1</sup> an organization of businessmen in West Germany. A draft code was published by the Society in November, 1957. Entitled "International Convention for the Mutual Protection of Private Property Rights in Foreign Countries," the code is designed for use as a basis of negotiations among interested nations. Coming at precisely the point in time when world politics seemed to be entering a new phase,<sup>2</sup> the document may prove to be of some importance in the development of new patterns of economic relations among nations. As such, it should be of interest to international lawyers everywhere.

The writer's purpose here is to present a brief commentary and appraisal of the draft code. The main focus in this paper is factual—essentially that of reporting on a contemporary event—and what follows, therefore, should not be considered to be a critique of the code. The purpose here is to indicate, in brief form, some of the previous attempts along similar lines and to indicate the salient features of the present proposal, following which a few generalized statements will be made with regard to it.

### I

The principal previous suggestion for a multilateral convention to protect the private investor is the still viable proposal in 1949 of the Inter-

\* Acknowledgment is made to the John Simon Guggenheim Memorial Foundation for a grant which made possible this and other studies.

<sup>1</sup> The Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V.; its headquarters are in Cologne. According to its statement of purpose, "The Society unites independent personalities in German business, law and politics, their object being to help remove the disregard of vested foreign rights and interests in international business which has become more noticeable after the last war and make constructive suggestions upon how this unfortunate development can be reverted which is undermining the free world economy and international confidence."

<sup>2</sup> That of economics. As Kruschchev put it in late 1957, "We declare war upon you in the peaceful field of trade."

national Chamber of Commerce, which in that year issued the draft of a code which resembles, but does not duplicate, the proposal of the German Society.<sup>3</sup> In 1957, the International Chamber of Commerce iterated its call for a lawmaking treaty to protect investment, this time proposing that ECOSOC, together with the International Bank for Reconstruction and Development and the International Finance Corporation, call a conference of interested groups to draw up a model international convention along the lines of the 1949 draft.<sup>4</sup> The International Chamber of Commerce said in 1957:

Agreements, whether bilateral or multilateral, arising out of a model convention of this kind, would be of inestimable value to capital-importing countries as well as to investors. By making clear in advance in an agreed and binding form under United Nations' auspices the treatment to be applied to foreign capital in their territories, the former would improve their prospects of attracting capital from overseas. At the same time investors would be in a better position to assess some at least of the non-economic risks involved in a particular area.

In addition, considerable discussion both in and out of United Nations organizations concerning private foreign investment has taken place in recent years. For example, the International Industrial Development Conference (IIDC), convened in San Francisco in October, 1957, had as its main theme the preferred means of stimulating the flow of private capital to the less developed areas of the world.<sup>5</sup> At that conference, more than 550 business leaders from the free-world nations met to discuss problems of development. It was there that the present code was first broached by the German financier, Hermann J. Abs.

Within the United Nations itself, ECOSOC has been active in studying the problem. In a resolution dated August 9, 1956, that body urged

governments of capital-exporting and capital-importing countries alike to continue their efforts to develop international confidence conducive to private investment, in conformity with the principles of the Charter of the United Nations. . . .<sup>6</sup>

The National Planning Association in Washington recently published a study of the problems of American private foreign investment written by Dr. Raymond Mikesell of the University of Oregon.<sup>7</sup>

<sup>3</sup> The ICC proposal may be found in its Brochure No. 129, entitled: "International Code of Fair Treatment for Foreign Investments."

<sup>4</sup> Resolution of the 16th Congress of the ICC, May, 1957, printed in its Brochure No. 193.

<sup>5</sup> The Conference was held under the joint auspices of Time-Life, Inc., and the Stanford Research Institute.

<sup>6</sup> Res. 619 (XXII), entitled "Financing of Economic Development," U.N. Doc. E/2929, ECOSOC, 22nd Sess., Official Records, Supp. No. 1, Aug. 17, 1956.

<sup>7</sup> Mikesell, *Promoting United States Private Investment Abroad* (NPA Planning Pamphlet No. 101, October, 1957). See also *Proceedings of the 52nd Annual Meeting of the American Society of International Law*, April, 1958, Panel VI: Legal Problems of International Private Enterprise, pp. 199-228; and *Proceedings of the International Investment Law Conferences held in Washington, D. C.*, Feb. 24-25, 1956, and Nov. 21-

Among other similar developments there may be mentioned the provisions in the still-born International Trade Organization relating to foreign investment,<sup>8</sup> and the numerous bilateral treaties negotiated since World War II by the United States—the treaties of friendship, commerce, and navigation.<sup>9</sup> Congressional encouragement of this latter development is reflected, *inter alia*, in a provision in the Mutual Security Act:

In order to encourage and facilitate participation by private enterprise to the maximum extent practicable in achieving any of the purposes of this Act, the President . . .

(2) shall accelerate a program of negotiating treaties for commerce and trade, including tax treaties, which shall include provisions to encourage and facilitate the flow of private investment to and its equitable treatment in nations participating in programs under this Act.<sup>10</sup>

During the period between the two world wars, some additional efforts were also made, all of which proved to be ineffective.<sup>11</sup>

## II

The code as drafted by the German Society consists of fifteen articles, designed as a whole "to resuscitate, on a reciprocal basis, the principle of inviolability of private property and other private rights." It is thought that this will afford "a material contribution to the re-establishment of international confidence in business relations, which will benefit recipients and investors of capital alike."<sup>12</sup> Three main points make up the essence of the proposal: the protection of the business activities of foreign investors; the establishment of international tribunals to deal with disputes; and enforcement of the code's provisions through the application of sanctions. "The ultimate goal," it is said, "must be to

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22, 1958, sponsored by the American Society of International Law. See also Brandon, "Legal Aspects of Private Foreign Investments," 18 Fed. Bar J. 298 (1953).

<sup>8</sup> Art. 12 of the ITO Charter. In Brown, *The United States and the Restoration of World Trade* 271-272 (1950), it is suggested that the ITO, if given the opportunity, could have worked out a code for the protection of private investment.

<sup>9</sup> For discussions, see Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 A. J. Comp. Law 229 (1956); *idem*, "Provisions on Companies in United States Commercial Treaties," 50 A.J.I.L. 373 (1956); Wilson, "Property-Protection Provisions in United States Commercial Treaties," 45 A.J.I.L. 83 (1951).

<sup>10</sup> 68 Stat. 847 (1954), as amended, 70 Stat. 555, 558 (1956).

<sup>11</sup> *E.g.*, in 1931 the International Chamber of Commerce suggested treaty protection of private investment; and in 1929 a conference to that effect was held in Paris pursuant to Art. 23(e) of the League of Nations Covenant. See Lewis, *The United States and Foreign Investment Problems*, Ch. 12 (1948).

<sup>12</sup> The quotations are from the commentary on the draft code published with the code by the Society to Advance the Protection of Foreign Investments. This document is 67 pages in length, of which the greater part is devoted to statements of the reasons for such a code, the present status of international law as it relates to protection of private property, and the like.

arrive, on an international plane, at a system of effective and universally guaranteed legal protection such as applies on the national level."<sup>13</sup>

Articles IV through VIII set out the protections to be accorded private foreign investors. This would be accomplished through guarantees of the right of free economic or business activity on a non-discriminatory basis as between nationals and non-nationals.<sup>14</sup> Limitations on the freedom of business activity would be lawful only with respect to public utilities and like activities of vital importance to the state in question.<sup>15</sup> In addition, provision is made to protect against indirect measures unduly inhibiting business activity, such as levying incommensurate taxes, exclusion from raw materials, refusal to grant import licenses, and the like.<sup>16</sup>

A concomitant guarantee of equal importance would prevent expropriation of the assets of a private foreign investor for thirty years after investment.<sup>17</sup> When and if expropriation does take place, it would have to be compensated for adequately and promptly.<sup>18</sup> Finally, all of these protections for private property would be valid during war between any of the nations party to the convention, subject to the right of control of that property during the time of conflict.<sup>19</sup>

For handling disputes arising under the convention it is proposed that an international court be established, under a charter to be separately negotiated.<sup>20</sup> Another tribunal—an international arbitration committee—would be set up to decide questions concerning the adequacy, amount and form of compensation due following any expropriation of a foreign investment.<sup>21</sup> Provision is made for the convention to prevail over inconsistent national law; and of special interest is the clause providing that both the state and its nationals are entitled to rights under the convention. In other words, an individual would be permitted to assert "rights before all courts and government authorities."<sup>22</sup>

Sanctions would be twofold: by publicity and economic measures. Whenever any party to the convention took action in contravention of the code, as found by the international court, the court would have power to request cessation of the unlawful act within three months. Failing compliance, the court could then make public announcement of the delinquency.<sup>23</sup> If that proved ineffective, the court could then call for economic sanctions to be invoked against the offender.<sup>24</sup> Included in such measures would be the refusal of other parties to make loans to the delinquent, revocation of any most-favored-nation clauses which may exist, and other similar actions.

### III

The considerable attention which the proposed code has received since its announcement indicates that it may reflect a felt need among Western

<sup>13</sup> *Ibid.*

<sup>14</sup> Art. V.

<sup>15</sup> Art. VI.

<sup>16</sup> Art. VIII.

<sup>17</sup> *Id.*

<sup>18</sup> Art. XI.

<sup>14</sup> Art. IV.

<sup>15</sup> Art. IV.

<sup>16</sup> Art. VII.

<sup>17</sup> Art. X.

<sup>18</sup> Art. IX.

<sup>19</sup> *Id.*

commercial interests.<sup>25</sup> Even so, without attempting any detailed analysis, there are a number of statements which can be made about the code which suggest some doubts as to its efficacy. While agreement to the provisions of the code by nations generally would doubtless tend to create a favorable climate for private investment, the assumptions on which it is based are subject to question. Among these assumptions, the following appear worthy of mention: (a) that a community of interest exists among would-be participants in the code; (b) that such a system would, granting that it would be efficacious in causing the flow of funds to points of need, serve the political goals of the West in the newly-declared trade war between East and West; and (c) that such a code of prescribed conduct would be obeyed and adhered to. These assumptions involve major problems, for a discussion of which a volume would be necessary. What follows is merely the statement of some of the questions raised by the underlying bases of the code.

First, does a community of interest exist? This broad question has two facets: as among the capital-exporting nations themselves, and as between the capital-exporting and the capital-importing nations. If it is granted without argument that the first of these facets does exist (an assumption in itself which may be of dubious validity),<sup>26</sup> there seem to be real problems existing between the exporters and importers of capital. This is particularly true as between the industrialized nations of the West and the less developed areas of the world—the very regions where capital is most needed but where, for a variety of reasons, it has not been flowing.<sup>27</sup> Without laboring the point, evidence as to the divergent views of spokesmen for the already industrialized nations and of the less developed nations is available in the addresses to the International Industrial Development Conference in San Francisco and at the meeting of the GATT Contracting Parties at Geneva in late 1957. At San Francisco serious doubts were expressed about the mutual benefit of private investment funds by representatives of such underdeveloped areas as the Philippines and Cuba.<sup>28</sup> And at Geneva, the attending ministers from other underdeveloped nations pointed to the growing disparity in wealth between the already industrialized and the non-industrialized nations as evidence that patterns of world trade were not mutually beneficial.<sup>29</sup>

The point here would seem to be not so much whether such fears are in

<sup>25</sup> *E.g.*, Time Magazine, Oct. 28, 1957; Life Magazine, Oct. 28, 1957; American Banker, Oct. 16, 1957; New York Times, Oct. 16, 1957; Journal of Commerce, Dec. 3, 1957; Financial Times (London), Nov. 27, 1957.

<sup>26</sup> A criticism of the concept of harmony of interests in international economic relations can be found in Myrdal, *Economic Theory and Underdeveloped Regions* (1957).

<sup>27</sup> See text at note 34 below.

<sup>28</sup> *E.g.*, by Miguel A. Cuaderno, Governor of the Central Bank of the Philippines and then Chairman of the International Monetary Fund, who expressed the feeling that peoples of the underdeveloped countries fear that private investments from abroad might dominate the economic, if not political, affairs of their nations. See New York Times, October 16, 1957. Cuba's Guillermo Belt called the proposed investment code "a return to the Gay Nineties." Time Magazine, October 28, 1957.

<sup>29</sup> *E.g.*, the Ministers from Ghana, Ceylon, and Indonesia.

fact valid, as that the leaders of the poorer nations of the world believe them to be so. Their attitude is by no means a recent one: as long ago as 1952 it was reflected in the resolution adopted in the United Nations General Assembly entitled "Right to Exploit Freely National Wealth and Resources." This resolution recommended that all Member States "refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources" and

in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations.<sup>30</sup>

The question, accordingly, can seriously be raised as to whether the assumption of a community of interest between the exporters and importers of capital is valid.<sup>31</sup> What may be involved here is something to which, in another context,<sup>32</sup> this writer has given the label of the "Fallacy of Nineteenth-Centuryism." By that term is meant the notion that institutions suitable for one point in time can be refurbished and used at a later time when the conditions in which they operated differ markedly. This is a view of widespread currency; it underlies much of what has taken place in free-world economic patterns since World War II.<sup>33</sup> But it is a view profoundly in error.

<sup>30</sup> Resolution 626 (VII), Dec. 21, 1952, General Assembly, 7th Sess., Official Records, Supp. No. 20 (A/2361), p. 18. Both the International Chamber of Commerce and the National Association of Manufacturers expressed grave misgivings over the resolution. The ICC adverted to "the grave anxiety aroused in the business world" by the resolution, and asserted that emphasis should also be given to respect for contractual obligations, the duty of compensation in case of nationalization, and to the fair treatment of foreign capital and enterprise. ICC Brochure No. 175, p. 36 (July, 1953). See James N. Hyde, "Permanent Sovereignty over Natural Wealth and Resources," 50 A.J.I.L. 854 (1956).

<sup>31</sup> To put it in another way, is there a community of interest in the present trading system between the already industrialized nations and the less developed countries? See, in this regard, Myrdal, note 26 above; Hilgerdt, "Uses and Limitations of International Trade in Overcoming Inequalities in World Distribution of Population and Resources," in 5 Proceedings of the World Population Conference 46 (U.N. 1955. XIII.8): "It is time to recognize that . . . trade has proved inadequate to bring about close international integration, both because of the special difficulties affecting economic relations among countries during the past twenty years, usually referred to as international economic disequilibrium, and for more fundamental reasons." *Ibid.* at 49.

<sup>32</sup> Miller, "Foreign Trade and the 'Security State': A Study in Conflicting National Policies," 7 Journal of Public Law 37, 91 (1958).

<sup>33</sup> The international economic institutions created in recent years, such as the International Monetary Fund and the International Bank for Reconstruction and Development, are essentially attempts to re-create patterns of commercial relations typical of the nineteenth century. They are examples of the difficulties which may be expected in attempting to refurbish institutional arrangements of a past era. Some remarks of the late Lord Keynes are meet in this connection: "I am . . . a hopeless skeptic about this return to nineteenth century laissez-faire, for which you [his correspondent] and the State Department seem to have such a nostalgia." Quoted in Harrod, *The Life of John Maynard Keynes* 567 (1951).



The second assumption on which the German proposal is based is that a system of international *laissez-faire* among the nations of the free world and, presumably, of the "uncommitted" world, would, if established, not only enhance the economic well-being of those nations but would also serve to further the interests of the free world *vis-à-vis* the Sino-Soviet bloc. But even if it is granted that the renascence of *laissez-faire* would further the well-being of the free world and of the uncommitted nations, it does not seem at all certain that private investment as such could effectively counter the economic moves of the Soviets. Private investment funds will tend to flow to those areas where the likelihood of profit is at the highest when balanced against the risk involved. But the very areas where capital may be most desperately needed may also be those from which the private investor may shy away.

The point here is that it is not at all certain that private capital will necessarily serve the political and strategic needs of the United States and the other free nations. Can, for example, the proposed system of private investment effectively counter bulk buying and other state trading activities carried on by the Soviet Union without regard to whether a profit is made? In this connection, some statistics cited by Mikesell in his recent study are instructive: At the end of 1955, of the 28.5 billion dollars in American private foreign investment, 56 percent went to Western Europe and Canada, 29 percent to Latin America, and 15 percent outside those two areas (one-half of which was devoted to petroleum).<sup>34</sup> The so-called Afro-Asian nations are at the bottom of the pipeline of private investment. Those are the nations which make up the area of contention in the economic war between the free world and the Soviets. Again, the question can seriously be raised as to the validity of the second assumption.

Similar statements can be made about the third basic assumption: Would promulgation of such a code mean that it would be effective? The question can seriously be raised as to whether the code would be effective under present conditions; and conversely, whether a code would be necessary if conditions were improved. What, in other words, may be lurking here are the twin fallacies of legalism and economism. Legalism is the notion, by no means uncommon, that enactment of a code of laws, or some piece of legislation, is all that is necessary to solve a problem.<sup>35</sup> And economism is the similar fallacy that economics can be divorced from politics; as it was put by Wilhelm Röpke, it is "the erroneous belief in the autonomy of the economic sphere as dominated by economic laws independent of institutions, legal forms, or social habits."<sup>36</sup>

Granted that negotiation and ratification of the proposed code would help in the maintenance of a climate beneficial to private investment; if conditions were such that promulgation of the code would be possible, it could be said then that there would be no real need for it. The

<sup>34</sup> Mikesell, note 5 above, at 15.

<sup>35</sup> The term is also used by Gardner, *Sterling-Dollar Diplomacy* 383 (1956), and by Röpke (although called "Juridicism") in his Hague Academy lectures entitled "Economic Order and International Law," 86 *Recueil des Cours* 207 (1954).

<sup>36</sup> Röpke, note 35 above. Again Gardner, note 35 above, also uses the term.

well-known doctrines of international law would serve adequately instead of the code. The third assumption thus can be questioned.

#### IV

What has been said in the paragraphs immediately above is in the nature of raising some fundamental questions about the proposed code, questions which should be resolved before serious attention is given the code. Action would be necessary to allay the fears of the capital-importing nations in what are now euphemistically called the "less developed" areas (as compared to their former designations as "backward" or "underdeveloped") that the proposed economic system would in fact redound to their detriment.<sup>37</sup> Then, too, a judgment would have to be made that the code would enhance the political and strategic, as well as the economic, interests of the capital-exporting nations. Finally, which should come first—the code or the conditions permitting use of Western economic techniques throughout the world?<sup>38</sup>

These, then, are the fundamental problems which must be resolved before negotiation of a code to protect private foreign investment. If not, then the effort may founder before it leaves port. But if those problems are met satisfactorily, then the "Magna Charta" of the private investor may yet become a part of international law.

<sup>37</sup> Compare the following statements made at the October, 1957, meeting of the GATT Contracting Parties:

Sir Claude Corea of Ceylon: There is a "persistent phenomenon of the failure of the exports of nonindustrialized countries as a whole to keep up with the general rate of trade expansion. . . . It seems likely that this trend will continue."

Shri T. Swaminathan of India: "You, Mr. Chairman [Sir Claude Corea], have drawn attention to the one significant fact in the trend of international trade, namely, that the commerce of the industrialized countries has expanded a good deal more satisfactorily than that of less developed countries."

Professor Sunardjo, Minister for Trade of Indonesia, after noting that a GATT report showed world trade at record levels in volume and value, maintained that: "the increase in value of international trade was mainly due to the expansion of trade among industrial countries, while the trade between industrial and nonindustrial countries showed unfortunately an unfavorable trend. . . . The progress made by the industrial countries has not been matched by the less developed countries, neither in respect of the expansion of international trade, nor in respect of economic growth."

<sup>38</sup> Cf. Brierly, "International Law: Its Actual Part in World Affairs," 20 *International Affairs* 381, 386 (1944): Order precedes law, "for it is never law that creates order."

## EDITORIAL COMMENT

### THE SYSTEMATIC PROBLEM OF THE SCIENCE OF INTERNATIONAL LAW<sup>1</sup>

The first and principal task of the science of international law is to present the international law actually in force, to present it in its totality and in a systematic way. For a science is, in the words of Kant, not a mere aggregate, but a system; and in order to arrive at a system, we need a method, *i.e.*, a procedure according to principles of reason by which alone a diversity of cognitions can become a system. The science of international law has always been faced with the systematic problem.) The system of public-private international law<sup>2</sup> is untenable, as it is not the system of one and the same science. Private international law, so-called, is, apart from treaties on this subject, municipal law, although it ought to be cosmopolitan in its outlook. (True, international law and conflict of laws are both a consequence of the present territorial organization of mankind, but in a very different way. (International law results from the fact that the international community is composed of territorially organized sovereign states.) Conflict of laws is necessary because of the co-existence at the same time of many different municipal legal orders, each with a territorial sphere of validity, which may, but need not, coincide with the territory of a sovereign state. (Hence, international law would govern two or more sovereign states, even if they had absolutely identical municipal laws; on the other hand, conflict of laws may be necessary within one and the same sovereign state, whether federal or unitary. Equally, the coming into existence of a world state would bring international law in the actual sense to an end, but not necessarily conflict of laws. There is only one international law—often called “public” international law.)

(The oldest system of international law is that of peace, war and neutrality.) This system dominated from Grotius' *De jure belli ac pacis* until 1914. It corresponded to the continuity of the development of our international law from its beginning to the first World War, to the “classic” international law of a primitively organized international community, a law limited in problems and content, dealing nearly exclusively with the rights and duties of sovereign states. (The system of the first part (“Peace”) corresponded to the concept of private law analogies: persons, things, contracts, torts, a system which goes back to Gaius—the system of Roman private law.

<sup>1</sup> See also this writer's study, “El Sistema del Derecho Internacional,” in *Estudios de Derecho Internacional, Homenaje al profesor Camilo Barcia Trelles* (Santiago de Compostela, Spain, 1958), pp. 87-102.

<sup>2</sup> Thus, the *Trattato di Diritto Internazionale* in twelve volumes, edited by Prospero Fedozzi and Santi Romano, contains four volumes on conflict of laws. In the newer *Trattato di Diritto Internazionale*, edited by Balladore Pallieri, Gaetano Morelli and Rolando Quadri, one series of seven volumes treats international law, the other series of seven volumes deals with conflict of laws. But the two series together constitute the “Treatise of International Law.”

(Since 1914 international law has been in flux, in a period of transition, of crises and transformations) it has seen, on the one hand, an ever-increasing expansion as to problems and content, and, on the other hand, a change in well-established norms and therefore uncertainty in many legal rules and whole departments. (This development of international law since 1914 has challenged the science of international law in many ways: as to the general attitude toward international law—from the Utopians to the “neo-realists”; as to methodological problems—the attack against legal positivism, both from a revived natural law and strengthened sociological and “realist” schools; as to the actual content of many international norms, theoretical problems and problems of construction, and the outlook for the future—from gloomy predictions of chaos to optimistic prophecies of a “world law of humanity.”

(The development of international law since 1914 has also put the systematic problem in a new light.) Yet, although the problem has been seen by some writers,<sup>3</sup> it has only been lightly treated.<sup>4</sup> As a consequence of the disastrous neglect of the laws of war since 1920, treatises have sometimes been restricted to the law of peace,<sup>5</sup> or the laws of war have been treated in a few pages in an “annex.” (But in general the old and traditional system—peace, war and neutrality—has remained the dominating system since 1920.<sup>6</sup>)

(True, systematic changes have appeared since 1920. One such change is related to the theory of the “Vienna School.”) (As every legal norm must have a personal, territorial, material and temporal sphere of validity) international law was built up systematically in the following way: treating the four spheres of validity of international law, then the process of creating international norms; further—as a primary task of international law—the delimitation by international law of the four spheres of validity of the municipal legal orders of the sovereign states, and finally the solution of international conflicts.<sup>7</sup> (Another systematic change stems equally from theoretical considerations, namely, the growing attack against private law analogies.) The private law system, of persons, things, contracts, torts, has often been replaced by a system of public law, taken from advanced municipal legal orders: constitutional, administrative, procedural, and

<sup>3</sup> Georges Scelle, “Essai de Systématique du Droit International Public,” 30 *Revue Générale de Droit International Public* 116-142 (Paris, 1923). See also Manlio Udina, *Il Diritto Internazionale Tributario* 1-15 (Padua, 1949).

<sup>4</sup> Thus still, the two-volume work by Marcel Sibert, *Traité de Droit International Public* (Paris, 1951), is restricted to the “Droit de la Paix.”

<sup>5</sup> Thus the leading English treatise by Oppenheim, even in the newest edition by Sir Hersch Lauterpacht, is still based on this system. Also the treatise by Mariano Aguilar Navarro: whereas the first three parts (in seven volumes) will deal with the law of peace, the fourth part will treat the laws of war and neutrality.

<sup>6</sup> This system is, e.g., to be found in the treatises by Paul Guggenheim, *Traité de Droit International Public*, Vol. I (Geneva, 1953), and by Alfred Verdross, *Völkerrecht* (3rd ed., Vienna, 1955). See also Josef L. Kunz, “Teoría General del Derecho Internacional,” *Academia Interamericana de Derecho Comparado e Internacional, Cursos Monográficos*, Vol. II, pp. 327-444 (Havana, 1955).

criminal law.<sup>7</sup> (The concept of a "constitutional international law" has been made familiar by Verdross.<sup>8</sup> Many works have been dedicated to "International Administrative Law"; in recent times many books on "International Criminal Law" have been published. The concept of an "international law of procedure" has been created, including all the norms for the pacific settlement of international conflicts as well as the laws of war and neutrality.<sup>9</sup>)

Inspired by the continuous expansion of international law, other attempts, having a merely pragmatic character, have consisted in dividing international law systematically into more and more divisions: international fiscal law,<sup>10</sup> international law of communications, international air law, international law of fisheries, international labor law, and many others.<sup>11</sup> But these new systematic attempts are hardly satisfactory; they are often only partially applied,<sup>12</sup> they often overlap the traditional system: peace—war and neutrality.) To that it must be added that it is necessary to distinguish also between general and particular international law. Exactly for that reason a new system has been tried: to divide a treatise on international law into two great parts, "general international law" and "international organization," a systematic division which often also overlaps other systems.<sup>13</sup> The clearest and most consequent applica-

<sup>7</sup> The only writer who has applied this system completely is Antonio Sánchez de Bustamante y Sirvén, *Derecho Internacional Público* (5 vols., Havana, 1933-1938).

<sup>8</sup> Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926). See also Georges Scelle, *Précis de Droit des Gens*, Vol. II: *Droit Constitutionnel* (Paris, 1934). The second part of the treatise by Mariano Aguilar Navarro (referred to in note 5 above) is entitled: "Constitución de la Comunidad Internacional."

<sup>9</sup> Thus, e.g., the second volume of P. Guggenheim's treatise (mentioned in note 6 above, Vol. II, Geneva, 1954); thus also the planned fourth part of A. P. Sereni, *Diritto Internazionale*. See also Julius Stone, *Legal Controls of International Conflict* (New York, 1954).

<sup>10</sup> See Manlio Udina, *Il Diritto Internazionale Tributario* (Padua, 1949).

<sup>11</sup> Philip C. Jessup recently introduced the concept of an "International Parliamentary Law," 51 A.J.I.L. 396-402 (1957).

<sup>12</sup> Thus the treatise, edited by Fedozzi and Santi Romano (referred to in note 2 above) contains, among twelve volumes, one on international administrative law, one on international tributary law, one on international labor law, and even one on international ecclesiastical law.

<sup>13</sup> Thus the series dedicated to international law, in the treatise edited by Balladore Pallieri, Morelli and Quadri (referred to in note 2 above), is based on the traditional system: peace—war and neutrality. But whereas the first four volumes will deal with "classic" international law, the fifth is dedicated to "International Organization." The treatise by Mariano Aguilar Navarro (referred to in note 5 above) is based on the same traditional system. But the second part (in four volumes) deals with general international law, whereas the third part will deal with "Cooperación Internacional y Servicios Internacionales," i.e., with international organization. This division appears in a different way in the *Diritto Internazionale* by A. P. Sereni. The second part (in two volumes) is entitled: "Organizzazione Internazionale." But that means here the organization of the international community. The first volume, already published, treats "subjects of a territorial character" (states and insurgents recognized as belligerent parties), i.e., general international law. The second volume will deal with "international persons of a functional character," i.e., primarily with international organization.

tion of this new system can be seen in the third edition of Verdross' treatise.<sup>14</sup> The first part treats the whole general international law of peace, war and neutrality; the second part, "Constitution of the Organized Community of States," deals with particular international law.

(These new systematic attempts, inspired by theoretical reasons, by pragmatic considerations and by the ever-increasing expansion of international law, are clearly reflected in the organization of "International Legal Studies"<sup>15</sup> at the leading American law schools, which add international administrative, aerial, labor, economic, investment, and taxation law, and so forth.) International law and international organization remain basic, although "International Legal Studies" go farther. But, as the Dean of Harvard Law School stated, this newer group has nothing to do with the teaching of "international relations," but deals exclusively with international legal problems. But even the system of general-particular international law today is no longer adequate. On the one hand, "International Organization" cannot be presented without the general international law which is its very basis. On the other hand, the law of international organizations influences general international law; at a time when the United Nations has eighty-two Members, it is no longer possible to present even general international law without taking the Charter of the United Nations into consideration.<sup>16</sup> Present international law is no longer restricted to sovereign states, their rights and duties, the traditional problems of recognition, nationality, territory, jurisdiction, treaties, international responsibility, and so forth. It deals also with universal and regional economic, financial, social, hygienic, and cultural problems, and with financial and technical aid to underdeveloped countries; it tries to deal with the international protection of human rights, stateless persons, refugees, aborigines of mandates and trusteeships. Non-states (units of federal states, colonies, the proposed "Free Territory of Trieste") may become partial subjects of international law. The new international law of atomic energy has come into existence; the new international law of outer space is beginning to develop. The ever-increasing number of international organizations, universal and regional, general and specialized, has created new problems: these international organizations are often persons in international law, have international privileges and immunities, conclude treaties with member and non-member states as well as with other

<sup>14</sup> Alfred Verdross, *Völkerrecht* (3rd ed., Vienna, 1955).

<sup>15</sup> See Josef L. Kunz, "Der heutige Stand der Wissenschaft und des Unterrichts des Völkerrechts in den Vereinigten Staaten von Amerika," 7 *Österreichische Zeitschrift für Öffentliches Recht* 401-427 (1956).

<sup>16</sup> This impossibility is confirmed by the newest edition of Oppenheim-Lauterpacht, *International Law, A Treatise*, Vol. I: Peace (8th ed., London, 1956). Sir Hersch Lauterpacht writes that this treatise is primarily dedicated to the presentation of the norms of general international law. But the norms of particular international law not only constantly appear as additions and notes in many places, but the editor has, characteristically, found it necessary to add a large chapter on "International Organization" (Vol. I, pp. 370-450), to treat the International Labor Organization, and to give us a large appendix on international specialized organizations (Vol. I, pp. 977-1029).

international organizations, have a right of diplomatic protection of their employees *vis-à-vis* states, have international responsibility. There is the whole "internal law" of international organizations, which is also international law, although on a hierarchically lower stage. There is the new "law of international functionaries."

Nor is this all. New developments have raised questions of the governing law in novel situations. What is the legal character of the contracts concluded by international organizations with their own functionaries? Which law has to be applied by the "International Administrative Tribunals"? What law governs contracts made by international organizations with foreign corporations for the supply of materials or services? What law governs the relations between international organizations and private international organizations admitted for purposes of consultation?<sup>17</sup>

(New developments in the law of international organizations have appeared. The attempts at unification of free Europe often follow novel lines. There are now "supra-national" organizations. Very new types of international organizations, referred to as "*établissements publics internationaux*,"<sup>18</sup> public international corporations, or, in appropriate cases, public international works, have come into existence, such as Eurofima in Europe, the "*Entreprises Communes*" of the Euratom Treaty, and the International Finance Corporation.) They, too, are international organizations created by states through treaty; but they perform international services for the benefit of individuals. As operational units, independent of governments, they make contracts with an indefinite number of individuals. What law governs them? First of all, the law of the basic treaty. But as there is no international incorporation, they are constituted as banks or corporations under some municipal law, and the treaty, by international legislation, may change this municipal law and make it, through *renvoi*, applicable as the *lex fori* in the courts of the other participating states under principles of conflict of laws.

(There are writers<sup>19</sup> who conceive the so-called "international economic law" as a new juridical department which extensively overlaps international law and conflict of laws. Jessup<sup>20</sup> has studied these frontier problems under the heading of "transnational law." Of great importance today are the problems of the repudiation of concessions granted to a foreign corporation by a state.) With regard to the repudiation of *ultra vires* state contracts, Meron<sup>21</sup> has shown that older international tribunals applied only the relevant municipal law and, in case such law laid down that such contract was void *ab initio*, decided in favor of the state. But

<sup>17</sup> See, on these problems, Karl Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (Vienna, 1957), reviewed by the writer in 52 A.J.I.L. 565-567 (1958).

<sup>18</sup> See, on these problems, H. T. Adam, *Les Établissements Publics Internationaux* (Paris, 1957), reviewed by the writer in 51 A.J.I.L. 569-572 (1957).

<sup>19</sup> See Georg Erler, *Grundprobleme des Wirtschaftsrechtes* (Göttingen, 1956).

<sup>20</sup> Philip C. Jessup, *Transnational Law* (New Haven, 1956).

<sup>21</sup> Theodore Meron, "Repudiation of Ultra Vires State Contracts and the International Responsibility of States," 6 Int. and Comp. Law Q. 273-289 (1957).

newer international decisions show the tendency to apply to such repudiation the international law of state responsibility. They may, according to the case, apply the principle of "unjust enrichment," or the argument that the contract has been ratified by the conduct of the state, or the general principles of law recognized by civilized nations or the rule of general international law concerning the responsibility of the state for damage caused to aliens. Even more important are the cases of expropriation, confiscation, or nationalization by a state *vis-à-vis* foreign corporations, where a contract has been concluded between a sovereign state and foreign corporations. Such contracts often contain arbitration clauses. But the contracts may not only regulate the problem of jurisdiction but also that of the applicable law, *e.g.*, the Iran Oil Consortium of 1954. In the *Serbian*<sup>22</sup> and *Brazilian*<sup>23</sup> *Loans* cases, the Permanent Court of International Justice laid down that every contract which is not a contract between sovereign states in their capacity as persons in international law must be based on the municipal law of some state. In consequence, the international tribunal must apply municipal law, and the decision as to which municipal law is applicable must be determined according to the norms of conflict of laws. Hence these agreements have been considered contracts, not international treaties, and Lauterpacht has stated that the tribunals instituted by these contracts are not genuine international tribunals. But there is a strong tendency in the free world to apply the norm "*Pacta sunt servanda*" to these contracts. To this tendency Alfred Verdross, in an interesting article,<sup>24</sup> has recently given a theoretical foundation. Verdross distinguishes between property of aliens acquired under private law or concessions granted by the state on the basis of its administrative law (in both cases on the basis of the municipal law in question), and contracts between a sovereign state and foreign corporations for the economic development of the country, by which the concessions granted to the foreign corporation are put under this *lex contractus* and also contain arbitral clauses. Such contracts are neither international treaties nor municipal contracts. They belong to a third group of contracts. The dictum of the Permanent Court of International Justice that contracts can only be under international law or some municipal law is false. Such contracts were concluded under neither international nor municipal law; they have no positive legal order above them. The rights established by the contract are subordinated to a new legal order created by agreement of the parties, the *lex contractus*. These "quasi-international" contracts are legally characterized by the fact that the basis for their validity is directly in the supra-positive legal principle of *Pacta sunt servanda*, that they are contracts *inter pares* containing arbitral clauses, and that the *lex contractus* regulates exhaustively the relations between the parties. The investigations which Jessup made under the

<sup>22</sup> P.C.I.J., 1929, Series A, No. 20.

<sup>23</sup> *Ibid.*, No. 21.

<sup>24</sup> A. Verdross, "Die Sicherung von ausländischen Privatrechten aus Abkommen zur Wirtschaftlichen Entwicklung mit Schiedsklauseln," 18 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 635-651 (1958).



heading of "transnational law" have, therefore, counterparts in the writings of Adam, Erler, Verdross and Zemanek.

All this shows the insufficiency of all the newer systematic attempts. This insufficiency has induced the eminent international lawyer, C. Wilfred Jenks,<sup>25</sup> to urge and propose a completely new system. Although he does not take the idea of a "transnational law" into consideration, he starts from his conviction that the development of international law in the first half of the twentieth century has transformed the character and content of international law to such a degree that it no longer can be presented within the framework of the classic law of nations. It is no longer possible, he states, to take care of this new development by way of mere additions to the pre-existing structure, by way of casual and sometimes illogical modifications of the pre-established system. It is no longer possible to understand the actual development by starting from the classic presumptions. The systematic problem is today much more fundamental; what is needed is an entirely new system. Jenks sees the actual development of international law as a tendency toward a common law of humanity, although at this time only in an early, imperfect, insecure and precarious stage. The actual trend, according to him, is toward a law of the organized world community, still on the basis of sovereign states, but fulfilling more and more common functions through a complex of international organizations. The law of sovereign states remains an important part, but only a part, of the law of nations. The new status must be reflected in a new system and he tentatively proposes such a new system. There is no doubt that such new system will only be gradually developed, but the task is undoubtedly before us, for, to return to where we started, a science is not a mere aggregate, but a system.

JOSEF L. KUNZ

STANDARDIZATION OF CHOICE-OF-LAW RULES FOR INTERNATIONAL CONTRACTS:  
SHOULD THERE BE A NEW BEGINNING?

"The subject, Contracts, is the most confused one in conflict of laws."<sup>1</sup>

This observation was made with the situation within the United States primarily in view. It is just as valid with respect to contracts which have associations with two or more national states; and in the field of international economic transactions the consequences of the confusion may be even more serious than within the country, for chaos such as we have as to the proper law of the contract makes for a bad business or investment climate in an area already marginal in attractiveness, and thus affects international economic activities ranging from the sale of goods to major development projects. Within recent years two important international groups, the Hague Conference on Private International Law and the Inter-American Bar Association, have considered the methods whereby

<sup>25</sup> C. Wilfred Jenks, "The Scope of International Law," 31 Brit. Year Bk. of Int. Law 1-48 (1954).

<sup>1</sup> Cheatham, Goodrich, Griswold and Reese, *Cases on Conflict of Laws* 533 (1957). Cf. Kronstein, "Crisis of 'Conflict of Laws,'" 37 Georgetown Law J. 483 (1949).

the international situation as to choice of law for international contracts might be improved. It is the objective of this editorial to appraise the possibilities for improvement which these bodies have discussed and to suggest other alternatives for further study.

The improvement of predictability with respect to legal relationships under international contracts takes, of course, two major lines of approach: (1) the unification of the applicable substantive law, and (2) the improvement of conflict of law rules. The latter is here admitted to be only a "second best" solution. The work of unifying substantive law, to the end, *inter alia*, of making conflict of laws problems less material, is a great and important work, carried on by several international professional groups of the highest standing—and deserving of more attention and support than it gets, officially and unofficially, in the United States.<sup>2</sup> But the road is hard and slow.<sup>3</sup> Hence attention turns to better conflicts rules.

In Europe, international efforts to standardize choice-of-law rules have traditionally used the multilateral international convention as the chosen instrument for bringing uniformity in legal effect within the various states joining in the effort. A proposal made at the 1956 Hague Conference on Private International Law by the United States observers, that, as an alternative to international agreements, the possibilities inherent in the formulation of model legislation be considered, was regarded as an unsettling novelty and consequently met with little enthusiasm.<sup>4</sup> Among the reasons advanced against the suggestion were these: (1) the Hague Conference is a body representative of states, and the formulation of international agreements is hence more consistent with its official character; (2) an international agreement, once it becomes legally binding among the states which have signed it, affords better assurance against subsequent unsettling deviation by later change than would model legislation, which any state could, at will and free of international obligation, supersede. Whether, notwithstanding the foregoing, any seeds of doubt as to the chosen instrument were planted by the American observers, cannot yet be determined.

At its Buenos Aires meeting in 1957 the Inter-American Bar Association showed itself to be willing to consider on an equal footing both approaches to standardization of choice-of-law rules. Resolution 15 of the Final Act of the Tenth Conference recommends: "... the adoption of uniform or standard legislation and/or multilateral conventions in connection with efforts to standardize the rules of conflict of laws." The agenda for the

<sup>2</sup> The writer has heard from more than one source expressions of puzzlement at the seeming lack of official United States interest in group efforts along these lines. Cf. Reese, "Some Observations on the Eighth Session of the Hague Conference on Private International Law," 5 A. J. Comp. Law 611 (1956).

<sup>3</sup> For a current estimate of the challenge, the need and the prospects for a uniform substantive law of international sales transactions, see Honnold, "A Uniform Law for International Sales," 107 U. Pa. Law Rev. 299 (1959).

<sup>4</sup> Nadelmann and Reese, "The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws," 7 A. J. Comp. Law 289 (1958).

Eleventh Conference, to be held at Miami in April, 1959, includes discussion of a somewhat narrower aspect of the foregoing resolution, namely, "Measures for the Adoption of Uniform Standards Governing the Conflict of Laws with Respect to International Contracts."

United States international lawyers are thus called upon to give their best counsel. What shall they say about the treaty and model legislation approaches to their colleagues from other countries with the same interest in law improvement? It is submitted, with regret, that they must report that current prospects for the United States to be able to help in the task by either the means of multilateral conventions or parallel model legislation are slight. In digest form the reasons follow.

#### A. DIFFICULTIES REGARDING THE USE OF FEDERAL POWER FOR THIS PURPOSE IN THE UNITED STATES

As a matter of Constitutional doctrine, it would lie within the power of the Federal Government in the United States to impose by treaty conflict-of-law rules relating to international transactions, which rules would be binding throughout the nation and override the choice-of-law rules of the several States of the Union. There are no specific precedents supporting the attainment of a similar national uniformity by the enactment of a uniform act by the Congress. But it is probable that the power of the Federal legislature with respect to the foreign commerce of the United States would support such a national law. From a practical standpoint, however, it cannot be seriously expected that either route to a uniform national law corresponding to an internationally developed set of choice-of-law rules holds much promise in the United States. As to treaties, there has always been some reticence about using to the fullest the powers of the Federal Government to make national law by treaty.<sup>5</sup> This has been particularly true with respect to aspects of litigation normally falling within the competence of the State courts in the United States, as issues of commercial and property law do. As is widely known, State conflict-of-law rules must even be followed by the Federal courts when sitting in cases not involving some Federal statute, power, or interest (*i.e.*, in diversity of citizenship cases).<sup>6</sup> It is quite unlikely that the Senate (in the case of treaties) or the Congress (in the case of national legislation) would be willing to use Federal power to take away from the

<sup>5</sup> For an effort at appraisal of standard Department of State reticence prior to the Bricker amendment episode, see Oliver, Statement and Testimony to Subcommittee of the Senate Judiciary Committee, 83rd Cong., 1st Sess., Record of Hearings 683-696 (1953). The press has reported various instances in which this reticence appears to have become extreme since then.

<sup>6</sup> *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941). For an important argument, *inter alia*, in the context of this discourse, that the Erie case elimination of Federal general jurisprudence should not be held to deprive the Federal Government, under its power over foreign relations, of authority to make State law conform to federally accepted views of international law as a part of the law of the land, see Jessup, "The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law," 33 A.J.I.L. 740 (1939).

States of the Union their present general (and "vested") competence with respect to choice-of-law issues. If control of choice of law by a single national law is not feasible in the United States, the only route open to achieve a uniformity within the United States conforming to that sought internationally would be by the enactment of the model choice-of-law legislation in each of the fifty States of the Union. To expect fifty States to adopt individually such legislation is hardly less illusory than to expect that, if treaty ratification were so left to the States of the Union, they would all ratify. In truth, the history and course of enactment of uniform laws within the North American Union has not been easy, speedy or complete, even when purely domestic matters of common interest are involved.

#### B. DIFFICULTIES OF FORMULATING GENERALLY ACCEPTABLE CHOICE-OF-LAW RULES

The first *Restatement of Conflict of Laws* attempted to lay down a universal set of criteria for choice of law, based on the notion that for every type of legal relationship some body of substantive law was, in the nature of things, controlling in a jurisdictional sense. This effort was made undoubtedly for very laudable reasons: universality, certainty, uniformity, respect for the fundamental or basic interests of the sovereignty whose law was chosen under these rules. However, the intellectual attacks on this approach to uniformity have been heavy—and in the United States successful.<sup>7</sup> Thus, it is likely that the second *Restatement of Conflict of Laws* now in preparation (but not yet published) will recede from the principle of the *lex loci contractus*, even with respect to questions of essential validity and effect of the contract. Despite the older *Restatement* many States permit the forum to make its choice of law on the basis of (1) a weighing of the connections or contacts which the contract has with the several sovereignties involved, unless (2) the parties have chosen the local law of a particular State to govern, and: (a) that law was reasonable for the parties to choose, and (b) does not violate the strong public policy of the forum. More strongly put, State courts in the United States have tended, despite the old *Restatement*, to make their decisions as to the proper law of the contract upon the bases of such a variety of variables as to make prediction uncertain and formulation of effective principles difficult. Recently three notable studies by Currie have caused a new ferment, the implications of which in terms of the problem under consideration can be seen from the following excerpt from a brief summary of his tentative position prepared by Professor Currie<sup>8</sup> for a round-table discussion by

<sup>7</sup> The classic one is Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942). The latest from the presses is Ehrenzweig, *Conflict of Laws*, Pt. One, *passim*, and 6-10 (1959).

<sup>8</sup> Professor Currie's thesis is developed in "Married Women's Contracts: A Study in Conflict-of-Laws Method," 25 U. of Chicago Law Rev. 227 (1958); "Survival of Actions: Adjudication Versus Automation in the Conflict of Laws," 10 Stanford Law Rev. 205 (1958); "On the Displacement of the Law of the Forum," 58 Col. Law Rev. 964 (1958).

conflict of laws professors in the United States:

We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws. This would imply a basic method along the following lines:

1. Normally, even in cases involving foreign elements, the court should be expected as a matter of course to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should first of all determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum even though the foreign state also has an interest in the application of its contrary policy, and *a fortiori* it should apply the law of the forum if the foreign state has no such interest.

The developments briefly outlined show how difficult it will be in the present intellectual climate to work out any set of universal, non-volitional rules for choice of law in the field of international contracts. There will be great resistance to any effort to go back to the old *Restatement* approach. The "balancing of contacts" theory gives no certainty or uniformity. While Professor Currie's approach would bring resistance from many, if put forward at this stage as a basis for either a treaty or model legislation, it is now part of the common currency of conflict of laws controversy, and upon the strength of it there would also be resistance to solutions which ignored it. The factors discussed above are "difficulties," not prohibitions. It is not that change is impossible; it is just not probable enough to offer much hope for solution of the current crisis in the conflict of laws. Are there shorter-run expedients which ought to be stressed as first steps? It is submitted that there are two: (1) greater development and use of party autonomy to pre-select the applicable law in the contract itself; (2) international commercial arbitration.

It is generally recognized that the parties to a contract may, within variant limits, specify the substantive law which is to govern their con-

tract. Professor Beale recognized in his text what he did not in the *Restatement*, that in a great number of cases the will of the parties as to choice of law in contracts cases has been held to prevail. Valuable comments and notes containing collections of authorities regarding party autonomy have been prepared by the Reporter for the *Restatement of Conflict of Laws*, Second; but, as the Tentative Draft in which these appear has not been considered by the American Law Institute as a whole, it may not be cited or its contents described at the present time. At this writing it is not possible to predict when the Tentative Draft on this subject will become available for citation and general study.

Morris J. Levin has proposed a rule which might well be considered as a basis for international discussion:

Where the parties to a commercial contract have made an express stipulation that the law of a particular state or nation should govern the contract, and the law so stipulated has a substantial connection with the transaction and its enforcement would not be contrary to the public policy of the forum, then the forum should use the internal (domestic) law of the particular state or nation stipulated as governing all questions arising under the contract.<sup>9</sup>

Mr. Levin's proposal contains two variables which some might think should be further standardized or reduced as to effect: (1) the requirement of "substantial connection" between the law chosen and the transaction; (2) the "public policy" doctrine. The first of these variables is quite amply discussed in several of the works cited in the notes. As to public policy, Paulsen and Sovern<sup>10</sup> found that all too frequently the rejection by a forum on grounds of "public policy" of the otherwise applicable foreign law results from poor analysis of the conflicts issues in the case or, what is worse, from a cloaked judicial parochialism favoring the forum's internal law without actually saying so.

A third variable affecting the parties' choice arises when the parties are not in an equal bargaining position with respect to the choice of law made in the contract. On this aspect of the problem Professor Ehrenzweig's work<sup>11</sup> is particularly useful. This writer tentatively holds the following views on the immediately foregoing, considering that the types of contracts under consideration are mainly ones of a commercial nature and involving business transactions between equally knowledgeable and competent parties:

(1) The law the parties shall be deemed to have chosen, unless the instrument specifically provides otherwise, is the internal law of the state chosen by them, not the "whole law" (including the conflict-of-laws rules) of that state. From the standpoint of contract draftsmanship at the present time, however, this point should be made clear in the instrument, pending further standardization of general law on the point.

<sup>9</sup> Levin, "Party Autonomy: Choice-of-Law Clauses in Commercial Contracts," 46 *Georgetown Law J.* 260 (1957).

<sup>10</sup> "Public Policy" in the *Conflict of Laws*, 56 *Col. Law Rev.* 969, 1015-16 (1956).

<sup>11</sup> "Adhesion Contracts in the *Conflict of Laws*," 53 *Col. Law Rev.* 1072 (1953).

(2) The necessity for the "substantial connection" requirement as a matter of policy is doubtful, except where one party has taken an unreasonable advantage of the other in stating the choice. But pending further developments, the parties should probably choose a connected law.

(3) The choice of law made by the parties should not be upset unless the law chosen violates the strongest moral convictions of the forum or appears profoundly unjust to it.

(4) The attachment to main contracts substantially under the control of only one of the parties of ancillary ("adhesion") agreements as to choice of law should be treated as valid unless found to be "profoundly unjust" under (3).

It is most important for lawyers (and perhaps for judges also) to be made to realize that the present crisis in the choice of law requires as a matter of urgency that the profession use "self-help" to develop techniques for conflicts *avoidance* through (a) making full use of permitted party autonomy in the drafting of instruments, and (b) resort to arbitration. The needs of international trade and commerce cannot wait indefinitely for scholars to formulate, and a host of legislatures to enact, tight new rules of general application to contract choice of law. These developments may come eventually. In the meantime the parties must help themselves out of their present difficulties. The best way to begin to get that help is by having professional attention sharply focused upon the need for it. The education of the Bar as to this need goes hand in hand with teachings from experience by those lawyers who have already had the foresight (or have felt the necessity) to develop party autonomy provisions in particular kinds of contracts and to make provisions for commercial arbitration.

Existing rules regarding party autonomy need clarification from country to country and perhaps further work, by treaty, model legislation, common acceptance, or whatever, to develop a common scope for such rules. Thus there is needed at the threshold a thorough survey of party autonomy<sup>12</sup> and arbitration<sup>13</sup> as now recognized from state to state.

Such inquiry, which should be undertaken under the leadership of an appropriate Bar group, would serve as the basis of further planning of the

<sup>12</sup> A good beginning would include Yntema, "'Autonomy' in Choice-of-Law," 1 A. J. Comp. Law 341 (1952); see also Batiffol, "Conflict Avoidance in European Law," Symposium on Conflict Avoidance, 21 Law and Contemporary Problems 571 (1956).

<sup>13</sup> International Trade Arbitration (American Arbitration Association, 1958, Domke, ed.) is a very useful source book. As to the present situation in the United States with respect to (1) State laws on arbitration, (2) treaty practice, (3) the Federal Arbitration Act, and (4) a prediction that the United States will stand aloof from the arbitration proposals made by the Economic and Social Council, consult Hynning, "A Comparison of British and American Policies on International Commercial Arbitration," *loc. cit.* above, pp. 117-136. For the United Nations proposals resulting from the 1958 Conference, see Haight, Summary Analysis of Record of the United Nations Conference and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, May/June, 1958 (published in offset, apparently by the International Chamber of Commerce, 1958); and Domke, this JOURNAL, p. 414, below.

steps which ought to be taken toward reduction of the dimensions of the choice-of-law crisis. Among these steps should be one directed toward better lawyer education as to how to cope with the crisis as long as it remains unresolved by official action, *i.e.*, the preparation of a pamphlet or small book for the guidance of attorneys in which there would be collected the various clauses on party choice of law which have been developed and successfully used in international commercial transactions. Such a collection might also call to attention particular areas, such as in the sale of goods, where differences in customary practices have led to difficulties, thus suggesting specific clarifications to be made by the parties.

COVEY T. OLIVER

#### THE COMMONWEALTH AS SYMBOL AND AS INSTRUMENT

"In the history of Commonwealth development, the lawyer has never been able to keep up with the statesman."<sup>1</sup> Yet there should be no defeatism in the pursuit. It should not be deterred by suggestion that the strictly legal aspects of Commonwealth relations are in a sense the least important ones. The international legalist cannot escape the fact that the unique experiment touches upon his subject at many points.<sup>2</sup> State succession, nationality, responsibility of states, judicial assistance, membership in international public organizations, and responsibility for the maintenance of peace, are but a few of the matters involved. For the student of international law, as well as for observers of foreign policy, there would seem to be justification for continuing inquiry into what the Commonwealth essentially is. It may be useful to draw attention to some recent comment, principally Australian, on the general subject.

Perhaps the most significant element in Commonwealth relations is tradition. An elder statesman of Australia has concluded that "the real strength of the Commonwealth is the cultural unity of the British people."<sup>3</sup> To another, whose public career spanned practically the entire period of federation in Australia up to the present time, the Commonwealth of Nations was associated with non-Communism, non-totalitarianism, good faith, good will and mutual aid.<sup>4</sup> Still another view suggests the "curious blending of historical experience, sentiment, material interest and national advantage" combined with a belief in voluntary association as a basis for freedom of decision.<sup>5</sup>

<sup>1</sup> G. C. G., "The Evolution of the Commonwealth," in *The British Commonwealth* 7 (London: Stevens, 1956).

<sup>2</sup> Some of these are the subjects of discussion in Nicholas Mansergh and others, *Commonwealth Perspectives*, Ch. III: "The Commonwealth and The Law of Nations" (1958); Robert E. Clute and Robert R. Wilson, "The Commonwealth and Favored-Nation Usage," 52 *A.J.I.L.* 455-468 (1958); Robert R. Wilson, "Some Questions of Legal Relations between Commonwealth Members," 51 *A.J.I.L.* 611-617 (1957).

<sup>3</sup> Frederic W. Eggleston, *Reflections on Australian Foreign Policy* 187 (1957).

<sup>4</sup> Robert Garran, *Prosper the Commonwealth* 331, 332 (1958).

<sup>5</sup> Gordon Greenwood and Norman Harper (eds.), *Australia in World Affairs, 1950-1955*, p. 29 (1957). *Cf.* the statement by the present Foreign Minister of Australia that the Commonwealth of Nations "has no set of universally recognized rules or even conventions." R. G. Casey, *Friends and Neighbors* 32 (1955).



It is possible to envisage the Commonwealth as an association of peoples with a common belief in parliamentary sovereignty, individual liberty and the rule of law. There is now no common racial or religious background. The great majority of human beings now living in Commonwealth states are Asians or Africans. The Commonwealth no longer symbolizes a common allegiance. Upon becoming a republic, India dissolved the tie of allegiance for its people; Pakistan has done likewise; these governments acknowledge the Queen only as head of the Commonwealth. There has even been suggestion of the possibility of having a two-tier Commonwealth, in which would be distinguished those states acknowledging allegiance to a common sovereign from those not acknowledging such allegiance, or those which join in a common diplomatic and defense program from those which do not.<sup>6</sup> This, however, has not happened. The announcement by Ceylon's Prime Minister in 1956 that his government proposed to introduce in due course a republican constitution for Ceylon was followed by an expression of agreement, by the Prime Ministers of the other Commonwealth states, to Ceylon's remaining a member.<sup>7</sup>

The past decade has seen considerable divergence of views among member states on matters of policy. At the time of the Suez crisis members were ranged on different sides under circumstances in which there was appeal to law as well as decision on policy. Some Commonwealth states are parties to defense arrangements which others sharply criticize. Continuing tension over the question of Kashmir, and complaints concerning the treatment of persons of Indian ancestry in South Africa, are reminders that the Commonwealth does not symbolize *agreement* on all matters. The "White Australia" immigration policy meets with no applause in certain other Commonwealth states. India's neutralism is at variance with the policy of those members that have firmly aligned themselves with the Western democracies.

Yet the Commonwealth endures. Its values appear to transcend many differences; its processes seem to command mutual respect. The Prime Minister of Canada, when recently in Australia after having visited a number of other Commonwealth countries, referred to the feeling of oneness, of responsibility of members to each other, and of common heritage.<sup>8</sup> At about the same time, in Kuala Lumpur, the President of India described the Commonwealth nations as "drawn and bound by invisible bonds which do not require any formal treaty to express themselves."<sup>9</sup> For individual members' foreign policies, if the latter are contrary to those of other members, there seems to be a considerable degree of tolerance. For example, one view with respect to India's neutralist position has been that that country may be regarded as an interpreter of the East to the West and as presenting "an alternative to the authori-

<sup>6</sup> See discussion in Fred Alexander, "The 1956 Commonwealth Conference," 28 *Australian Quarterly* 9-16, at 10 (1956).

<sup>7</sup> 27 *Current Notes on International Affairs* 454 (Department of External Affairs, Australia, 1956).

<sup>8</sup> *The Canberra Times*, Dec. 5, 1958, p. 1.

<sup>9</sup> *Ibid.*, Dec. 9, 1958, p. 14.

tarianism of Communism by experimenting with national democratic solutions."<sup>10</sup> The absence of a common policy or even of a common allegiance does not appear to prevent common discussion of many of the major issues in foreign relations. In a time of precarious peace, the traditional practice of the Commonwealth in this respect merits special consideration. It is in accord with what the President of the United Nations General Assembly is reported to have said recently concerning the United Nations and "the opportunity for perpetual discussion."

Whether the Commonwealth, clearly a symbol, may also become an instrument of action, is questionable. The former Dominions have come far since they were, from the standpoint of international law, "mere colonial portions of the mother country."<sup>11</sup> As they have moved into an era of statehood they have created no instrumentalities to which all are subject. There is but one organ in the Commonwealth as such—the Prime Ministers' Conference. Apparently these meetings are not necessarily preceded by preparatory work. The rôle of individual participants may assume special importance, as, for example, that of Prime Minister Nehru in connection with bases in Ceylon and the Cyprus question in 1956.<sup>12</sup> Even if the decisions taken at the conferences are not legally binding upon the governments represented, the value of these regular meetings in guiding toward understanding and toward possible co-operative action, would seem to be unquestionable. Conferences do not lose their usefulness merely because defense talks no longer take place in full session.<sup>13</sup> Nor are these meetings of Prime Ministers at London the only occasions when heads of Commonwealth governments come together. The Colombo Plan, to take but one example, came as a sequel to a meeting which Prime Ministers from seven of these countries attended in 1950.

From time to time there have been suggestions of additional machinery. At the 1907 Colonial Conference the Prime Minister of Australia (Deakin) proposed a permanent imperial secretariat and an imperial council. Of the latter (which would have been composed of ministers and conceived of as permanently in session) the Australian spokesman said that it would not have meant more than "Imperial Conference."<sup>14</sup> In 1950 Australia's Foreign Minister (Spender) favored regular meetings of High Commissioners in each Commonwealth country under the chairmanship of a senior minister—a plan which seems to have been adopted to some extent. The Foreign Minister also suggested frequent meetings, at the ministerial level, in different parts of the Commonwealth. In the course of the same statement he observed that the Commonwealth could become "an instrument of our peace and security."<sup>15</sup> Still more recently, Prime Minister

<sup>10</sup> Gordon Greenwood and Norman Harper, *op. cit.* 88.

<sup>11</sup> 1 Oppenheim, *International Law* 198 (8th ed., 1955).

<sup>12</sup> Fred Alexander, *loc. cit.* 11, 12.

<sup>13</sup> See Robert Gordon Menzies, *Speech Is of Time* 28 (1958) (a reproduction of a statement first published in *The Times* (London) in June, 1956).

<sup>14</sup> Minutes of Proceedings of the Colonial Conference, 1907, Cd. 3523, at p. 27.

<sup>15</sup> 21 Current Notes on International Affairs 165, 166 (Department of External Affairs, Australia, 1950).

Menzies has indicated need for a new approach. While agreeing that there will always be need for a general conference, he has suggested that there might be more functional conferences (and perhaps regional ones in which selected British countries would participate).<sup>16</sup> It seems unlikely, however, that any new permanent organs will soon evolve, or that the control by each Commonwealth country of its own foreign policy will be relinquished in any measure.<sup>17</sup>

While the Commonwealth may not mean exactly the same thing to each of its members, all of them appear to have found substantial reasons for continuing in their unique association. It is an instrument only in the sense of an organ of consultation. The people whom the Prime Ministers in conference collectively represent include about one fourth of the world's total population. Traditionally, the Commonwealth has symbolized especially the idea of individual freedom as associated with British methods of government. It can conceivably promote a sense of common values such as must undergird any sound edifice of international law.

ROBERT R. WILSON

<sup>16</sup> Robert Gordon Menzies, *op. cit.* 30.

<sup>17</sup> On some of the possible difficulties in connection with a "minister resident" plan for the Commonwealth, as seen by a former Prime Minister of Australia, see W. M. Hughes, *The Splendid Adventure* 258-269 (1929).

## NOTES AND COMMENTS

FIFTY-THIRD ANNUAL MEETING OF THE SOCIETY  
APRIL 30-MAY 2, 1959

THE MAYFLOWER HOTEL, WASHINGTON, D. C.

### PROGRAM

DIVERSE SYSTEMS OF WORLD PUBLIC ORDER TODAY

THURSDAY, APRIL 30, 1959

9:30 a.m.—Maryland Room

Meeting of the Executive Council

2:30 p.m.—East Room

#### *Representative Systems of World Public Order Today*

Chairman: Hardy C. Dillard, *University of Virginia Law School*

Panel I:

Universality in Perspective:

Speaker: Harold D. Lasswell, *Yale University Law School*

Comments: Adda von Bruemmer Bozeman, *Sarah Lawrence College*

The Russian System:

Speakers: Oliver J. Lissitzyn, *Columbia University School of Law*

John N. Hazard, *Columbia University, Russian Institute*

Comments: Leon Lipson, *Yale University Law School*

2:30 p.m.—Pan American Room

Chairman: Josef L. Kunz, *Toledo University College of Law*

Panel II:

The Islamic System:

Speaker: Dr. Majid Khadduri, *School of Advanced International Studies, Johns Hopkins University*

Comments: Dr. Saba Habachy, *of the Egyptian Bar*

The Latin American System:

Speaker: H. E. Señor Don Julio A. Lacarte, *Ambassador of Uruguay to the United States*

Comments: Martin B. Travis, Jr., *Stanford University*  
 A. J. Thomas, Jr., *Southern Methodist University School of Law*

8:30 p.m.—East Room

Addresses: C. Wilfred Jenks, *Assistant Director General, International Labor Organization*: "The Challenge of Universality"  
 Maxwell Cohen, *McGill University*  
 Myres S. McDougal, *President of the Society*: "Perspectives for an International Law of Human Dignity"

FRIDAY, MAY 1, 1959

9:30 a.m.—East Room

Panel I: *Security Problems among Diverse Systems of World Public Order*

Chairman: Edgar Turlington of the *D. C. Bar*; *Vice President of the Society*

Speakers: W. T. R. Fox, *Columbia University*  
 Quincy Wright, *University of Virginia, Woodrow Wilson Department of Foreign Affairs*  
 Florentino P. Feliciano, *University of the Philippines*

Comments: Richard R. Baxter, *Harvard Law School*  
 Ruth C. Lawson, *Mt. Holyoke College*

9:30 a.m.—Chinese Room

Panel II: *Diverse Systems and Principles of Jurisdiction*

Chairman: Herbert W. Briggs, *Cornell University*; *Vice President of the Society*

Speakers: Cecil J. Olmstead, *New York University*  
 Kenneth S. Carlston, *University of Illinois School of Law*  
 Richard A. Falk, *Ohio State University College of Law*

Comments: Breck P. McAllister, *of the New York Bar*  
 Louis Henkin, *University of Pennsylvania Law School*

2:30 p.m.—East Room

Panel I: *The Allocation of Resources and Contending Systems*

Chairman: William W. Bishop, Jr., *University of Michigan Law School*

Recent Developments in the Law of the Sea:

Speakers: Arthur H. Dean, *of the New York Bar*  
 William T. Burke, *Yale University Law School*

Comments: Brunson MacChesney, *Northwestern University Law School*

Joseph W. Bingham, *Stanford University Law School*

Sharable and Strategic Resources—Outer Space, Polar Areas, and the Oceans:

Speaker: Nicholas deB. Katzenbach, *University of Chicago Law School*

Comments: To be announced

2:30 p.m.—Chinese Room

Panel II: *Human Rights among Diverse World Orders*

Chairman: Louis B. Sohn, *Harvard Law School*

Speakers: Egon Schwelb, *Deputy Director, Division of Human Rights, United Nations Secretariat*

Moses Moskowitz, *Secretary General, Consultative Council of Jewish Organizations*

Telford Taylor, *Chief Counsel for War Crimes, Nuremberg War Crimes Trials*

Comments: James Simsarian, *Officer in Charge, U. N. Cultural and Human Rights Affairs, Department of State*

Marek St. Korowicz, *Fletcher School of Law and Diplomacy*

Stanley H. Hoffman, *Harvard University*

5:30 p.m.—Pan American Room

Informal Reception for Officers and Members of the Society and Their Guests

8:30 p.m.—East Room

Panel I: *Economic Growth and Trade among Competitive Systems*

Chairman: G. Winthrop Haight, *Asiatic Petroleum Corporation*

Speakers: Richard N. Gardner, Jr., *Columbia University*

Stephen M. Schwebel, *of the New York Bar*

Harold J. Berman, *Harvard University*

Comments: Stanley D. Metzger, *Department of State*

Arthur H. Dean, *of the New York Bar*

(Others to be announced)

8:30 p.m.—North Room

Panel II: *Diverse Systems and the Law of Treaties*

Chairman: Philip C. Jessup, *Columbia University*

Speakers: David R. Deener, *Tulane University*

Jan F. Triska, *Cornell University*

Alona E. Evans, *Wellesley College*

Comments: Covey T. Oliver, *University of Pennsylvania Law School*  
Gertrude C. K. Leighton, *Bryn Mawr College*  
Wesley L. Gould, *Purdue University*

SATURDAY, MAY 2, 1959

9:30 a.m.—East Room

BUSINESS MEETING

12:30 p.m.—Maryland Room

MEETING OF THE EXECUTIVE COUNCIL

7:00 p.m.—East Room

ANNUAL DINNER

Presiding: The President of the Society

Addresses: The Honorable Loftus E. Becker, *Legal Adviser, Department of State*

The Honorable Oscar Schachter, *Director, General Legal Division, Office of Legal Affairs, United Nations*

His Excellency Wilhelm G. Grewe, *Ambassador of the Federal Republic of Germany to the United States*

The Honorable Henry M. Jackson, *Senator of the United States*

#### NOTICE OF PROPOSED AMENDMENT TO THE CONSTITUTION OF THE SOCIETY

The Executive Council of the Society, at its meeting on April 24, 1958, approved the submission to the annual meeting in 1959 of an amendment to the third paragraph of Article V of the Society's Constitution by substituting in the last sentence of that paragraph the word "April" for "January." The sentence with the proposed amendment would read: "The fiscal year shall begin on the first day of April."

The Council also amended the Regulations of the Society with regard to the annual report of the Treasurer (Section VI, paragraph 5) so that it now reads:

The Treasurer shall submit an annual financial report to the Executive Council and to the Society at the annual meeting in each year, which report shall cover the fiscal year beginning on the first day of April in each year.

By direction of the Executive Council, the books of the Society shall be kept on the basis of the fiscal year April 1-March 31.

ELEANOR H. FINCH  
*Executive Secretary*

## CONSIDERATION AT THE UNITED NATIONS OF THE STATUS OF OUTER SPACE

Within the last year, the interest of the nations of the world in the use and control of outer space has been demonstrated not only by their scientific achievements but by certain of their actions in the United Nations as well. The regular session of the General Assembly in the Fall of 1958, for example, provided in its debates the first occasion on which representatives of a substantial number of states expressed official positions on the status of outer space. As early as March 15, 1958, the Soviet Union submitted a proposed agenda item for consideration at the thirteenth regular meeting of the General Assembly in which the "banning of the use of cosmic space for military purposes, the elimination of foreign bases on the territories of other countries, and international co-operation in the study of cosmic space" were linked.<sup>1</sup> States were to undertake to launch rockets into cosmic space only under an agreed international program, and a United Nations agency for international co-operation in the study of cosmic space was proposed in order:

To work out an agreed international programme for launching intercontinental and space rockets with the aim of studying cosmic space, and supervise the implementation of this programme;

To continue on a permanent basis the cosmic space research now being carried on within the framework of the International Geophysical Year;

To serve as a world center for the collection, mutual exchange and dissemination of information on cosmic research;

To coordinate national research programmes for the study of cosmic space and render assistance and help in every way towards their realization.

On September 2, 1958, the United States also proposed that a "programme for international co-operation in the field of outer space" be included in the Assembly's agenda.<sup>2</sup> On September 22, the General Assembly combined these requested items into a single "Question of Peaceful Use of Outer Space," and included the question in its agenda, referring it to the First Committee for consideration and report.

The First Committee considered the item at its 981st to 995th meetings, held from November 11 to November 24, 1958. The work in that committee proceeded initially on the basis of a Soviet draft resolution, submitted on November 7, which substantially followed the form of the Soviet Union's requested agenda item as set forth above and which continued to link the elimination of foreign military bases "with a program for the peaceful use of cosmic space under international supervision."<sup>3</sup> On November 13, twenty nations, including the United States,<sup>4</sup> submitted a quite different draft resolution<sup>5</sup> calling only for the establishment by

<sup>1</sup> U.N. Doc. A/3818, March 17, 1958.

<sup>2</sup> U.N. Doc. A/3902, Sept. 2, 1958.

<sup>3</sup> See U.N. Doc. A/C.1/L.219, Nov. 7, 1958, and, for the supporting reasoning, the statement by Mr. Zorin, Doc. A/C.1/SE.982, Nov. 12, 1958, pp. 2-5.

<sup>4</sup> Others were Australia, Belgium, Bolivia, Canada, Denmark, France, Guatemala, Ireland, Italy, Japan, Nepal, The Netherlands, New Zealand, Sweden, Turkey, Union of South Africa, United Kingdom, Uruguay and Venezuela.

<sup>5</sup> U.N. Doc. A/C.1/L.220.



the General Assembly of an *ad hoc* committee on the peaceful uses of outer space to report to the Fourteenth General Assembly on:

1. (a) the activities and resources of the United Nations, its specialized agencies, and of other international bodies relating to the peaceful uses of outer space;
- (b) the area of international co-operation and programmes in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices to the benefit of states irrespective of the stage of their economic or scientific development;
- (c) the future United Nations organizational arrangements to facilitate international co-operation in this field;
- (d) the nature of legal problems which may arise in the carrying out of programmes to explore outer space;

The draft resolution then

2. *Requests* the Secretary-General to render appropriate assistance to the above-named committee and to recommend any other steps that might be taken within the existing United Nations framework to encourage the fullest international co-operation for the peaceful uses of outer space.

On November 18, the Soviet Union submitted a drastically revised version of its draft resolution, which dropped mention of a United Nations agency and of the elimination of military bases, and suggested instead the establishment of a United Nations committee for co-operation in the study of cosmic space and of a preparatory group, consisting of representatives of the Soviet Union, the United States, the United Kingdom, France, India, Czechoslovakia, Poland, Rumania, the United Arab Republic, Sweden and Argentina, to draft a program for that committee.<sup>6</sup> The committee was to continue the spirit of co-operation engendered during the International Geophysical Year, to organize the exchange of information and to co-ordinate national research programs. Members of the twenty-nation group, however, objected particularly to the inclusion of so many Soviet satellites and "unfriendly" "neutral" nations in the preparatory group, and countered with a revised draft of their own resolution, which named as members of the proposed *ad hoc* committee Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, U.S.S.R., U.A.R., U.K. and the U.S.A.<sup>7</sup> In addition, in paragraph 1(b), the words "the stage of their economic or scientific development" were replaced by:

the state of their economic or scientific development, taking into account the following proposals, among others:

- (i) continuation on a permanent basis of the outer space research now being carried on within the framework of the International Geophysical Year;
- (ii) organization of mutual exchange and dissemination of information on outer space research; and

<sup>6</sup> U.N. Doc. A/C.1/L.219/Rev. 1, Nov. 18, 1958.

<sup>7</sup> *Ibid.* A/C.1/L.220/Rev. 1, Nov. 21, 1958.

- (iii) co-ordination of national research programmes for the study of outer space, and the rendering of all possible assistance and help towards their realization.

Further, a draft resolution requesting the United States and the U.S.S.R. to consider the problem of the peaceful use of outer space and to report to the Committee of the General Assembly "on an agreed and practical approach to this problem" was introduced on November 24 by Burma, India and the U.A.R.,<sup>8</sup> but was rejected on a roll-call vote. Compromise on the states to be included and on the Soviet desire to establish a more permanent body at once proved impossible of attainment, and the Soviet Union withdrew its draft resolution, since no "unanimous" decision was in sight, and unanimity, they argued, was essential in these matters. The revised twenty-Power draft was then adopted as a whole by 54 votes to 9 (Soviet bloc), with 18 abstentions (Arab-Asian group plus Austria, Yugoslavia, Ethiopia, Finland and Israel).<sup>9</sup> The Soviet Union, Poland and Czechoslovakia immediately announced that they would not co-operate in the *ad hoc* committee's work, however.<sup>10</sup>

In addition to the "action" paragraphs already noted, the resolution recommended by the First Committee recognized "the common interest of mankind in outer space and that it is the common aim that it should be used for peaceful purposes only," and sought "to avoid the extension of present national rivalries into this new field." While the *ad hoc* committee is essentially a study group to inquire into the problems of the space age and to report on areas of necessary co-operation and United Nations activities, and has as one of its tasks the uncovering of legal problems which might follow man's venture into space, a perhaps surprising number of the representatives in the First Committee, in the course of discussing these draft resolutions, took stands on one or more of the "legal" issues involved.<sup>11</sup>

On the broadest aspects of the use of outer space, there was universal agreement<sup>12</sup> with the propriety of limiting the use of space to "peaceful" purposes, a concept which had already been expressed in such instances as General Assembly Resolution 1148 (XII) and in the United States National Aeronautics and Space Act of 1958,<sup>13</sup> and which was reaffirmed in the resolution as adopted. Several representatives felt that there were

<sup>8</sup> U.N. Docs. A/C.1/L.224 and Rev. 1, Nov. 24, 1958.

<sup>9</sup> See, generally, Report of the First Committee, U.N. Doc. A/4009, Nov. 28, 1958.

<sup>10</sup> See U.N. Doc. A/C.1/SR.995, Nov. 24, 1958, p. 15.

<sup>11</sup> While the resolution, as adopted, intentionally avoided for the present conclusions on the legal problems involved, at least one representative, Lodge, of the United States, suggested that it might be possible to take up the legal problems at once, even though the nature of outer space was not as yet known. U.N. Doc. A/C.1/SR.983, Nov. 13, 1958, p. 5.

<sup>12</sup> See, e.g., statements of the U. S., U.S.S.R., New Zealand, U.A.R., French, Chinese and Peruvian representatives. U.N. Docs. A/C.1/SR.983, pp. 6-8; 984, p. 2; 985, p. 4; 986, pp. 4-5, 9; 987, p. 9; 989, p. 2; and 990, p. 6.

<sup>13</sup> U. S. Public Law 85-568, 85th Cong., H.R. 12575, July 29, 1958, proposes that: "activities in space should be devoted to peaceful purposes for the benefit of all mankind."

as yet no legal norms in existence governing occurrences in outer space and that outer space was a "judicial vacuum,"<sup>14</sup> but the Netherlander, Schurmann, argued that the "general principles of law recognized by civilized nations" must be applicable even now to relations between nations in space.<sup>15</sup> Among those speaking to the point there was at least general agreement that the rules of the Paris Convention of 1919 and of the Chicago Convention of 1944 related only to "airspace" in the sense of the term "*espace atmosphérique*" as used in the Paris Convention,<sup>16</sup> but only a few attempted to indicate where "outer space" began.<sup>17</sup> The concept of "*usque ad coelum*" was, however, characterized as "absurd" with respect to "ownership" of outer space.<sup>18</sup>

It was said that space was, unlike the seas which are finite in nature, "indivisible" and hence not subject to the extension of national sovereignty.<sup>19</sup> Representatives of several small nations cited the lack of proof tests at the passage overhead of Russian and American orbiting satellites as "proof" of the non-existence of national sovereignty at these altitudes,<sup>20</sup> although, particularly since the height of "airspace" remains undefined, it cannot be said that satellites have not at various times moved through what would generally be considered "airspace." The concept that space is *res nullius* and therefore subject to acquisition was rejected by several spokesmen of smaller nations, who termed the "appropriation" of

<sup>14</sup> See, e.g., statements by representatives of Austria, Chile, Italy and Yugoslavia. U.N. Docs. A/C.1/SR.982, pp. 8-10, 10 ff.; 989, p. 5; 990, p. 5.

<sup>15</sup> *Ibid.* SR.987, p. 2.

<sup>16</sup> See, e.g., statements by representatives of Chile and Italy. U.N. Doc. A/C.1/SR.982, pp. 8 ff. Cf. note by Stephen Latchford, below, p. 405.

<sup>17</sup> The Swedish representative suggested that some definition in terms of kilometers up from the earth's surface was necessary, but only the Chilean seems to have used concrete figures, suggesting that national sovereignty be limited to something between 500 and 1000 kilometers up. See U.N. Docs. A/C.1/SR.982, pp. 8-10, and SR.984, p. 2.

<sup>18</sup> See comment by the Australian representative, *ibid.* SR.986, p. 9. In discussing this concept with respect to private claims to *airspace*, the Supreme Court of the United States has already stated that this "doctrine has no place in the modern world." *United States v. Causby*, 328 U. S. 256, 260-261 (1946).

<sup>19</sup> See statements by the representatives of Austria, Greece, Iran, The Netherlands, the Philippines, Peru and Yugoslavia. U.N. Docs. A/C.1/SR.983, pp. 6-8; 987, p. 2; 988, p. 7; 989, p. 5; 991, pp. 4, 6.

<sup>20</sup> See, e.g., statements by the representatives of Austria, Chile, Iran, The Netherlands, Peru, the Philippines and Sweden. U.N. Docs. A/C.1/SR.982, pp. 8-10; 983, pp. 6-8; 984, p. 2; 987, p. 2; 988, p. 6; 990, p. 5; 991, p. 6. Some, but not all, noted that launching of satellites, up to the time of the Committee's sessions, had occurred under the network of international arrangements constituting the International Geophysical Year and might be unobjectionable on that account alone. Both the United States and the Soviet Union have suggested this explanation at other times, but the matter is at least confused by a Soviet announcement at the time Sputnik I was launched that it was not an IGY satellite, but a special test satellite for Soviet purposes only. See Loftus Becker, "The Control of Space," 39 Dept. of State Bulletin 418 (1958); A. Galina, "On the Question of Interplanetary Law," Soviet State and Law, No. 7, 1958, pp. 52-58; New York Times, Oct. 7, 1957, p. 1, col. 7; and Survey of Space Law, Staff Report of the Select Committee on Astronautics and Space Exploration, 85th Cong., 2nd Sess. (1958).

space or of heavenly bodies "impossible" or at least "improper,"<sup>21</sup> though the Chilean felt that the question was still open.<sup>22</sup> Others seemed to insist that "space," the moon, the planets, *et cetera*, were "owned"<sup>23</sup> or "belonged"<sup>24</sup> or were the "common domain"<sup>25</sup> or the "common property"<sup>26</sup> of the "world" or of all nations or of all peoples.

The Canadian representative suggested that, while outer space might belong to the world as a whole, "jurisdiction" over space and its contents was properly in the United Nations.<sup>27</sup> The Italian representative generously added to this assertion that outer space "belonged" to all the states of the world, that it was equally the property of "all other communities of thinking and organized beings living on other planets."<sup>28</sup>

Equality of access to, and enjoyment of the benefits to be obtained from use of, outer space were stated to be existent rights<sup>29</sup> or at the least essential rules for man's development of space<sup>30</sup> by representatives of several small Powers, some of whom formally termed outer space as a *res communis omnium* or *res extra commercium*.<sup>31</sup> Only a few seemed to insist on an unlimited free and equal right to "use" outer space,<sup>32</sup> for most of those who discussed this point noted that rights of free use by all would be feasible only under international control due to the danger to the rest of the world of abuse of such rights.<sup>33</sup>

While both the representatives of the United States and of the Soviet Union agreed to the need for the peaceful exploitation of man's new capabilities in outer space for the benefit of all mankind, neither took a position on the potential legal status of space and neither in fact stated a position which would estop future claims from being made. The Soviet representative, Zorin, talked of the importance of firing rockets into space only "as part of an international program,"<sup>34</sup> and Senator Johnson pointed out the usefulness of maintaining the current situation in which no "concessions" exist and of avoiding the mere "extension of . . . national policies" which might result from unilateral penetrations

<sup>21</sup> See, e.g., comments by the representatives of Australia, the Philippines and El Salvador, U.N. Docs. A/C.1/SR.986, p. 9; 991, p. 6, and 992, p. 3; and see also the citation of the Secretary General's Memorandum on this point at Doc. A/C.1/SR.989, p. 9.

<sup>22</sup> See U.N. Doc. A/C.1/SR.982, pp. 8-10.

<sup>23</sup> Venezuela, *ibid.* SR.990, p. 2.

<sup>24</sup> Iran, U.N. Doc. A/C.1/SR.988, p. 7; Italy, *ibid.* SR.982, pp. 10 ff.

<sup>25</sup> Greece, *ibid.* SR.991, p. 4.

<sup>26</sup> El Salvador, *ibid.* SR.992, p. 3.

<sup>27</sup> *Ibid.* SR.989, p. 9.

<sup>28</sup> *Ibid.* SR.982, pp. 10 ff.

<sup>29</sup> Bolivia, *ibid.* SR.991, p. 5.

<sup>30</sup> Guatemala, *ibid.* SR.988, p. 5; China, *ibid.* SR.985, p. 4; Canada, *ibid.* SR.989, p. 9.

<sup>31</sup> See, e.g., remarks by the Chilean and Italian representatives, *ibid.* SR.982, pp. 8 ff.

<sup>32</sup> See statements by the representatives of Argentina and Portugal, U.N. Docs. A/C.1/SR.985, p. 2, and 990, pp. 6-7. The Swedish representative argued for free use but only for "peaceful" traffic, using the analogy in this instance of the "high seas." *Ibid.* SR.984, p. 2.

<sup>33</sup> See, e.g., statements by the representatives of Australia, Austria, Canada, Chile, Italy, Peru and Yugoslavia. *Ibid.* SR.982, pp. 8 ff.; 983, pp. 6-8; 984, p. 2; 986, p. 9; 989, pp. 5, 9; 990, pp. 5, 10-11.

<sup>34</sup> *Ibid.* SR.982, p. 4.

of outer space.<sup>35</sup> Neither, as noted, talked in the narrower terminology of rights and obligations employed by many of the representatives of states not now having the ability to penetrate into space. All this, of course, indicates, as expressly pointed out by the representatives of Canada and New Zealand, that, "in the last resort, the choice between various possible legal arrangements for outer space [will be] a political decision. . . ." <sup>36</sup>

A resolution setting up the *ad hoc* committee in accordance with the First Committee's proposal was in turn adopted by the General Assembly on December 13, 1958,<sup>37</sup> but the Soviet position of nonco-operation remains unchanged and no steps have as yet been taken to implement the resolution. While this resolution, it will be recalled, asks the *ad hoc* committee to report on "the nature of legal problems which may arise in the carrying out of programs to explore outer space," the discussions noted above indicate clearly the extent to which the legal problems, as well as the obvious political and economic problems inherent in man's movement into space, have *already* caught the attention of those representing their countries at the United Nations.

HOWARD J. TAUBENFELD

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#### THE BEARING OF INTERNATIONAL AIR NAVIGATION CONVENTIONS ON THE USE OF OUTER SPACE

It would seem that any study of the extent to which the various governments or their nationals might make use of outer space for exploration or other purposes should begin with a consideration of the extent to which international air navigation agreements have dealt with the subject of sovereignty over airspace. Since governments have very definitely committed themselves to the principle that they have complete sovereignty over the airspace above their territory, it may very well become necessary to determine what bearing the movement in outer space of objects such as space ships, rockets, missiles, satellites, *et cetera*, would have on the exercise by the various governments of sovereignty over the airspace above their territory.

Article 1 of the English text of the International Convention for the Regulation of Aerial Navigation, signed at Paris on October 13, 1919, provided:

The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space<sup>1</sup> above its territory.

<sup>35</sup> *Ibid.* SR.986, pp. 4-5, and 39 Dept. of State Bulletin 978 (1958).

<sup>36</sup> U.N. Docs. A/C.1/SR.986, p. 9, and SR.988, p. 9.

<sup>37</sup> 5 U.N. Review 12 (January, 1959). See also 40 Dept. of State Bulletin 24-32 at 32 (1959).

<sup>1</sup> The term "airspace" as used in the Paris Convention of 1919, which was drawn up in the English, French and Italian languages, appears as "*espace atmosphérique*" in French, and as "*spazio atmosferico*" in Italian. It is understood that the French and Italian versions have been regarded as synonymous with the English terms "air"

The drafting of the Paris Convention of 1919 was one of the results of the deliberations of the Paris Peace Conference at the end of the first World War. As the result of certain decisions made by the Supreme Council of the Peace Conference, an Inter-Allied Aeronautical Commission of the Peace Conference was organized for the purpose of developing certain topics pertaining to aviation in connection with the deliberations of the Peace Conference, and also for the specific purpose of drafting an international convention relating to the regulation of aerial navigation. The Aeronautical Commission decided first to draw up a list of twelve principles which should govern the preparation of the proposed convention. For the purpose of the present discussion it is sufficient to quote paragraphs 1 and 2 of these principles, which are as follows:

1. Recognition.—(1) of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft; (2) of the right of each State to impose its jurisdiction over the air above its territory and territorial waters.

2. Subject to the principle of sovereignty, recognition of the desirability of the greatest freedom of international air navigation in so far as this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the Contracting States and with the domestic legislation of the State.

The principle of national sovereignty over the airspace found in Article 1 of the Paris Convention of 1919 was embodied in the Convention on Commercial Aviation signed on behalf of the United States and other American Republics at Habana on February 20, 1928, during the Sixth International Conference of American States. It was also embodied in the Convention on International Civil Aviation adopted at the international aviation conference held at Chicago in 1944. The Chicago Convention came into force on April 4, 1947, and superseded both the Paris and Habana conventions referred to above. It may be stated as a matter of historical interest that, although representatives of the United States participated in the drafting of the Paris Convention, which was signed on behalf of this country, it was never, for reasons which do not appear to be pertinent to the present discussion, ratified by the United States.

The Paris Air Navigation Convention of 1919 was drafted soon after the conclusion of a devastating war. It can be assumed, therefore, that the framers of the convention were not only aware of the potential use of aircraft for military purposes, but were determined to incorporate in the convention such provisions as would enable each state to provide for its own security. Therefore, while adopting principles looking to the establishment of international air transportation without undue restrictions, they made it clear that this should in no way conflict with the basic prin-

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and "airspace." See John C. Cooper, "The Problem of a Definition of 'Airspace,'" Memorandum for the 9th Annual Congress of the International Astronautical Federation, The Hague, August, 1958; reprinted in *Space Law—A Symposium Prepared at the Request of Honorable Lyndon B. Johnson, Chairman, Special Committee on Space and Astronautics, 85th Cong., 2nd Sess. (December 31, 1958)*, p. 403.

ciple of national sovereignty over the airspace. It is of interest in this connection to recall that the United States was represented on the Aeronautical Commission of the Peace Conference by Rear Admiral Harry S. Knapp and Major General Mason Patrick. In addition, certain United States Army and Navy officers served on technical subcommittees working under the direction of the Aeronautical Commission in the drawing up of the draft convention. It can be assumed, therefore, that members of the United States Delegation were well aware of the bearing which the convention would have on national security. In fact it was at the insistence of the American Delegation that the Aeronautical Commission of the Paris Peace Conference of 1919 adopted the principle of the full and absolute sovereignty of each state over the air above its territory, as quoted above.

In adopting the principle of absolute sovereignty over the airspace, the framers of the Paris Convention of 1919 repudiated all previous theories about freedom of flight above a certain zone. They probably used the term "air space" for the reason that they did not at the time foresee the possibility of flights in outer space beyond the earth's atmosphere. Nevertheless, it is believed to be not unreasonable to assume that, aside from a natural desire to protect national aircraft from undue competition by foreign commercial aircraft, they were primarily concerned with the problem of safeguarding national security by regulating the movement of any mechanically operated objects over, into or across the territory of the subjacent states, and that whether such objects could be classified as aircraft, missiles, rockets, space ships or satellites was a secondary consideration as far as providing for national security was concerned. The matter of the distance of such objects above the surface of the earth was perhaps also a secondary consideration, insofar as the framers of the Convention of 1919 were, as a practical matter, in a position to deal with the problem at the time.

Since the Paris Convention of 1919 was superseded by the Chicago Convention of 1944 containing a declaration of sovereignty over the airspace corresponding to the similar provision of the Paris Convention, it is reasonable to assume that the general purpose of the Chicago Convention in this respect is the same as that of the Convention of 1919.

Some authorities have indicated that they have been unable to find any definition of the term "airspace" as it appears in the Paris and Chicago conventions. Mr. John C. Cooper, a distinguished authority on international air law and outer space matters, has stated that the Chicago Civil Aviation Conference of 1944 did not define the term "airspace" as it appears in Article 1 of the air navigation convention adopted there. Mr. Cooper speaks with a good knowledge of what took place at Chicago, since he was not only an Adviser to the American Delegation to the Conference, but also served as Chairman of the Drafting Committee that made reports to the Conference on the various articles of the draft convention submitted to the Conference by the American Delegation as the basis of discussion. In his capacity as Adviser on Air Law in the Department of State, this

writer prepared the draft convention submitted by the American Delegation at Chicago, and as an Adviser to the Delegation, he participated in the discussions of the reports on the draft as submitted by the Drafting Committee. He therefore is in a position to express his agreement with Mr. Cooper that the Chicago Conference did not define the term "airspace." Article 2 of the draft convention submitted by the American Delegation (Conference Document No. 16) contained a recognition that "each Contracting State has complete and exclusive sovereignty over the airspace above its territory." This principle was accepted by the Conference except that it substituted "every State" for "each Contracting State," thus bringing the wording of the article into conformity with the substance of Article 1 of the Paris Convention of 1919. The American draft did not preclude an interpretation differing from that article.

The delegates at Chicago had difficulties enough trying to reach an accord on controversial air transport problems without attempting to determine the exact meaning of the term "airspace." As there did not appear to have been any serious efforts to make use of outer space at the time of the adoption of the Paris and Chicago air navigation conventions, there was no real necessity to attempt to spell out just how far above the surface of the earth the various governments would exercise sovereignty over the airspace. In other words, there was a presumption that any aircraft flying into or across the territory of any Power would necessarily be operating within the airspace over which such Power had sovereignty. It is not recalled that any pilot of aircraft charged with flying over the territory of some state without its prior authorization was ever able to interpose the defense that he was not operating through the airspace but was navigating in outer space beyond the earth's atmosphere.

In connection with the foregoing, it is of interest to consider what bearing the action of Soviet Russia in sending up its "Sputniks" and the action of the United States in sending up its own "Explorers," apparently without either government finding it necessary to take up the matter in advance with other governments, may have had on the sovereignty provisions of the Paris Convention of 1919 as carried over into the Chicago Convention of 1944. Soviet Russia never became a party to either convention, although it seems very clear that the U.S.S.R. is in full accord with the international law doctrine of national sovereignty over the airspace, since it has strictly adhered to and enforced the requirement that its prior permission be obtained for flights by foreign aircraft over Soviet territory. Perhaps the strongest argument against the necessity for obtaining prior permission from foreign governments before launching space ships, missiles, satellites, *et cetera*, is that apparently no government, in the present state of the art, so far as is known, is in a position to control the movements of such vehicles or objects once they are placed in orbit. In other words, it may be that there is too much uncertainty as to the identity of the countries whose airspace might be penetrated to render it feasible to take up the matter intelligently with foreign governments before sending up such vehicles or objects. However, as seeming to have



some bearing on the problem, attention is called to Article 8 of the Chicago Civil Aviation Convention of 1944, which carries over a similar provision from the Paris Convention of 1919. Article 8 of the Chicago Convention reads as follows:

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

While the above quotation may not be exactly in point, since it refers to the movement of air-supported vehicles, it does appear to indicate a desire to guard against the entry of uncontrolled vehicles into the airspace.

The writer merely submits as a point for study the above comment in regard to the actions of the Soviet Union and the United States in launching "satellites" in outer space, and does not undertake to express a definite opinion as to whether a different procedure should have been followed. It will be recalled that one of the Soviet "Sputniks" was propelled by a rocket which the Russians alleged had fallen on United States territory. Although United States officials disclaimed any knowledge of the rocket's fall on American territory, it would seem that such incidents might have special significance in a consideration of the doctrine of sovereignty over the airspace. It is realized, however, that prior consultation with, and possibly obtaining consent of, other governments before sending up a satellite would not be as simple as the requests that have been made in the past for permission to fly aircraft over the territory of a foreign state, which ordinarily required furnishing only such basic data as the type of plane and the route to be flown over, as well as the purposes and duration of the flight. Perhaps the United States and the Soviet Union have in effect adopted the only practical course to be followed in sending up their satellites, and since other governments generally do not appear to have taken exception to these exploits, there is reason to assume that, at least until some international accord on the subject is reached, such course of action may become a generally accepted international practice.

It may be true that there has not yet been sufficient experience in the exploration of outer space to afford a basis for an international agreement covering many of the important problems that would doubtless arise in the "space age," but it would not be premature to undertake some preliminary studies of the matter.) Experience has shown that there is a tendency to postpone the solution of problems that are new and difficult, especially when many are inclined to the belief that such solution may not be especially urgent, but in this connection it should be realized that it takes a very long time, usually a period of years, to reach agreement on new and fundamental issues in the relations between nations. In the circumstances, the sooner appropriate studies of such issues are made, the better it will be for all concerned. In this connection, it would seem to be desirable to endeavor to reach an international understanding as soon as may be practicable on the scope of the international rule that each nation

has absolute sovereignty over the airspace above its territory. This would appear to be necessary in order to avoid overlapping with possible future agreements regarding the use of outer space. It seems to be unlikely that the various governments will be disposed to relinquish their control of the airspace above their territories. In the circumstances it is believed that, notwithstanding the difficulties to be encountered in endeavoring to arrive at a solution, a serious effort will have to be made to reconcile the sovereignty provision of Article 1 of the Chicago Convention of 1944 with any international agreement that may be entered into for the use of outer space. Otherwise a very serious jurisdictional problem may very well arise.

The opinion has been expressed in some quarters that existing air navigation agreements have little, if any, bearing on the question of movement of objects in outer space, since such agreements were not concluded for the specific purpose of regulating the movement of objects in outer space. As a matter of fact, air navigation agreements, insofar as they have established the international rule that each state has absolute sovereignty over the airspace above its territory, have a very important bearing on movements in outer space. It is believed to be conceded that a rocket, missile or other contrivances, or parts of such contrivances, intended for outer space, sent up by the authorities of one government, could conceivably fall to the surface through the airspace over which some other government has absolute sovereignty under a rule of international law well established by international agreements and practice. The fall of such objects could possibly do great damage on the surface and constitute an infringement of such sovereign rights. The possibility of a rocket or missile falling on a vessel at sea appears, for the present at least, to be rather remote. However, if there should be such an incident, the question might arise whether it would constitute an infringement on the right of freedom of the seas.

Although it is recognized that any efforts to reach an international agreement on outer space might be difficult and tend to retard the efforts of certain governments to explore outer space, it is believed that because of the great importance of the matter some form of international agreement should be sought. The fall of objects through the airspace of some country might not only be a cause of alarm, but might even have serious international repercussions. While it might be much more difficult to reach international agreement on outer space than it would be to conclude an air navigation agreement such as those that have been entered into in the past, it would appear desirable that as a beginning, at least, some international rule might be adopted whereby a government would be required to give advance notification of its intention to send up a rocket or other contrivance into outer space.<sup>2</sup> Perhaps in the meantime a more detailed international agreement on the subject could be under study.<sup>3</sup> In any

<sup>2</sup> See Myres S. McDougal, "Artificial Satellites: A Modest Proposal," 51 A.J.I.L. 74 (1957).

<sup>3</sup> See Loftus E. Becker, "The Control of Space," 39 Dept. of State Bulletin 416 (1958); and note by Taubenfeld above, p. 400.

case, it would not be premature to reach a general international understanding that whatever exploitation of outer space is undertaken shall be solely for peaceful purposes. The use of outer space for military purposes would be so terrifying as to make it mandatory to reach an early agreement on the use of such space for peaceful purposes.<sup>4</sup>

Many eminent scholars have given the world the benefit of their views with regard to the many problems in the fields of law and science which they think would arise in connection with the use of outer space. In general, however, it has been much easier to outline the problems than it has been to offer any satisfactory solutions. In some instances, however, there even seems to be considerable confusion as to what the real problems are. There have been discussions and debates on many technical subjects pertaining to outer space, including such matters as the difference between air and atmosphere; the height of airspace above the surface of the earth (some suggesting that it might be as high as 60,000 miles); claiming sovereignty over the moon and other celestial bodies or developing their mineral resources; rules for inter-planetary travel; settlements for damages that might be caused by the fall of objects sent into outer space, *et cetera*. It is extremely difficult to understand how practical application of many of the theories advanced could be given to a sort of "no man's land" where developments in the fields of physical science and law are in such a nebulous state.

While all these discussions have been enlightening and helpful as showing the nature of problems that may arise, it is believed that such discussions and debates will continue indefinitely without any concrete results unless some international accord is reached as to what the actual problems are and as to what solutions are called for.

While it is thought that the International Civil Aviation Organization (ICAO) or some other agency of the United Nations might consider certain specialized subjects with reference to outer space, a general international conference on outer space<sup>5</sup> should first be held, in the spirit of international co-operation and good will, in order that the scientists may have a full opportunity to give some indications as to what seems feasible to accomplish. Such a conference might tend to clarify the atmosphere, or the controversial airspace, and thus bring the experts back to earth long enough to get their bearings. The legal profession should then be in a better position to develop the legal principles to be applied to outer space.

STEPHEN LATCHFORD \*

<sup>4</sup> See statement in Committee I by the U. S. Representative to the U. N. General Assembly, Jan. 14, 1957, and the U. S. Memorandum of Jan. 12, 1957, 36 Dept. of State Bulletin 225 *et seq.* (1957).

<sup>5</sup> See "Space Law and the Fourth Dimension of Our Age," speech of the Hon. Kenneth B. Keating before the 9th Annual Congress of the International Astronautical Federation, The Hague, Aug. 29, 1958; reprinted in *Space Law—A Symposium*, *op. cit.* note 1 above, p. 419.

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## LEGAL STATUS OF THE GULF OF AQABA

The following geographical and historical information obtained during the writer's research on the Gulf of Aqaba<sup>1</sup> amplifies, substantiates and contradicts some of the arguments in Mr. Selak's excellent article on the subject.<sup>2</sup>

1. Due to the prevalence of strong northerly winds, the confined waters of the Gulf are very difficult to navigate by northbound sailing vessels. As a result, the Gulf was rarely used by ships prior to the advent of steam navigation. Probably King Solomon and the Crusader, Reynald de Chatillon, were the Gulf's sole early users, and they made only one or a few trips. Instead, Turks, Arabs, Nabateans, Romans, and probably their predecessors, used ports on the open Red Sea for their trade with the south and east. For the same reason, Moslem pilgrim sailing ships do not appear to have used the Gulf, and the writer has not discovered any recorded reference to such traffic. After construction of a road from Egypt about 1840, Aqaba became a land staging point for pilgrims, without, however, handling any maritime traffic. Edible fish are not plentiful in the Gulf and, until after World War I, there were no fishing vessels there. These conclusions are supported by the works of many explorers, historians, and archaeologists; for example, Baron Jean de Laborde (1836), A. C. Parker (1906), T. E. Lawrence (1914), Ph. Scherti (1936), James Hornell (1947), G. W. Murray (1953), Sir Mortimer Wheeler (1954), Hermann von Wissmann (1956). Due to the absence of ships or even boats in the Gulf, both Laborde and Lawrence had to construct rafts to visit the Crusader ruins on the Isle de Graye (Gezira Firoun in Arabic, also known as Pharaon Island), an island about 400 yards offshore near Taba (Egypt). The mangrove forest growing offshore near Dahab (Egypt) also speaks for the absence of sailing in the Gulf. In this treeless region a forest of this nature would have been cut by sailors for lumber or firewood, similar to the nearly eradicated mangrove forests on the African shore of Egypt, or the mangrove forests of East Africa, which to this day are exploited by mariners from Kuwait.

2. The introduction of steam navigation into the Red Sea about 1837 did not bring traffic to the Gulf until 1917, when the British Government

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engaged in the study of international aviation problems prior to his retirement from the Department in 1948. He was Chairman of the U. S. Section of OITEJA (Comité Internationale Technique d'Experts Juridiques Aériens), Vice Chairman of the U. S. Delegation to the Fourth International Conference on Private Air Law, 1938, and an Adviser to the U. S. Delegation to the International Civil Aviation Conference at Chicago in 1944.

The writer is the author of an article entitled "Freedom of the Air," in the Department of State publication, "Documents and State Papers," Vol. I, No. 5, August, 1948. He is also the author of a number of other articles on international air law appearing in the same Department of State publication and in other publications.

The statements in the present note are his own opinions or observations and do not necessarily reflect the views of any official or agency of the United States Government.

<sup>1</sup> Partly published as the "Political Geography of the Gulf of Aqaba," in 47 *Annals of the Association of American Geographers* 231-240 (1957).

<sup>2</sup> 52 *A.J.I.L.* 660-698 (1958).

commenced to supply its troops in Ottoman territory by this route. Mr. Chaim Weizmann, later first president of Israel, traveled this way at the end of World War I. With the end of that war this traffic halted and was not resumed until the middle nineteen-thirties, when a road was built connecting the then terminal of the Hejaz railroad at Maan with Aqaba. However, substantial commercial tonnages were not handled in the Gulf before 1952. Jordan always received and dispatched most of this traffic (201,000 tons in 1955). Israel handles substantially less dry cargo than Jordan, but may now receive more liquid tonnage. By numbers British ships predominate, followed by Scandinavian, German, *et cetera*, vessels. Ships flying the flags of Arab states are rare and have appeared only recently, especially since 1950. Apart from small primitive fishing vessels, these are usually surplus World War II tank-landing ships, which deliver occasional cargoes to points on the Saudi Arabian shore. Pilgrims travel in chartered vessels flying the flags of all major maritime nations. Due to the existence of motorable tracks in Sinai Peninsula, Egypt makes virtually no use of the Gulf. There is no traffic between Egypt and Saudi Arabia across the Gulf, nor between Egyptian or Saudi Arabian points in the Gulf and any other Arab state.

3. The first survey of the Gulf was made with difficulty by the British Indian sailing ship *Palinurus* in 1832. Subsequent surveys—all British—provide all the available nautical information on the Gulf which has been reprinted or copied by map-makers of many nations. The names of the entrances to the Gulf—the Enterprise and Grafton Passages—similarly attest to the rather recent establishment of navigation in the Gulf.

4. Due to the absence of any defined sovereignty in the Gulf, Laborde claimed Isle de Graye for France in 1830. He based his claim on his visit to the island, occupation by Crusaders from France from 1115 to 1170, and the absence of any subsequent claim or of any other recent residents or visitors. To this day, this small rocky, waterless island is important to small ships, for its lee side offers the only shelter from storms in the northern portion of the Gulf. Due to the absence of navigation in the Gulf during the decades following Laborde's visit, his claim lapsed. T. E. Lawrence is not certain if all the ruins of Isle de Graye originated in Crusader times, or whether some are the relics of later additions dating up to the 18th century. Irrespective of the origin of these ruins, he is certain that the shoddy nature of their construction indicates temporary use only. This again accords with lack of regular navigation in the Gulf.

Research supports the view that navigation rights have definitely been established in the Gulf of Aqaba by nations other than the Arab states. Use of the Gulf by Arab states, particularly for pilgrim travel, followed only upon the pioneering efforts of other nations. The significance of foreign, rather than local, trade in the region of the Gulf is also indicated by the exclusion of Sinai Peninsula from Egyptian customs territory.

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## THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

The United Nations Conference on International Commercial Arbitration, which convened from May 20 to June 10, 1958, in New York, resulted from a proposal of the International Chamber of Commerce to the Economic and Social Council of the United Nations to conclude a convention on the enforcement of foreign arbitral awards.<sup>1</sup> Previous international agreements on commercial arbitration, namely, the Geneva Protocol on Arbitration Clauses of September 24, 1923, and the Convention on the Execution of Foreign Arbitral Awards of September 26, 1927,<sup>2</sup> were no longer adequate to the needs of an ever-increasing world trade. On April 6, 1954, the United Nations Economic and Social Council, in Resolution 520 (XVII),<sup>3</sup> established an *Ad Hoc* Committee, composed of representatives of eight member states, to study the draft convention of the International Chamber of Commerce. The Committee included representatives of Australia, Belgium, Ecuador, Egypt, India, Sweden, the Union of Soviet Socialist Republics, and the United Kingdom. It met in March, 1955, after having received comments from various governments on that draft convention.<sup>4</sup> The *Ad Hoc* Committee in turn prepared and submitted a draft convention<sup>5</sup> and an accompanying report.<sup>6</sup> This Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the report were submitted, pursuant to Resolution 570 (XIX) of the Economic and Social Council of May 20, 1955,<sup>7</sup> to member governments and non-members of the United Nations for their comment. In addition, the draft was transmitted to those "non-governmental organizations in consultative status as may be interested in international commercial arbitration." The ensuing observations on the draft convention, and further comments of the various governments on "the desirability of convening a conference to conclude a convention" were submitted in the Secretary General's report to the Economic and Social Council.<sup>8</sup> The Council, in Resolution 604 (XXI) of May 3, 1956,<sup>9</sup> decided to call a conference for the conclusion of a convention on the recognition and enforcement of foreign arbitral awards and, further, "to consider, if time permits, other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes and to make such recommendations as it may deem desirable." The Secretary General was further requested

<sup>1</sup> Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention, Brochure 174 (1958); U.N. Doc. E/C.2/373.

<sup>2</sup> 27 League of Nations Treaty Series 158, and 92 *ibid.* 301; also reprinted in International Trade Arbitration: A Road to World-Wide Cooperation 283, 285 (ed. Martin Domke, 1958).

<sup>3</sup> U.N. Economic and Social Council, 17th Sess., Official Records, Supp. No. 1.

<sup>4</sup> U.N. Doc. E/AC. 42/1.

<sup>5</sup> U.N. Doc. E/AC. 42/4/Rev. 1 and Corr. 1. The Draft Convention is also published in International Trade Arbitration, *op. cit.* 288.

<sup>6</sup> U.N. Doc. E/2704 and Corr. 1, of March 28, 1955.

<sup>7</sup> U.N. Economic and Social Council, 19th Sess., Official Records, Supp. No. 1A.

<sup>8</sup> U.N. Doc. E/2822, of Jan. 31, 1956, and Addenda 1 to 6. See also Memorandum by the Secretary General, Doc. E/2840 of March 22, 1956.

<sup>9</sup> U.N. Economic and Social Council, 21st Sess., Official Records, Supp. No. 1.

to "ask inter-governmental organizations, active in the field of international commercial arbitration, to submit brief reports on the progress of their activities on this subject, together with any comments or suggestions they may have." A Consolidated Report by the Secretary General, of April 24, 1958,<sup>10</sup> dealt with the status of these activities, and a Note dated March 6, 1958,<sup>11</sup> summarized all the comments and suggestions that had been submitted on the draft convention. The Note also drew attention to some of the major problems, to wit, the scope of the application of the convention, procedures and standards for the enforcement of awards, judicial control of the recognition and enforcement of awards, and the relationship between any new multilateral convention and other treaties or laws.

Forty-five states were represented at the Conference,<sup>12</sup> and, among inter-governmental organizations, the Hague Conference on Private International Law and the (Rome) International Institute for the Unification of Private Law. Finally, the International Chamber of Commerce, the International Law Association and the International Association of Legal Science, all non-governmental organizations, had observers who actively participated in the deliberations of the Conference.<sup>13</sup>

The deliberations of the Conference, both in plenary sessions and in *ad hoc* working parties,<sup>14</sup> resulted in a Convention on the Recognition and Enforcement of Foreign Arbitral Awards (for the text, see Annex below). The Convention, which was annexed to the Final Act of June 10, 1958,<sup>15</sup> was signed by 10 states<sup>16</sup> and, within the period open for signature (until December 31, 1958), by thirteen more states.<sup>17</sup>

The Conference further adopted a recommendation to the Economic and Social Council on other measures to increase the effectiveness of arbitration in the settlement of private law disputes, on the basis of the Secretariat's survey and analysis.<sup>18</sup> This recommendation (printed in the Annex below),<sup>19</sup> paragraph 16 of the Final Act, outlines as possible courses of action the collection and publication of information on existing arbitra-

<sup>10</sup> U.N. Doc. E/CONF. 26/4 (30 pp.).      <sup>11</sup> U.N. Doc. E/CONF. 26/2 (14 pp.).

<sup>12</sup> The United States was represented by a delegation consisting of W. T. M. Beale, Jr., Deputy Assistant Secretary of State for Economic Affairs, Chairman; Edmund F. Becker, Deputy Director, Office of Trade Promotion, Department of Commerce; John J. Czyzak, Office of Assistant Legal Adviser for Economic Affairs, Department of State; Seymour M. Finger, United States Mission to the United Nations; and Charles H. Sullivan, Trade Agreements and Treaties Division, Department of State.

<sup>13</sup> For a list of representatives and observers, see U.N. Doc. E/CONF.26/INF. 1/Rev. 2, of June 2, 1958, and Add. 1, of June 4, 1958.

<sup>14</sup> U.N. Docs. E/CONF. 26/SR. 1 to 25; E/CONF. 26/L. 1 to 63.

<sup>15</sup> U.N. Doc. E/CONF. 26/9/Rev. 1, of June 10, 1958.

<sup>16</sup> Belgium, Costa Rica, El Salvador, Federal Republic of Germany, India, Israel, Jordan, Netherlands, Philippines and Poland.

<sup>17</sup> Argentina, Bulgaria, Byelorussian S.S.R., Ceylon, Czechoslovakia, Ecuador, Finland, Luxembourg, Pakistan, Sweden, Switzerland, Ukrainian S.S.R., and U.S.S.R. Subsequently Israel ratified the convention, and Morocco and the United Arab Republic acceded to it. It will therefore come into force on June 7, 1959 (Art. XII (1)).

<sup>18</sup> U.N. Doc. E/CONF. 26/6 (12 pp.).

<sup>19</sup> Adopted by 35 votes in favor, to none against, with one abstention (Belgium).

tion facilities; prospects for the improvement of such facilities; technical assistance in developing arbitration; regional study groups or working parties on the subject; assistance in establishing impartial machinery and the preparation of model laws on arbitration.

The Conference considerably amended the text of the Draft Convention prepared by the *Ad Hoc* Committee. Most of the changes concerned questions of private international law; for example, an addition to the definition of arbitral awards (Article I) to include those made by permanent arbitral bodies, and thus to take into account arbitration bodies in those countries with planned economies where awards are rendered by state arbitral tribunals.<sup>20</sup> The Convention also applies to awards "not considered as domestic awards in the state where their recognition and enforcement are sought" (Article I(1)).<sup>21</sup> Article II requires contracting states to recognize the validity of arbitration agreements in writing,<sup>22</sup> and the courts of such states, when resorted to in matters which the parties had agreed to arbitrate, to refer the parties to arbitration when requested to do so by one of the parties.

Enforcement shall be had in accordance with the procedural rules of the forum under conditions and standards laid down in the Convention, *i.e.*, limitations on fees and charges have been added to prevent substantially more onerous conditions being imposed than prevail with respect to domestic awards, thus providing essentially national treatment in the matter of administrative conditions.<sup>23</sup>

The most important feature of the new Convention appears to be that the party seeking enforcement in the country of the debtor need only produce the award itself (or a certified copy of it) and the agreement to arbitrate. The burden is now (in contrast to the Geneva Protocol of 1923) on the losing party to prove that the award has not become "binding" or has been set aside or suspended.<sup>24</sup>

<sup>20</sup> The entire plenary session of May 28, 1958, was devoted to the debate on that provision. It was rightly stated by the Italian representative that the crucial point was not "whether the body was permanent or specially appointed, but whether there was an element of compulsion in the submission." U.N. Doc. E/CONF. 26/SR. 8, p. 3.

<sup>21</sup> It appears that Art. I(1) of the Convention, speaking of "persons, whether physical or legal," would also apply to corporate bodies under public law, and particularly to states in their capacity as entities having rights and duties under private law, as expressly stated by Austria (U.N. Doc. E/2822, Annex I B). In extensive deliberations on Art. I, this matter was, however, not further discussed at the Conference.

<sup>22</sup> Corresponding to the American concept (*e.g.*, sec. 1449, New York Civil Practice Act) that arbitration agreements "in writing" need not be signed by the parties, but may be evidenced by "an exchange of letters or telegrams."

<sup>23</sup> During the debate of May 29, 1958, the United States representative said that the principle of national treatment "deserved serious consideration in any situation in the arbitral process in which discrimination based on nationality was possible." U.N. Doc. E/CONF. 26/SR. 10, p. 3.

<sup>24</sup> See Andrew J. Bateson, "The 1958 Convention on Foreign Arbitral Awards," *The Journal of Business Law* (London) 1958, p. 393.

On the other hand, the court may still find the award incompatible with the public policy of the forum (Art. V(2)). For a recent discussion of that issue (under Dutch law), see Nolzen, "Openbare Orde en Arbitrage," *Arbitrale Rechtspraak*, No. 454 (October, 1958), p. 289.



Among the questions which relate to issues of public international law, reciprocity was extensively discussed at the Conference. Article XIV, added at the final (24th) meeting of the Conference, states that a contracting state shall not be entitled to avail itself of the Convention against other contracting states, except to the extent that it is itself bound by the Convention. In other words, the rights of a contracting state are limited to the scope of its own obligation, as, for example, by reason of the federal-state clause.<sup>25</sup> Article XI, the "federal and non-unitary State" clause, indeed makes allowance for countries having a federal system of government. The article requires a federal state to determine whether particular articles of the Convention come within the jurisdiction of the central or local authority. Only in the former case are the articles of the Convention fully binding, as for instance, in the Federal Republic of Germany,<sup>26</sup> where the States (*Laender*) have no jurisdiction at all in arbitration matters. In other cases, with concurring and even somewhat overlapping jurisdiction such as in the United States,<sup>27</sup> or in Canada<sup>28</sup> or Switzerland,<sup>29</sup> where the federal power has no legislative authority on arbitral matters, the central government is only obligated to bring the articles of the Convention to the attention of the local authorities with a favorable recommendation (Article XI(1b)). The federal-state clause was accepted against the votes of the "Iron Curtain" countries, which alleged that it "placed federal States in a privileged position by permitting them to evade some of the obligations imposed by the Convention,"<sup>30</sup> a reason why the Commission on Human Rights had "rejected the federal clause when it prepared the drafts of international conventions on human rights."<sup>31</sup>

With respect to reservations, the Final Act states in paragraph 14 that the Conference decided, without prejudice to other provisions of the Convention (Articles I(3), XI, and XIV), that "no reservations shall

<sup>25</sup> A Yugoslav amendment to limit the Convention to awards made between persons "subject to the jurisdiction of one of the Contracting States" (U.N. Doc. E/CONF. 26/L. 12) was not adopted. As a result of this negative vote, the Yugoslav representative felt compelled to abstain from the final vote on the Convention as a whole (U.N. Doc. E/CONF. 26/SR. 24, p. 11). See also Aleksandar Goldstajn, "Submission to Arbitration of Disputes with a Foreign Element," 5 *Jugoslovenska Revija za Medunarodno Pravo* 118 (1958).

<sup>26</sup> See R. Bernhardt, *Der Abschluss voelkerrechtlicher Vertraege im Bundesstaat. Eine Untersuchung zum deutschen und auslaendischen Bundesstaatsrecht* (1957).

<sup>27</sup> See John Czyzak and Charles H. Sullivan, "American Arbitration Law and the U.N. Convention," 13 *Arbitration Journal* 197 (1958).

<sup>28</sup> Cf. William Eaton, "Canadian Judicial Review and the Federal Distribution of Power," 7 *A. J. Comp. Law* 47, 57 (1958).

<sup>29</sup> See Robert V. Looper, "The Treaty Power in Switzerland," 7 *A. J. Comp. Law* 178 (1958). The Chairman of the Swiss Delegation, Professor Pierre Jean Pointet, stated in a pamphlet, "*La Convention de New-York sur l'exécution des sentences arbitrales étrangères*" (Zurich, 1958), p. 22: "Etant donné que la procédure d'arbitrage relève dans notre pays de la compétence des cantons, il était opportun, du point de vue politique, que la Confédération prenne préalablement contact avec ces derniers."

<sup>30</sup> Statement of the Polish representative, U.N. Doc. E/CONF. 26/SR. 20, p. 5.

<sup>31</sup> Statement of the Czechoslovakian representative, *ibid.*, p. 6.

be admissible to the Convention."<sup>82</sup> However, a reservation maintained in Article I(3) established reciprocity inasmuch as the countries may apply the Convention only to awards rendered in the territory of another contracting state. Otherwise the country would have to apply the Convention to awards rendered in any foreign country, whether the latter was a contracting party or not. Thus, the concept of universality in Article I(1) has been considerably qualified by the option of reciprocity.

The second reservation in Article I(3) allows countries to enforce awards only in cases of controversies arising out of legal relations considered to be commercial under their national law.<sup>83</sup> Such a provision accommodates countries which provide for arbitration only in matters under their commercial code, *e.g.*, Belgium, which has separate civil and commercial codes.<sup>84</sup>

Among the final clauses, those on the relationship between the new Convention and other arbitration treaties should be noted. Existing bilateral and multilateral treaties are covered by a saving clause (Article VII) of particular interest to the United States, in view of its recent treaties of friendship, commerce and navigation, which contain provisions for the mutual recognition of arbitration agreements and enforcement of awards rendered thereunder.<sup>85</sup>

The so-called colonial clause of Article X makes allowance for countries wishing to extend the Convention to autonomous or semi-autonomous dependent areas, a clause adopted against the vote of the "Iron Curtain" countries, which considered it an "obsolete provision which took no account of the movement of peoples towards independence."<sup>86</sup>

The articles dealing with signature and accession, although in the form usually adopted in conventions concluded under United Nations auspices,

<sup>82</sup> This proposal received 24 votes in favor with only 2 against, and 6 abstentions, U.N. Doc. E/CONF. 26/SR. 23, p. 12. Argentina and Guatemala made the following reservations to Art. X, included in par. 15 of the Final Act (note 15 above):

"If another Contracting Party extends the application of the Convention to territories which fall within the sovereignty of the Argentine Republic, the rights of the Argentine Republic shall in no way be affected by that extension."

"The Delegation of Guatemala will vote in favour of Article X of the Convention on the express understanding that it cannot affect or detract from the rights of Guatemala over Belize (improperly called British Honduras), if the Power occupying that part of Guatemala's national territory should at any time extend this Convention to that territory."

<sup>83</sup> However, the phrase in Art. I(3) "legal relationships whether contractual or not" appears also to cover other disputes, such as damage claims which might come within the scope of the commercial code.

<sup>84</sup> The Turkish representative stated that "it was not correct to regard the commercial clause as a reservation. In addition to France and Belgium, it would benefit Turkey, in which commercial law was distinct from civil law." U.N. Doc. E/CONF. 26/SR. 23, p. 9.

<sup>85</sup> See Herman Walker, Jr., "Commercial Arbitration in United States Treaties," 11 *Arbitration Journal* 68 (1956); and "United States Treaty Policy on Commercial Arbitration 1946-1957," in *International Trade Arbitration*, *op. cit.* note 2, at p. 49.

Also *cf.* "Table of Bilateral Conventions relating to the Enforcement of Arbitral Awards and the Organization of Commercial Arbitration Procedure," prepared under the auspices of the United Nations Economic Commission for Europe (U.N. Publication 1957. II. E/Mim. 18).

<sup>86</sup> U.N. Doc. E/CONF. 26/SR. 20, p. 4.

permit signature or accession by any country to which an invitation has been addressed by the General Assembly of the United Nations (Articles VIII(1) and IX). This provision was unsuccessfully opposed by the United States<sup>37</sup> for the reason that it would permit signature by unrecognized regimes. On the other hand, a Polish suggestion<sup>38</sup> that would have opened the Convention directly to signature by "all states" was rejected, after lengthy speeches for and against the principle of universality.<sup>39</sup>

The position of the United States, which participated actively in the deliberations of the Conference, though it did not sign the Convention, will be essentially pragmatic. It was expressed by the Delegation's Chairman in his opening statement:

the variations in arbitration concepts, law and practice among the countries represented here suggest strongly that flexibility of approach is desirable, and that the variety of problems presented may require indeed a variety of solutions. . . . In its study of arbitration law and practice in the United States and throughout the world, the United States has been particularly impressed by the value of the pragmatic approach. . . . The discussion of practical arbitration problems gives promise of the beginnings of important and useful work. The United States attaches importance to such an exchange of views as affording a basis for sound and enduring progress.<sup>40</sup>

To the United States, the bilateral treaty approach, in its new commercial treaties (note 35 above), appears preferable to the multilateral convention concept, all the more since it lacks a sufficient domestic legal basis in the arbitral statutes of the various States of the Union for an advanced international convention.<sup>41</sup>

On the other hand, the United States, in furtherance of its foreign economic policy, may well take an increased interest in implementing the recommendations for post-conference study of measures to increase the effectiveness of international commercial arbitration (note 19 above), through participation in organs of the United Nations and other appropriate bodies. Thus, the United States has participated in deliberations on commercial arbitration by the Economic Commission for Asia and the Far East,<sup>42</sup> and the *Ad Hoc* Working Group on Arbitration of the Committee on the Development of Trade, Economic Commission for Europe. The latter prepared a *Handbook of National and International Institutions Active in the Field of International Commercial Arbitration*<sup>43</sup> which also

<sup>37</sup> U.N. Doc. E/CONF. 26/SR. 19, p. 3.      <sup>38</sup> *Ibid.*, p. 4.

<sup>39</sup> *Ibid.*, p. 9.

<sup>40</sup> U. S. Mission to the United Nations, Press Release No. 2930, May 21, 1958.

<sup>41</sup> See note 27 above. Signature by the United States is also considered unlikely by the Chairman of the West German Delegation, Professor A. Buelow, "in view of the controversies relating to the treaty-making power of the Federal government." *Aussenwirtschaftsdienst*, 1958, p. 146.

<sup>42</sup> Cf. Commercial Arbitration Facilities, Report of the Executive Secretary, Economic Commission for Asia and the Far East, Committee on Industry and Trade, Sub-Committee on Trade, Doc. E/CN. 11/I & T/Sub. 4/5, of Oct. 18, 1954 (40 pp.). Cf. also Docs. E/ON. 11/Trade/L. 19 of Dec. 31, 1958, and L. 21 of Jan. 22, 1959.

<sup>43</sup> Final version (5 vols., 621 pp.), Trade W[orking] P[arty] 1/15, Rev. 1, Dec. 3, 1958.

covers institutions in the United States active in the field of commercial arbitration.

Undoubtedly, the acceptance of the new Convention by as many states as possible will facilitate the task of private commercial arbitration by providing fair and speedy settlement of trade controversies. That this is true is evidenced by the fact that provisions of the Convention, having been considered by the United Nations Conference, have already received a measure of acceptance by expert representatives of different legal systems. Implementation of various means of increasing the effectiveness of international commercial arbitration will give further new impetus to the effective settlement of foreign trade controversies.

MARTIN DOMKE

#### ANNEX

##### CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

*Adopted by the United Nations Conference on International Commercial  
Arbitration, June 10, 1958<sup>1</sup>*

#### ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.

#### ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

<sup>1</sup> U.N. Doc. E/CONF. 26/8/Rev. 1.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

#### ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

#### ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) the duly authenticated original award or a duly certified copy thereof;
- (b) the original agreement referred to in Article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains

decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

#### ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

#### ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other state which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to

the Statute of the International Court of Justice, or any other state to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

#### ARTICLE IX

1. This Convention shall be open for accession to all states referred to in Article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### ARTICLE X

1. Any state may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the state concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the state concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each state concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the governments of such territories.

#### ARTICLE XI

In the case of a federal or non-unitary state, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal government shall to this extent be the same as those of Contracting States which are not federal states;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal state party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the

United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

#### ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each state ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such state of its instrument of ratification or accession.

#### ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any state which has made a declaration or notification under Article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

#### ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

#### ARTICLE XV

The Secretary-General of the United Nations shall notify the states contemplated in Article VIII of the following:

- (a) Signature and ratifications in accordance with Article VIII;
- (b) Accessions in accordance with Article IX;
- (c) Declarations and notifications under Articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with Article XII;
- (e) Denunciations and notifications in accordance with Article XIII.

#### ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.



2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the states contemplated in Article VIII.

RESOLUTION OF THE UNITED NATIONS CONFERENCE ON  
INTERNATIONAL COMMERCIAL ARBITRATION

*June 10, 1958*

*The Conference, believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,*

*Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General, document E/CONF.26/6,*

*Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,*

*Expresses the following views with respect to the principal matters dealt with in the note of the Secretary-General:*

1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations, and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts;

2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing

organizations, and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation.

*Expresses the wish* that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future.

*Suggests* that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations.

*Requests* that the Secretary-General submit this resolution to the appropriate organs of the United Nations.

#### THE 47TH CONFERENCE OF THE INTER-PARLIAMENTARY UNION

It was more or less of an experiment for the Inter-Parliamentary Union to hold a conference in Latin America. Only four Latin American states were members, Argentina, Brazil, Haiti and Peru; but, on the other hand, that could be a reason for selecting Rio de Janeiro as the seat of the Conference, held from July 24 to August 1, 1958; and, as a matter of fact, three additional Latin American states, Chile, Panama and Paraguay, participated in the meeting, and were admitted as members. Canada and Uruguay sent observers, looking to membership later. In all, forty-five National Groups were officially represented out of a total membership of fifty-seven. Not all of the delegations, however, could be said to represent democratically elected parliaments, Czechoslovakia, Hungary, Poland and Rumania, among others, being present. The United States Delegation included four Senators and seven Representatives, Hon. Henry O. Talle acting as Chairman in place of Hon. Daniel A. Reed, President of the Group, who was unable to attend. Former Senator Homer Ferguson attended as honorary member of the Union.

Following its traditional procedure, the Conference promptly began its debate on the Secretary General's Report, which provides an opportunity for the members, within strict time limits, to expound the national policies of their countries and to raise the particular issues affecting their parliaments and peoples. Here the emphasis was upon world peace and the urgent need to find a solution for the existing tense international situation. In response to the appeals of numerous delegates, the Conference adopted as its first resolution an urgent call upon the parliaments of all countries to take the necessary measures to bring about an early convocation of a "summit conference" of representatives of states "to discuss the most urgent international problems in the interest of easing international tension."

The Economic and Financial Committee then presented its report on the investment of foreign capital in undeveloped countries, the discussion ranging over the whole field of governmental and international investment in contrast with the investment of private capital and the necessity of greater security for the private investor. A significant feature of the resolution taken on the subject was the proposal to adopt an international investments code and to create a guarantee fund, with recourse on the part of the private investor to an international court of justice.

The Committee on the Reduction of Armaments had before it two draft resolutions, one concerned with the Problem of Atomic Weapons and Nuclear Tests and the other with the Possibility of Establishing an International Police Force. There was general agreement on the first resolution, although regret was expressed that the appeal could not have been made in more positive terms; and the second also was adopted, favoring the establishment of such a force under the aegis of the United Nations, the two United States speakers advocating the strengthening of the present United Nations police force, and the delegate of the Soviet Union speaking against it, but failing to get majority support. The delegate of Iran spoke categorically in favor of the resolution.

Two significant draft resolutions were submitted by the Committee on Intellectual Relations and the Committee on Juridical Questions, the former calling for wider international co-operation in cultural and scientific matters, and the latter appealing for a free exchange of news, information and publications between libraries and cultural associations of the respective countries, and urging the members of the Union to adopt in their respective parliaments "the necessary measures to make means of communication accessible to all branches of opinion in such a way that information does not become a privilege or a way of controlling public opinion."

A final resolution came from the Committee on Non-Self-Governing Territories and Ethnical Questions, proclaiming the belief in the progressive development of democratic institutions in non-self-governing territories; proposing "rejection of all forms of colonial rule and subjection exercised by force upon the independence and freedom of another country," and solidarity with all colonized countries which "still fight for their autonomy"; but modifying these far-reaching policies by insistence that self-government must not be "detrimental to human rights and the institutional forms of coexistence."

A special feature of the meeting was the plenary session at which the Secretary General of the Organization of American States addressed the delegates, pointing out the fact that the Inter-Parliamentary Union was founded in the same year, 1889, in which the first International Conference of American States met in Washington. Both organizations had the same general objectives, although pursuing them in different ways, the Inter-Parliamentary Union seeking to bring the force of public opinion against war, and the Union of American Republics seeking to create a sense of solidarity which would prevent recourse to hostilities by means of co-operative economic relations. There was, however, a striking similarity

in the procedure of arbitration proposed by the Inter-Parliamentary Union and the Plan of Arbitration adopted at the Conference at Washington. The Secretary General then went on to describe the development of the inter-American system and its progress from the promotion of commercial relations to its present procedure of consultation and its principles of inter-American regional security, accompanied by far-reaching measures of economic, social and cultural co-operation.

The record of the Inter-Parliamentary Union in the cause of democracy and peace is outstanding and its successive annual meetings, brief as they are, offer an interesting contrast to the General Assemblies of the United Nations. The Union holds to its original purpose of providing a means of exchange of information between the members of national legislative bodies. It does not take sides in conflicts of a political nature between nations; it merely calls attention to fundamental principles of international conduct upon which peaceful relations depend. It maintains the democratic ideals of its founders; it is a unique meeting place where legislators of all shades of opinion can speak in their individual capacities without instructions from their governments or from the particular political party they may happen to represent.

But as the times are changing and new issues are arising to make concerted action on the part of the governments more imperative, the question has been put whether parliaments should not play a more active rôle in the decisions of foreign policy. This point is raised in an illuminating foreword in the current *Bulletin* of the Union in which the Secretary General of the Union, M. André de Blonay, urges that the Union make its voice heard against the use of force or the threat of force in international relations and in favor of the acceptance by all nations of common juridical principles. Emphasis is also put by the Secretary General upon what can be done by parliamentarians meeting in their individual capacities and in an atmosphere of complete freedom. This "free atmosphere" of the Inter-Parliamentary Conference may be said to be the essential condition of its effectiveness and the justification of its activities in the field of international relations otherwise reserved to the foreign offices of governments.

C. G. FENWICK

#### INTERNATIONAL ASPECT OF THE RECENT YUGOSLAV NATIONALIZATION LAW

On December 26, 1958, the Yugoslav National Assembly adopted "The Law on Nationalization of Buildings for Rent and Building Lots."<sup>1</sup> The main purpose of this law, as explained by responsible Yugoslav of-

<sup>1</sup> Official Gazette of the FPR of Yugoslavia, No. 52, Dec. 31, 1958. This law is similar to nationalization laws on buildings for rent and building lots which were enacted in other Communist-controlled states after World War II. Cf. for Albania, Decree No. 1835 and Edict No. 836 of March 22, 1954; for Bulgaria, Decree No. 630/1948, Official Gazette, No. 87 of April 15, 1948; for Communist China, Decree on Requisition of Houses and Building Lots of Dec. 1, 1950; for Hungary, Law No. 4 of Feb. 17, 1952, Official Gazette, No. 18/1952; for Rumania, Decree No. 92/1950, Official Gazette of April 20, 1950.

ficials, is to "eliminate the last traces of the capitalist economy" in the country," and thus to further integrate the Yugoslav socio-economic and legal systems into the present Socialist order of the state.<sup>2</sup> The law nationalizes all buildings with more than two apartments (in certain cases those buildings having more than three small one-room apartments), and all the building lots in urban communities. It became effective immediately, i.e., on the day of its passage, but its application in practice was left to special Nationalization Commissions to be formed within the respective Yugoslav administrative agencies.<sup>3</sup>

From the point of view of internal legal relations this law changed little, if anything, in respect to the actual rights of the owners of nationalized real estate as these rights had existed at the moment of the enactment of the law. The Yugoslav Government, on December 26, 1953, had issued its Decree on Management of Housing,<sup>4</sup> pursuant to which so-called House Councils were created in all the buildings having more than two apartments. These House Councils were put in charge of the administration of each building, its repairs and rent collection, under the supervision of the local People's Committee. Under this decree, the owner was entitled to use his apartment free of rent, if he lived in the house, but was obliged to contribute proportionally to the general maintenance expenses. If there was a balance left from the rent, the owner was entitled to receive up to ten percent of the gross rent income. He remained, however, the owner of record and, at least in theory, was permitted to dispose of his real property as he saw fit within the existing legal provisions. The new Law on Nationalization of Buildings abrogates private ownership as registered in the land records and in principle gives to the former owners as compensation ten percent of the gross annual rent income during a period of fifty years. This compensation can be capitalized, paid in various installments, or computed for a period shorter than fifty years, at the discretion of the Nationalization Commission.<sup>5</sup> In essence, the former house owners are bound to receive in the near future proportionally the same amount which they have been receiving during the last five years. The position of the building lot owners is more disadvantageous under the new law. Although they are deprived of their ownership immediately, they will be compensated in the same manner as the house owners, but only from the time when their lots are actually taken into possession by the community and used for building or other purposes.<sup>6</sup>

Since the new law nationalizes the real property of Yugoslav citizens

<sup>2</sup> See "Novi Odnosi" (New Relations), an article written by the Yugoslav legal expert, L. Gerskovic, in "Vjesnik," No. 4370, Zagreb, Dec. 28, 1958.

<sup>3</sup> Arts. 12 ff. and 54 ff. of the Law, Off. Gaz., cited above, pp. 1222 and 1225 ff.

<sup>4</sup> Decree No. 432, Official Gazette, No. 52 of Dec. 26, 1953. Similar legal provisions about the management of housing still exist in Czechoslovakia and Poland, where the buildings for rent and building lots have not yet been generally nationalized. Cf. for Czechoslovakia, Law on House Management, No. 67/1956, Official Gazette of Dec. 27, 1956; for Poland, Law on the Public Management of Premises of Dec. 21, 1945, as amended by Decrees No. 343/1950, No. 75/1951 and No. 55/1955.

<sup>5</sup> Arts. 42 ff. of the Law, Off. Gaz., cited above, p. 1224.

<sup>6</sup> *Ibid.*, Arts. 38 and 47.

and foreigners alike, two questions arise from the point of view of international law: (a) Does this nationalization law violate any of the international agreements concluded between Yugoslavia and other countries, in particular, the agreements concluded between Yugoslavia and the United States? (b) Do the provisions of this law meet the generally accepted standards of nationalization, as interpreted by international law, and if not, what remedies are available to the foreign owners of nationalized property to request and to receive adequate compensation?

Answering the first question, it should be said at the outset that this nationalization law does not violate any of the international agreements concluded between the new Yugoslavia or recognized by her after World War II. In none of her international agreements has Yugoslavia assumed the obligation not to nationalize or expropriate the property of aliens or to take such property only under specific procedure or provisions.<sup>7</sup> With the United States Yugoslavia has concluded two relevant agreements: the Convention on Commerce and Navigation of October 14, 1881, with what was then Serbia,<sup>8</sup> and the Agreement regarding Certain Pecuniary Claims of July 19, 1948.<sup>9</sup> The Convention of 1881, Article 2, recognizes equal rights of the citizens of one country to own, hold and dispose of personal and real property in the other country. But unlike similar agreements concluded between the United States and some other countries after World War II,<sup>10</sup> this convention does not mention what standard and procedure are to be applied in cases of expropriation or other taking of foreign property. This is understandable, since at that time nationalization as a general economic and political measure was unknown, while individual expropriations were adequately covered by the local laws, which assured full protection to the foreign owners in receiving fair compensation for their property.<sup>11</sup> The Agreement of July 19, 1948, was signed primarily to provide compensation to American owners of property in Yugoslavia whose assets had already been nationalized or otherwise taken under previous nationalization laws, but it also fails to provide the procedure to be adopted in any future nationalization of American property in Yugoslavia. Moreover, the Agreement (Article 5) says only that:

The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets

<sup>7</sup> Cf. Yugoslav-American Agreement of July 19, 1948, 62 Stat. 2658, or Swiss-Yugoslav Agreement of Sept. 28, 1948, Yugoslav Official Gazette, No. 16 of 1949.

<sup>8</sup> 2 Malloy, *Treaties* 1613. This convention was recognized as valid after World War I by Yugoslavia.

<sup>9</sup> Note 7 above.

<sup>10</sup> Cf. the Treaty of Friendship, Commerce and Navigation between the United States and The Netherlands, of March 27, 1956, or the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea of Nov. 28, 1956, U. S. *Treaties and Other International Agreements*, Vol. VIII, pp. 2043 and 2219. Both treaties in their articles VI(4) provide as follows: "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public interest (purpose) nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

<sup>11</sup> Art. 217 of the Serbian Civil Code of 1844, and Art. 365 of the Austrian Civil Code of 1852.

in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia or any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.<sup>12</sup>

Since the nationalization law of December 26, 1958, treats aliens and Yugoslavs alike, it is evident that American assets in Yugoslavia were nationalized "on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia." Hence it is safe to conclude that none of the relevant Yugoslav-American agreements were directly violated by the recent Yugoslav law.

The picture is entirely different, however, if this new nationalization law is examined from the point of view of general principles concerning the standards of nationalization in international law as accepted by the United States.

It is generally agreed that a sovereign government has the right to nationalize or expropriate private property of foreigners for public purposes, provided the owners thereof receive adequate, effective and prompt compensation.<sup>13</sup> In the present Yugoslav nationalization law this is not the case. The ten percent of annual gross rent income of a building, which is provided as total compensation, is computed on the basis of the present rent which, due to strict rent control, is only slightly higher than the prewar rent, while, on the other hand the dinar currency has devaluated in the same period to approximately one twentieth of its prewar value. In practice this means that for a house appraised at \$10,000.00 in 1938 the owner may receive approximately \$100.00 during a period of fifty years. Clearly, this makes the compensation not only inadequate and ineffective but also not prompt.

It appears that the Yugoslav Government was fully aware of the inadequacy of compensation as established by international legal standards and has therefore envisaged the possibility of a special procedure to be adopted for the payment of compensation to foreign nationals. Article 77 of the new nationalization law provides:

The Federal Executive Council is authorized to enact special provisions concerning the mode of payment of compensation for nationalized real property of foreign citizens in accordance with international agreements and principles of reciprocity.<sup>14</sup>

<sup>12</sup> 62 Stat. at 2660.

<sup>13</sup> See S. Friedman, *Expropriation in International Law* 204-219 (1953); B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 5-50 (1953); I. Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* (1951); W. L. Gould, *An Introduction to International Law* 456-469 (1957); N. R. Doman, "Postwar Nationalization of Foreign Property in Europe," 48 *Col. Law Rev.* 1125 (1948). For the U. S. attitude on payment of compensation, see C. C. Hyde, "Compensation for Expropriation," 33 *A.J.I.L.* 108 (1939), and note 10 above. For Yugoslav theory, see M. Bartos and B. D. Nikolajevic, *Legal Status of Foreigners, Contemporary Practice in Present International Trends and Practice Applied in FPR of Yugoslavia* 186 (Belgrade, 1951).

<sup>14</sup> *Off. Gaz.*, cited above, p. 1227.

This provision clearly indicates that the Yugoslav Government has left the door open for any future negotiations on the problems raised by the nationalization of foreign property, provided, of course, that such negotiations are requested by the state whose nationals have suffered losses by this nationalization. Further, it is probable that any settlement following such negotiations would result in better conditions for payment of compensation than those applied to Yugoslav citizens, and therefore it should be expected that one or more states whose citizens have been affected by this nationalization law would request the opening of such negotiations. Yet, in view of the fact that Yugoslavia has already settled a great number of claims for nationalization of property of foreign citizens carried out before enactment of this new law, it is safe to anticipate that these new claims will relate in many instances to the property of individuals who became foreign nationals only after the initial nationalization of foreign assets was completed. The new claimants, as a rule, will be individuals with dual nationality who, though rightfully regarded as citizens of the espousing state, are, from the point of view of the Yugoslav law on citizenship, still considered Yugoslav nationals.<sup>15</sup> Undoubtedly, it is because of this conflicting view on nationality that difficulties may arise in any future negotiations. On the other hand, in many instances, especially in cases involving the nationality of former Yugoslav Jews or members of ethnic minority groups, the Yugoslav Government, prior to the new nationalization law, had issued individual releases from Yugoslav nationality and in these decrees had implicitly recognized the acquisition by the individuals concerned of the new citizenship of the country of their actual residence.<sup>16</sup> It is difficult to see what objections, if any, could be raised by the Yugoslav Government in such cases against otherwise valid claims.

It is too early to predict future developments concerning the mode of payment for the nationalized foreign assets in Yugoslavia pursuant to this new nationalization law. At any rate, the future will demonstrate whether Article 77 of the new Yugoslav Nationalization Law will have some concrete effects or will remain a dead letter without any practical significance.

BRANKO M. PESELJ

#### INTERNATIONAL RULES OF JUDICIAL PROCEDURE

On September 2, 1958, Public Law 85-906 of the 85th Congress (H.R. 4642) was approved, whereby there was established a Commission on International Rules of Judicial Procedure, charged with the duty of investigating and studying existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to improving such practices. With the specific purpose of making more

<sup>15</sup> Cf. Yugoslav Law on Citizenship, of Aug. 28, 1945, Arts. 8-6. See also Rode, "Dual Nationals and the Doctrine of Dominant Nationality," 53 A.J.I.L. 189 (1959).

<sup>16</sup> Cf. Yugoslav Law on Citizenship, Art. 22, and the decrees issued by the Yugoslav Federal Secretariat for Home Affairs on the basis of this article. See, for instance, Decree No. IV/2 11.261/56, of June 6, 1956, in the matter of Mrs. Draga Radan.



readily ascertainable, efficient and expeditious the necessary procedures in the conduct of litigation in State and Federal courts and in quasi-judicial agencies, involving the performance of acts in foreign countries, such as service of judicial documents, obtaining of evidence, proof of foreign law, and other activities referred to in general terms as "judicial assistance," the Commission is empowered to (1) draft international agreements on the subject for the assistance of the Secretary of State in negotiating such agreements; (2) draft and recommend to the President any necessary legislation; (3) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal and administrative proceedings; and (4) perform such other related duties as the President may assign.

Under the provisions of the law, the Commission is to consist of nine members: five public members appointed by the President, two members appointed by the Secretary of State and two by the Attorney General of the United States. Of the President's five appointees, two shall be officials of State government. The other four members of the Commission will represent the Departments of State and Justice, respectively. The Chairman of the Commission is to be elected by the Commission from among its members. The Commission shall also appoint a Director, who will serve as the reporter of the Commission and will supervise the preparation of reports and the activities of the personnel.

The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information it considers necessary to carry out its assigned functions, and is to submit annual reports to the President for transmittal to the Congress. It is to submit its final report and terminate its affairs before December 31, 1959. It is understood that the Commission is taking steps to ask the Congress for an extension of its life for an additional two years.

The law also establishes a fifteen-member Advisory Committee on International Rules of Judicial Procedure, to be appointed by the Commission and to advise and consult with the Commission. The members of the Advisory Committee are to be chosen from among lawyers, judges of Federal and State courts and other persons competent to advise the Commission on the matters under study.

Both the Commission and Advisory Committee are attached to the Department of Justice for administrative purposes. The members of the Commission on International Rules of Judicial Procedure are: the Honorable Herbert Brownell, Jr., former U. S. Attorney General, *Chairman*; the Honorable Henry F. Holland, former Assistant Secretary of State; the Honorable Charles S. Rhyne, former President of the American Bar Association; the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of California; the Honorable Charles D. Breitel, Judge of the Appellate Division, New York Supreme Court; the Honorable Loftus Becker, Legal Adviser, Department of State; the Honorable John W. Hanes, Jr., Administrator of Security and Consular Affairs, Department of State; the Honorable J. Lee Rankin, Solicitor General, Department of Justice;

the Honorable Malcolm R. Wilkey, Assistant U. S. Attorney General, Office of Legal Counsel, Department of Justice. The Director is Mr. Harry LeRoy Jones, formerly Chief Hearing Examiner, Office of Alien Property, Department of Justice.

As of the date of preparation of this note, the members of the Advisory Committee had not yet been appointed.

In the Senate Report<sup>1</sup> accompanying H.R. 4642 the reasons for improving the means of co-operation and assistance between the judicial organs of the United States and those of other countries are amply set forth. They have also been pointed out in a note in this JOURNAL by Mr. Harry LeRoy Jones<sup>2</sup> in connection with similar legislation introduced in the first session of the 84th Congress (H.R. 5061 and S. 1597). The increasing volume of foreign trade and investment by private American citizens, as well as of U. S. Government economic programs abroad, has served to accentuate the need for efficient international judicial assistance. Various organizations of lawyers interested in this vital aspect of international legal relations have urged that steps be taken to reach international agreement on the subject. The American Society of International Law adopted a resolution to this effect in 1951.<sup>3</sup> The establishment by the United States of a Commission and Advisory Committee on International Rules of Judicial Procedure therefore is an important step toward the accomplishment of this objective.

ELEANOR H. FINCH

#### IN MEMORIAM: NORMAN DWIGHT HARRIS

Norman Dwight Harris, after an illness of several months, passed away on September 4, 1958, in his home in Daytona Beach, Florida. Born in Cincinnati, Ohio, on January 25, 1870, Norman Dwight Harris graduated from the Sheffield Scientific School of Yale University in 1892. After studying a year in the University of Chicago, he spent three years at the Universities of Berlin and Leipzig. In 1901, he received his degree of doctor of philosophy at the University of Chicago. For the next four years he served as instructor in history in Lawrence College, in Appleton, Wisconsin. In 1906, he was appointed Professor of European Diplomatic History in Northwestern University. Ten years later, he organized the Department of Political Science at Northwestern, and remained chairman of this department until his retirement in 1928.

Norman Dwight Harris was among the young scholars who joined the American Society of International Law immediately upon its foundation in 1907. He became a life member of the Society in 1944. During this period he contributed numerous leading articles and book reviews to the AMERICAN JOURNAL OF INTERNATIONAL LAW, and delivered addresses before the Society's annual meetings.

In 1904, Professor Harris published his *History of Negro Servitude in*

<sup>1</sup> No. 2392, 85th Cong., 2d Sess., Aug. 15, 1958.

<sup>2</sup> 49 A.J.I.L. 379 (1955).

<sup>3</sup> 1951 Proceedings, American Society of International Law 188.

*Illinois*, which served as a prelude to his later studies in colonization and imperialism. His *Intervention and Colonization in Africa* was published in 1914, and a revised edition issued in 1927. His *Europe and Asia* appeared in 1925. These two books introduced a new and realistic method of study of imperialism and colonialism, based upon personal observation and investigation of the areas under scrutiny, as well as upon complete parliamentary documentation. The volumes enjoyed a high reputation in foreign offices throughout the world, and were widely used as textbooks in colleges and universities. In 1917-1918, Professor Harris served as a member of Colonel House's Committee for gathering data for the Paris Peace Conference of 1919.

As a student, and later as a teacher, Professor Harris made extensive travels in Europe (including Russia), in Africa and in Asia. During these travels, he collected an extensive library of books and documents in the field of diplomatic history and European colonization, which he presented to Deering Library of Northwestern University.

Professor Harris persuaded his father, Norman Waite Harris, founder of the Harris Trust and Savings Bank in Chicago, to build Harris Hall on the campus of Northwestern University. Completed in 1914, the Hall has ever since that date housed the Departments of Political Science and History. Professor Harris for a number of years also guided the selection of distinguished scholars, foreign as well as American, who delivered a notable series of lectures under the auspices of the Norman Waite Harris Fund.

After his retirement from teaching, Professor Harris spent most of his time in France where he served as a trustee of the American Library in Paris. Returning to the United States at the outbreak of the second World War, he made his home both in Evanston and in Daytona Beach, Florida. Throughout his life, Professor Harris continued his assistance to Chinese and Japanese students, providing scholarships for young students from both China and Japan.

KENNETH COLEGROVE

## JUDICIAL DECISIONS

BY BRUNSON MACCHESNEY

*Of the Board of Editors*

### *Interpretation and application of Hague Convention of 1902 governing Guardianship of Infants<sup>1</sup>—relation to local law*

CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS (NETHERLANDS *v.* SWEDEN) \*

I.C.J. Reports, 1958, p. 55.

International Court of Justice,<sup>2</sup> Judgment of November 28, 1958.

Marie Elisabeth Boll was a child of Dutch nationality born and permanently resident in Sweden. When her mother (a Swedish national until her marriage) died in 1953, her father became her guardian by operation of the Netherlands Civil Code. On March 18, 1954, on the father's application, a Swedish court at Norrköping registered the father's guardianship and appointed her maternal grandfather *curateur* ("god man") of the child. The Child Welfare Board at Norrköping on May 5, 1954, placed the child under the regime of protective upbringing (*skyddsuppfostran*) provided for by the Swedish law of June 6, 1924. The (Dutch) Amsterdam Cantonal Court on June 2, 1954, appointed a Dutch national living in The Netherlands as deputy guardian, and this deputy guardian joined the father in appealing in Sweden against the institution of protective upbringing. The Dutch court at Dordrecht, with the father's consent, on August 5, 1954, discharged the father as guardian, appointed Catharina Postema as guardian in his stead, and ordered that the child be handed over to the guardian. The Swedish authorities, including the Supreme Administrative Court, discharged the maternal grandfather as "god man" but maintained the Swedish regime of protective upbringing of the child.

<sup>1</sup> 95 Br. & For. State Papers 421; English translation in F. Meili, *International Civil and Commercial Law* 535 ff. (translated by Arthur K. Kuhn, 1905).

Art. 1 provides that the guardianship (*tutelle*) of a minor shall be governed by his national law. Art. 6 provides: "The administration of the guardianship extends to the person and over all the property of the minor, wherever it is situated." Art. 7 provides: "Measures necessary for the protection of the person and interests of an alien minor may be taken by the local authorities, pending the creation of a guardianship and in all cases of urgency. [*En attendant l'organisation de la tutelle, ainsi que dans tous les cas d'urgence, les mesures nécessaires pour la protection de la personne et des intérêts d'un mineur étranger pourront être prises par les autorités locales.*]"

\* Prepared by William W. Bishop, Jr., of the Board of Editors.

<sup>2</sup> Composed for this case of President Klaestad; Vice President Zafrulla Khan; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos, and Spender; and Judges *ad hoc* Sterzel and Offerhaus.

Relying on the acceptance by both The Netherlands and Sweden of the Court's compulsory jurisdiction, The Netherlands asked the International Court of Justice to hold that this measure of protective upbringing with respect to this child "is not in conformity with the obligations binding upon Sweden *vis-à-vis* The Netherlands by virtue of the 1902 Convention governing the guardianship of infants," and that "Sweden is under an obligation to end this measure." Sweden asked the Court to declare the Netherlands claim unfounded. National judges *ad hoc* were appointed.

In its final submissions The Netherlands contended:

- I. that the "*skyddsuppfostran*" (protective education) curtails Netherlands guardianship as protected by the 1902 Convention governing the guardianship of infants;
- II. that *ordre public* cannot prevail against the Convention, because *ordre public* generally cannot be invoked against conventions;
- III. that, even if *ordre public* could be invoked against the Convention:
  - A. the court, in virtue of its powers under the Statute, is fully competent to appreciate, in the light of all the relevant facts and circumstances and the nature of the municipal legal provisions applied thereto, whether or not the conditions for *ordre public* have been complied with;
  - B. in the present issue *ordre public* is not warranted,
    - i. either by the character of the case,
    - ii. or by the character of the provision of Swedish law as applied to the case.

Sweden asked the court

*As to admissibility:*

to hold

(1) that the rights pertaining to custody and control, to upbringing and all other rights exercised by Johannes Boll over the person of his daughter until August 5th, 1954, derived from his *puissance paternelle* and not from guardianship within the meaning of the 1902 Convention; that this was more particularly so in the present case inasmuch as on his application his guardianship was originally instituted in accordance with Swedish law which does not regard as falling within this institution rights relating to the person of the child; that the decision of May 5th, 1954, could accordingly not infringe any rights protected by the Convention;

(2) that when the Dutch authorities had subsequently instituted the guardianship of Johannes Boll in accordance with the law of the Netherlands and later released Johannes Boll from his functions, replacing him by Catherine Postema, the Swedish Courts terminated the guardianship instituted by them;

(3) that notwithstanding, Sweden not being bound by the 1902 Convention to recognize the validity of the Dutch decision putting an end to the *puissance paternelle* of Johannes Boll, nor consequently of the transfer of these rights to Catherine Postema, any breach of those rights would not constitute a violation of the Convention;

*As to the merits:*

to hold

that the rules pertaining to conflict of laws which form the subject-matter of the 1902 Convention on the guardianship of infant children do not affect the right of the High Contracting Parties to impose upon the powers of foreign guardians, as indeed of foreign parents, the restrictions called for by their *ordre public*;

that these rules leave unaffected in particular the competence of the administrative authorities responsible for the public service of the protection of children;

that the measure of protective upbringing taken in respect of Elisabeth Boll cannot accordingly in any way have contravened the 1902 Convention relied upon by The Netherlands;

that it is furthermore not for the Court, in the absence of any allegation of denial of justice, to judge the grounds on which the competent Swedish authorities decided to decree or to maintain the said measure;

The Court, by a vote of 12 to 4, rejected the Netherlands claim. Judges Kojevnikov, Winiarski and Córdova, and Judge *ad hoc* Offerhaus dissented. Judges Badawi, Lauterpacht, Moreno Quintana, Koo and Spender concurred in the result but gave separate opinions, Judge Zafrulla Khan agreeing with Judge Koo's opinion.<sup>3</sup>

The opinion of the Court stated:

The Court has before it a concrete case: did the Swedish authorities, by applying the measure of protective upbringing (*skyddsuppföstran*) to the Dutch infant, Marie Elisabeth Boll, fail to respect obligations resulting from the 1902 Convention on the guardianship of infants? The task of the Court is thus limited. It is not concerned with the correctness of the application of the Swedish Law of June 6th, 1924, on the protection of children and young persons, nor has it to pass upon the proper appreciation of the grounds on which the challenged decisions are based, or on the circumstances to which those grounds are related. These questions are not within the terms of the present dispute and would raise points which are outside the proceedings.

The final Submissions of the Government of the Netherlands, before asking the Court to adjudge and declare that Sweden, in taking and maintaining the measure complained of, is in breach of its obligations under the 1902 Convention, ask it to "declare" certain propositions relating to the effect of protective upbringing and to *ordre public*. These propositions are, in reality, the essential considerations which, in the view of the Government of the Netherlands, must lead the Court to adjudge and declare that Sweden is in breach of its obligations. In a less categorical form, the Submissions of the Government

<sup>3</sup> The dissenting judges believed that application of the Swedish law on protective upbringing did contravene the obligations of the convention, which ought to prevail over national law in case of such conflict.

The separate opinions were devoted particularly to questions of the relationship of *ordre public* ("public policy") to the normal application of rules of conflict of laws, and its status as an exception to otherwise applicable provisions of a treaty dealing with private international law.

of Sweden are set out in a similar way. The Court has to adjudicate upon the subject of the dispute; it is not called upon, as it pointed out in the *Fisheries* case, to pronounce upon a statement of this kind (I.C.J. Reports 1951, p. 126). It retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose.

Referring to the Swedish decisions instituting and maintaining the protective upbringing, the Court said:

The Government of the Netherlands submits that these decisions are not in conformity with the provisions of the 1902 Convention. The institution of protective upbringing in the case of Marie Elisabeth Boll prevents the infant from being handed over to the guardian for the exercise of her functions. The 1902 Convention provides that the guardianship of an infant shall be governed by his national law, and the Government of the Netherlands draws the conclusion that the Swedish authorities could take no measure once the national authorities had taken decisions organizing guardianship of the infant. The limitation on the principle of the national law contained in Article 7 of the Convention, according to the Government of the Netherlands, is not applicable to the present case because Swedish protective upbringing is not a measure permitted by that Article and because the condition of urgency required by that provision has not been satisfied.

The Government of Sweden does not dispute the fact that protective upbringing temporarily impedes the exercise of custody to which the guardian is entitled by virtue of guardianship under Dutch law; this fact, however, does not constitute a breach of the 1902 Convention or a failure by Sweden to fulfil her obligations thereunder. . . .

. . . . .

The Court has before it a measure taken in pursuance of the Swedish Law of June 6th, 1924, on the protection of children and young persons. It has to consider this measure in the light of what it was the intention of the Swedish Law to establish, to compare it with the guardianship governed by the 1902 Convention and to determine whether the application and the maintenance of the measure in respect of an infant whose guardianship falls within that Convention involve a breach of the Convention.

It has been contended that the measure is one "virtually amounting to guardianship," that it constitutes a "rival guardianship" in competition with the Dutch guardianship so that the latter, as a result of the measure, "is completely absorbed, whittled away, overruled and frustrated."

To judge of the correctness of this argument it is necessary to consider the attitude adopted with regard to the Dutch guardianship by the judgments given in Sweden.

So far as the administration of property is concerned, the judgment of the Norrköping Court of September 16th, 1954, and the judgment of the Supreme Court of July 2nd, 1955, both proceeded on the basis of recognition of the Dutch guardianship. With regard to the capacity of the guardian to concern herself with the person of the infant, that capacity was recognized in the decision of the Supreme Administrative Court of October 5th, 1954, given on an appeal lodged by the guardian; reference was there made to the fact that

the decision of the Dordrecht Court, appointing Mme. Postema as guardian, extended to the custody of the child and to the claim of the guardian that the regime of protective upbringing should be terminated; this claim was dismissed, not on the ground that it was inadmissible, but after it had been considered on the merits and because it appeared to the Court that to uphold it would, at that time, have constituted a serious danger to the mental health of the ward.

The judgment of the Supreme Administrative Court of February 21st, 1956, merits particular attention. This judgment was given on an appeal against a decision of the Provincial Government of Östergötland which had held that the measure of protective upbringing should be terminated: if matters had ended there, there would have been no subject for dispute. There is a subject for dispute only as a result of the judgment of February 21st, 1956, which decided that the measure should be maintained. That judgment was given, as the decision appealed against had been, in the light of and taking into account the desire expressed by the guardian, Mme. Postema, to entrust the infant to M. and Mme. Törnquist, at Norrköping. The Supreme Administrative Court did not question Mme. Postema's capacity to take proceedings before it, and it thereby recognized her capacity as guardian and her right to concern herself with the person of the infant; it did not raise protective upbringing to the status of an institution, the effect of which would be completely to absorb the Dutch guardianship; it confined itself, for reasons outside the scope of the Court's examination, to finding that the desire of the guardian and the satisfactory information which she gave with regard to the household which enjoyed her confidence did not constitute sufficient grounds for terminating the regime of protective upbringing applied to the infant. Finally, under the regime thus maintained, the person to whom the Child Welfare Board has entrusted the infant has not the capacity and rights of a guardian. He receives her, watches over her, provides for the care of her health: the infant is entrusted to his care as she would have been entrusted to the care of the Törnquist family if the guardian's wish had been carried out.

The protective upbringing applied to the infant, as it appears in these decisions, i.e. according to the facts in the present case, cannot be regarded as a rival guardianship to the guardianship established in the Netherlands in accordance with the 1902 Convention.

The Swedish measure of protective upbringing, as instituted and maintained in respect of Marie Elisabeth Boll, placed obstacles in the way of the full exercise by the guardian of her right to custody. Before the Supreme Administrative Court she relied, as has been recalled, upon her intention to entrust the infant to a home of her choice: that intention clearly corresponded to an exercise by the guardian of her right to custody. The guardian was not, however, asking that her intention should simply be acted upon; she relied upon it as a reason for terminating the regime of protective upbringing. The Supreme Administrative Court, by its judgment of February 21, 1956, dismissed her claim. In dismissing it, the Court limited itself no doubt to adjudicating upon the maintenance of protective upbringing, but, at the same time, it placed an obstacle in the way of the full exercise of the right to custody belonging to the guardian. Does this constitute a failure to observe the 1902 Convention, Article 6 of which provides that "the administration of a guardianship extends to the person . . . of the infant"?

In order to answer this question, it is not necessary, as has already



been said, for the Court to ascertain the real or alleged reasons which determined or influenced the decisions complained of. It is called upon to pronounce only on the compatibility of the measure with the obligations binding upon Sweden under the 1902 Convention. It has before it a measure instituted pursuant to a Swedish law which impedes the exercise by the guardian of the right to custody conferred upon her by Dutch law in accordance with the 1902 Convention. Are the imposition and maintenance of such a measure incompatible with the 1902 Convention?

The Court is not confronted by a situation in which it would suffice for it to say that a national law cannot override the obligations assumed by treaty. It is asked to say whether the measure taken and impugned is or is not compatible with the obligations binding upon Sweden by virtue of the 1902 Convention. To do that, it must determine what are the obligations imposed by that Convention, how far they extend and, especially, it must determine whether, by stipulating that the guardianship of an infant is governed by the national law of the infant, the 1902 Convention intended to prohibit the application to a foreign infant of a law such as the Swedish Law on the protection of children.

The 1902 Convention, as indicated by its preamble, was designed to "lay down common provisions to govern the guardianship of infants." It provides for the application of the national law of the infant for the institution and operation of guardianship by expressly extending in Article 6 the administration of a guardianship to the person and to all the property of the infant. It goes no farther than that, and indeed it has been pointed out that it does not make complete provision for guardianship, which should serve as a warning against any construction which would extend it beyond its true scope. In providing that guardianship and, in particular, that the guardian's right to custody should be governed by the national law of the infant, the Convention was intended to determine what law should be applied to settle these points. It was intended, in accordance with the general purpose of the Conferences on Private International Law, that it should put an end to the divergences of view as to whether preference ought to be given in this connection to the national law of the infant, to that of his place of residence, etc., but it was not intended to lay down, in the domain of guardianship, and particularly of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of the local law. The local law with regard to guardianship is in principle excluded, but not all the other provisions of the local law.

There may be some points of contact between matters governed by the national law of the infant which is applicable to guardianship and matters falling within the ambit of the local law. It does not follow that in such cases the national law of the infant must always prevail over the application of the local law and that, accordingly, the exercise of the powers of a guardian is always beyond the reach of local laws dealing with subjects other than the assignment of guardianship and the determination of the powers and duties of a guardian. If, for instance, for the purpose of administration of guardianship in respect of the person or the property of an infant, a guardian finds it necessary to travel to some foreign country, he will, so far as his journey is concerned, be subject to the laws relating to the entry and residence of foreigners. This is something outside the scope of guardianship as regulated by the 1902 Convention.

If, in a country in which a foreign infant, to whom the 1902 Convention applies, is living, laws relating to compulsory education and sanitary supervision of children, professional training or the participation of young people in certain work, are applicable to foreigners, in circumstances assumed to be in conformity with the requirements of international law and of treaties governing these matters, a guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant. In adopting the national law of the infant as the proper law to govern guardianship, including the guardian's right to custody, the 1902 Convention was not intended to decide upon anything other than guardianship, the true purpose of which is to make provision for the protection of the infant; it was not intended to regulate or to restrict the scope of laws designed to meet preoccupations of a general character.

The same must be true of the Swedish Law on the protection of children and young persons. Considered in its application to children of Swedish nationality, the law is not a law on guardianship, it does not relate to the legal institution of guardianship. It is applicable whether the infant be within the *puissance paternelle* of the parents or under guardianship. Protective upbringing which constitutes an application of the Law is superimposed, when that is necessary, on either, without bringing either to an end but paralyzing their effects to the extent that they are in conflict with the requirements of protective upbringing.

Is the 1902 Convention to be construed as meaning—tacitly, for the reason that it provides that the guardianship of an infant shall be governed by his national law—that it was intended to prohibit the application of any legislative enactment on a different subject-matter the indirect effect of which would be to restrict, though not to abolish, the guardian's right to custody? So to interpret the Convention would be to go beyond its purpose. That purpose was to put an end, in questions of guardianship, to difficulties arising from the conflict of laws. That was its only purpose. It was sought to achieve it by laying down to this end common rules which the contracting States must respect. To understand the Convention as limiting the right of contracting States to apply laws on a different topic would be to go beyond that purpose.

The 1902 Convention determines the domain of application of the laws of each contracting State in the matter of guardianship. It does this by requiring each contracting State to apply the national law of the infant. If the 1902 Convention had intended to regulate the domain of application of laws such as the Swedish Law on the protection of children and young persons, it would follow that that Law should be applied to Swedish infants in a foreign country. But no one has sought to attribute such an extraterritorial effect to that Law. The 1902 Convention is therefore not concerned with the determination of the domain of application of such a law.

A comparison between the purpose of the 1902 Convention and that of the Swedish Law on the protection of children shows that the purpose of the latter places it outside the field of application of the Convention.

The 1902 Convention did not seek to define what it meant by guardianship, but there is no doubt that the legal systems, as between which it sought to establish some harmony by prescribing what was the proper law to govern that situation, understood and understand

by guardianship an institution the object of which is the protection of the infant: the protection and guidance of his person, the safeguarding of his pecuniary interests and the fulfilling of the functions rendered necessary by his legal incapacity. Guardianship and protective upbringing have certain common purposes. The special feature of the regime of protective upbringing is that it is put into operation only in respect of children who, for reasons inherent in them or for causes external to them, are in an abnormal situation—a situation which, if allowed to continue, might give rise to danger going beyond the person of the child. Protective upbringing contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people. The 1902 Convention recognizes the fact that guardianship, in order to achieve its aim of individual protection, needs to be governed by the national law of the infant; to achieve the aim of the social guarantee which it is the purpose of the Swedish Law on the protection of children and young persons to provide, it is necessary that it should apply to all young people living in Sweden.

Protective upbringing is not, as is guardianship, applied for a pre-ordained period during which it is maintained. The public service of the protection of children is much more flexible, just because the measures taken depend upon the circumstances, and can be modified in accordance with alterations in those circumstances. Its functions correspond to preoccupations of a moral and social order. The Swedish Law being designed to provide a social guarantee, it was presented, on behalf of the Government of Sweden, as a law of *ordre public* which, as such, is binding upon all those upon Swedish territory. The consequences to be drawn from such a characterization were argued at length before the Court. It was contended that a proper interpretation of the 1902 Convention must lead to recognition that this Convention, bringing about the unification as between the contracting States of certain rules for the settlement of conflicts of law, must be understood as containing an implied reservation authorizing, on the ground of *ordre public*, the overruling of the application of the foreign law recognized as normally the proper law to govern the legal relationship in question. It has been argued that such an exception is recognized in the systems of private international law of those countries which joined in the partial codification of this branch of the law. The Court does not consider it necessary to pronounce upon this contention. It seeks to ascertain in a more direct manner whether, having regard to its purpose, the 1902 Convention lays down any rules which the Swedish authorities have disregarded.

The 1902 Convention had to meet a problem of the conflict of private law rules. It presupposes the hesitation which was felt in the choice of the law applicable to a given legal relationship: the national law of an individual, the law of his place of residence, the *lex fori*, etc. It gave the preference to the national law of the infant and thereby prescribed to the courts of each contracting State that they should apply a foreign law when the infant involved was a foreigner. It is perfectly conceivable that the courts of a State should in certain cases apply a foreign law.

Very different is the sense of the question if it be asked what is the domain of the applicability of the Swedish Law or of the Dutch law on the protection of children. The measures provided for or prescribed by Swedish law are applied, at least in the first stage as was

done in the present case, by an administrative organ. Such an organ can act only in accordance with its own law: it is inconceivable that the Swedish Child Welfare Board should apply Dutch law to a Dutch infant living in Sweden and equally inconceivable that the competent Dutch organ should apply Dutch law to such an infant living abroad. What a Swedish or Dutch court can do in matters of guardianship, pursuant to the 1902 Convention, namely apply a foreign law—Dutch law or Swedish law as the case may be—the authorities of those countries cannot do in the matter of protective upbringing. To extend the 1902 Convention to such a situation would lead to an impossibility. It is not permissible so to construe the Convention as to bring about such a result.

The 1902 Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship. There are no such competing claims in the case of laws for the protection of children and young persons. The claim of each of these laws is that it should be applied in the country in which it was enacted: such a law has not and, as has been seen, cannot have any extra-territorial aspiration, for that would exceed its social purpose as well as the means of which it disposes. The problem which was at the basis of the 1902 Convention does not exist in respect of these laws, and the only danger which could threaten them would lie in the negative solution which would be reached if, as a result of an extensive construction which has not heretofore been considered justified, the application of Swedish law was refused to Dutch children living in Sweden; since Dutch law on the same subject could not be applied to them, the protection of children and young persons, desired both by Swedish law and by Dutch law, would be frustrated. The 1902 Convention never intended that a negative solution should be reached in the domain with which it is concerned: this confirms that what is understood by the protection of children and young persons does not fall within the domain of the Convention.

It is scarcely necessary to add that to arrive at a solution which would put an obstacle in the way of the application of the Swedish Law on the protection of children and young persons to a foreign infant living in Sweden would be to misconceive the social purpose of that law, a purpose of which the importance was felt in many countries particularly after the signature of the 1902 Convention. The social problem of delinquent or even of merely misdirected young people, and of children whose health, mental state or moral development is threatened, in short, of those ill adapted to social life, has often arisen; laws such as the Swedish Law now in question were enacted in several countries to meet the problem. The Court could not readily subscribe to any construction which would make the 1902 Convention an obstacle on this point to social progress.

It thus seems to the Court that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly, the Court does not in the present case find any failure to observe that Convention on the part of Sweden.

## NOTES

*Habeas corpus—existence of "time of peace"—applicability of military law to offense by soldier dishonorably discharged while military prisoner*

Petitioner, while serving sentence imposed by previous court-martial, committed crime of conspiracy to commit murder on June 10, 1949. Petitioner had been dishonorably discharged on June 12, 1947, after his previous court-martial. For this subsequent offense, he was convicted and sentenced to life imprisonment by court-martial. The conviction was upheld below (see 52 A.J.I.L. 346 (1958)). The Supreme Court reversed, holding that the phrase "in time of peace" in Article 92<sup>1</sup> of the Articles of War meant, for this purpose, after the ending of hostilities and not the formal termination of a state of war. *Lee v. Madigan*, 358 U. S. 228 (U. S. Sup. Ct., Jan. 12, 1959, Douglas, J.; Harlan and Clark, JJ., dissenting).

*Jurisdiction—civilian employee of armed forces abroad—Constitutionality of trial abroad under Code of Military Justice.*

Civilian employee, who was attached as an electrician to armed forces of the United States at a Moroccan air force base and was convicted by court-martial there of conspiracy to commit larceny, claimed denial of his Constitutional rights to indictment by a grand jury and trial by jury. The District Court denied *habeas corpus*, 158 F. Supp. 171, noted in 52 A.J.I.L. 536 (1958). On appeal, the writ was granted. Article 2 (11) of the Uniform Code of Military Justice,<sup>2</sup> as applied to a civilian employee attached to the armed forces abroad, is unconstitutional on the basis of *Reid v. Covert*, 354 U. S. 1, noted in 51 A.J.I.L. 783 (1957), and subsection (11) is not severable. *U. S. v. McElroy*, 259 F.2d 927 (U. S. Ct. A., Dist. of Col., Sept. 12, 1958, Fahy, Ct.J.; Burger, Ct.J., dissenting). Certiorari granted, No. 570, Feb. 24, 1959, 27 L. W. 3236.

*Treaties—interpretation—domestic effect of subsequent legislation*

In *Mercado v. Feliciano*, 260 F.2d 500 (U. S. Ct. A., 1st Cir., Oct. 31, 1958, Magruder, C.J.), Article VIII<sup>3</sup> of the Treaty of Paris between Spain and the United States, which dealt with the preservation of property rights, was construed as excluding an inchoate right of reversion. Assuming it was preserved by the treaty, it was superseded as domestic law by subsequent legislative action.

*Trading with the Enemy—vesting of Philippine currency—valid transfers under Hague Regulations*

Two Philippine banks claimed prewar Philippine currency which had been vested pursuant to the Trading With the Enemy Act.<sup>4</sup> One bank

<sup>1</sup> 10 U.S.C. (1946 ed., Supp. IV) § 1564. <sup>2</sup> 10 U.S.C. § 802 (11).

<sup>3</sup> 30 Stat. 1758.

<sup>4</sup> 50 U.S.C. Appendix § 1 *et seq.*

had transferred currency pursuant to orders of Japanese military authorities. The court held this to be a valid transfer under Hague Regulations, Article 43, as a valid act of a belligerent occupant. The currency of the other bank had been properly requisitioned by the Japanese for use in purchasing supplies. The court held this to be also a valid transfer under Hague Regulations, Articles 49, 51, and 52. Accordingly, the currency was properly vested as enemy property. *Bank of the Philippine Islands v. Rogers*, 165 F. Supp. 100 (U. S. Dist. Ct., Dist. of Col., June 12, 1958, Tamm, D.J.).

*Nuclear tests—injunction—standing to sue and justiciability—U. N. Charter and domestic law*

Plaintiffs, American citizens and non-resident aliens of the Marshall Islands, sought a preliminary injunction against the Secretary of Defense and the Atomic Energy Commissioners to prevent the detonation of nuclear weapons having radioactive effects at the Eniwetok Proving Ground in the Pacific Ocean. The court denied the preliminary injunction, holding the plaintiffs' showing insufficient to outweigh the public interest in continuing the tests. In dismissing the complaints, the court held that the plaintiffs had no standing to sue with respect to a justiciable controversy, and that the U. N. Charter and the Trusteeship Agreement were not self-executing and, even if they were, they would be superseded domestically by the later enactment of the Atomic Energy Act of 1954.<sup>5</sup> *Pauling v. McElroy*, 164 F. Supp. 390 (U. S. Dist. Ct., Dist. of Col., July 31, 1958, Keech, D.J.).

*Executive agreement—Supremacy Clause—General Agreement on Tariffs and Trade—invalidity of territorial law*

Information was filed against defendant for selling foreign eggs without displaying placard so stating as required by Hawaiian law. Defendant demurred, *inter alia*, on the ground that the Hawaiian law<sup>6</sup> conflicted with an executive agreement, the General Agreement on Tariffs and Trade,<sup>7</sup> Article III, paragraphs 1 and 4, and was, therefore, invalid under the Supremacy Clause.<sup>8</sup> The court held the territorial law to be in conflict with G.A.T.T., and invalid by virtue of the Supremacy Clause, relying on the *Belmont*<sup>9</sup> and *Pink*<sup>10</sup> cases. *Territory v. Ho*, 41 Hawaii Reports 565 (Supreme Court of Hawaii, Jan. 31, 1957, Marumoto, J.).

*Treaties—inheritance taxes—bequest by American national to German President for charitable purposes*

Decedent bequeathed the residue of his estate, consisting entirely of personal property, to the President of the Federal Republic of Germany

<sup>5</sup> 42 U.S.C. § 2011 *et seq.*

<sup>6</sup> Revised Laws of Hawaii, 1945, Sec. 1308.02.

<sup>7</sup> 61 Stat. Pt. 5, as modified by Geneva Protocol, 62 Stat. 3679.

<sup>8</sup> Art. VI, Clause 2, U. S. Constitution.

<sup>9</sup> U. S. v. Belmont, 301 U. S. 324 (1937); 31 A.J.I.L. 537 (1937).

<sup>10</sup> U. S. v. Pink, 315 U. S. 203 (1942); 36 A.J.I.L. 309 (1942).

for the charitable purpose of aiding escapees from the East Zone, and provided specifically that the bequest should not be interpreted to be a trust. The court, after holding there was no exemption under Wisconsin statutes, held that no treaties with Germany, nor other treaties possibly applicable through a most-favored-nation clause, provided for a mandatory reciprocal exemption from inheritance taxation. *In re Wieboldt's Estate*, 92 N.W. 2d 849 (Supreme Court of Wisconsin, Nov. 5, 1958, Wingert, J.).

#### BRITISH AND COMMONWEALTH DECISIONS \*

*Criminal procedure—extradition—treaty between Britain and Switzerland of 1880<sup>1</sup> applicable to South Africa—meaning of “trial for offense extradited”*

Applicant had been extradited from Switzerland and convicted by a South African court. He now claimed that a court cannot take into consideration previous convictions when assessing sentence, nor can such previous convictions be taken into consideration when determining a remission of sentence, for such previous crimes are not indicated on the extradition order. Hill, J., rejected this submission and held that, although a court cannot try the extradited person for offenses not included in the extradition order, previous offenses can be taken into consideration when assessing sentence or considering questions of remission of sentence. *Grimley-Goodwin v. Director of Prisons*, [1958] 2 So.Afr.L.R. 545 (Transvaal Provincial Div., March 11, 1958, Hill, J.).

*Crime committed on board Norwegian ship—extradition—habeas corpus—treaty between Britain and Norway—meaning of “territory”*

Requisition having been made by Norway, the applicant was arrested and, after a hearing by the Metropolitan Magistrate, committed to prison to abide an order for extradition made by the Secretary of State. The applicant, an Italian seaman alleged to have murdered a fellow seaman on board a Norwegian ship, brought *habeas corpus* proceedings alleging that since no evidence of the geographical position of the ship at the time of the alleged murder was adduced before the Magistrate, the treaty between Britain and Norway was inapplicable as it applies only to crimes committed within the territory of Norway. Held, the term “territory” in Article 1 of the Extradition Treaty of June 26, 1873,<sup>2</sup> between Britain and Norway must be construed to refer to “jurisdiction.” Thus, even though a conflict of jurisdiction could occur if the ship were in territorial

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<sup>1</sup> 71 Brit. & For. State Papers 54 (1879-1880); 92 L.N.T.S. 432 (1930); Order in Council of May 18, 1881, 9 S.R. & O. 393 (Rev. 1948).

<sup>2</sup> 63 Brit. & For. State Papers 175 (1872-1873); 92 L.N.T.S. 437 (1930); Orders in Council of Sept. 30, 1873, 9 S.R. & O. 287 (Rev. 1948), and of Feb. 18, 1907, 9 S.R. & O. 392 (Rev. 1948). (S.R. & O. 1907, No. 545).

waters other than Norway's, the treaty was applicable and an extradition order can be made by the Secretary of State. *R. v. Governor of Brixton Prison, ex parte Minervini*, [1958] 3 W.L.R. 559, 3 All E.R. 318 (Q.B. Div. Ct., Oct. 7, 1958, Parker L.C.J., Cassels and Streatfeild, JJ.).

*South Africa—divorce—jurisdiction—domicile of choice—capacity to acquire—member of armed forces*

A member of the Royal Navy, stationed at the Cape, married there and evinced his desire to remain permanently. He returned to England for demobilization and once there changed his mind and refused to return to the Union of South Africa. His wife, desiring to petition the South African court for divorce on the ground of desertion, had to prove that her husband had acquired a domicile of choice in the Union at the time of his desertion.<sup>8</sup> The court stated that Roman-Dutch law, like Anglo-American common law, does not consider that a member of the armed forces, by being stationed outside his domicile, acquires a new domicile. But if the evidence indicates that there is more than mere presence on duty, that there is an intention to acquire a domicile in the place where such person is stationed, a domicile of choice will have been acquired. Holding this to be the case, the court granted the wife's petition. *Ex Parte Readings*, [1958] 4 So.Afr.L.R. 432 (Cape Provincial Div., Sept. 22, 1958, De Villiers, A.J.).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY

*Rogers v. Maron*, 257 F.2d 622 (D.C. Cir., May 22, 1958), mere naked title holder not eligible as "debt claimant"; *First National Bank v. Gilliland*, 257 F.2d 223 (D.C. Cir., June 12, 1958), failure to assert lien on fund; Foreign Claims Settlement Commission's determination is final; *Royal Exchange Assurance v. Rogers*, 257 F.2d 582 (2d Cir., June 17, 1958), trust deeds involving remainder proceeds subject to Trading With the Enemy Act; *Von Opel v. Von Opel*, 257 F.2d 666 (D.C. Cir., June 19, 1958), vested property cannot be reached by attachment or execution; *La Due & Co. v. Rogers*, 259 F.2d 905 (7th Cir., Oct. 13, 1958), plaintiff did not meet burden of proof as to his beneficial interest in the vested property; *Bank of the Philippine Islands v. Rogers*, 165 F.Supp. 100 (D.C. Cir., June 12, 1958), noted *supra*, evidence established valid vesting; *Rogers v. Reinberg*, 164 F.Supp. 340 (D.N.J., June 16, 1958), Attorney General entitled to invalid assignment made in 1935 by German nationals; *Rogers v. Hartford-Connecticut Trust Co.*, 165 F.Supp. 116 (D. Conn., July 10, 1958), vested interests acquired under a will properly seized, and treaties of friendship with Germany have no effect on this; *Mayer v. Chase Nat. Bank*, 165 F.Supp. 287 (S.D.N.Y., Aug. 5, 1958), debts owing to enemy aliens not automatically canceled.

<sup>8</sup> Matrimonial Causes Jurisdiction Act 1939, Sec. 1, Act No. 22 of 1939 (South Africa), as amended by the Matrimonial Affairs Act, 1953, Sec. 6, Act No. 37 of 1953 (South Africa).



## AMERICAN CASES ON NATIONALITY

*Citizenship. Perez v. Brownell*, 356 U. S. 44 (March 31, 1958), reprinted in 52 A.J.I.L. 767 (1958), statute authorizing loss of nationality of the United States for voting in a foreign state is Constitutional; *Trop v. Dulles*, 356 U. S. 86 (March 31, 1958), reprinted in 52 A.J.I.L. 777 (1958), statute authorizing loss of nationality of citizen convicted of desertion from the Army, even though no attempt is made to align with a foreign Power, is unconstitutional; *Mitsugi Nishikawa v. Dulles*, 356 U. S. 129 (March 31, 1958), noted in 52 A.J.I.L. 787 (1958), in a denationalization proceeding involving a native-born citizen of the United States, the Government has the burden of showing voluntary character of citizen's service in a foreign army by clear, convincing and unequivocal evidence; *Mendoza-Martinez v. Mackey*, 356 U. S. 258 (April 7, 1958), remanded for reconsideration in light of *Trop* decision; *Wolf v. Brownell*, 253 F.2d 141 (9th Cir., Nov. 27, 1957), act pertaining to citizenship and nationality at birth is not retroactive; *Tsuyoshi Iwamoto v. Dulles*, 256 F.2d 100 (9th Cir., Feb. 3, 1958), reacquisition of Japanese nationality found to be voluntary; *Lim Kwock Soon v. Brownell*, 253 F.2d 809 (5th Cir., April 1, 1958), sufficient evidence of citizenship; *Gee Chee On v. Brownell*, 253 F.2d 814 (5th Cir., April 1, 1958), sufficient evidence of citizenship; *Jalbuena v. Dulles*, 254 F.2d 379 (3rd Cir., April 11, 1958), dual citizenship between U. S. and Philippines possible, so receiving Philippine passport and giving oath to support Philippine Constitution did not revoke U. S. citizenship; *Zutich v. Gilliland*, 254 F.2d 464 (6th Cir., April 29, 1958), noted in 53 A.J.I.L. 191 (1959), under statute creating Foreign Claims Settlement Commission, courts were without jurisdiction to review decision denying relief on ground that claimant was not a national; *Puig Jimenez v. Glover*, 255 F.2d 54 (1st Cir., May 2, 1958), citizenship upheld, although no physical presence as of applicable date, since return was delayed by war; *In Re Russo*, 255 F.2d 97 (1st Cir., May 19, 1958), Secretary of State permitted to move to dismiss for lack of proper venue; *Fletes-Mora v. Rogers*, 160 F.Supp. 215 (S.D.Cal.C.D., March 27, 1958), oath required by Post Office Department of Mexico not an "oath of allegiance" sufficient to expatriate native-born citizen of foreign parentage; *Wong Get Ming v. Dulles*, 160 F.Supp. 904 (D. Mass., April 17, 1958), sufficient evidence of citizenship; *Moy Yee Mon v. Dulles*, 161 F.Supp. 924 (E.D.Mich., S.D., April 21, 1958), evidence failed to show plaintiffs were sons of native-born citizen of the United States; *Rosasco v. Brownell*, 163 F.Supp. 45 (E.D.N.Y., June 13, 1958), admission on non-immigrant visa for temporary period insufficient basis for declaratory judgment on nationality; *Bean v. Barber*, 163 F. Supp. 111 (N.D.Cal., S.D., June 27, 1958), absent legal steps to deport, person who established *prima facie* basis for United States citizenship entitled to remain despite his refusal to explain trip to Mexico and avoidance of service in the Armed Forces; *Lau Ah Yew v. Dulles*, 257 F.2d 744 (9th Cir., June 25, 1958), insufficient evidence to prove citizenship; *Et Min Ng v. Brownell*, 258 F.2d 304 (9th Cir., Aug. 4, 1958), admission of

blood test into evidence proper, even though no authority in immigration office to require one; *Kiyama v. Dulles*, 258 F.2d 109 (9th Cir., Aug. 11, 1958), evidence established Japanese loyalty; *Strupp v. Dulles*, 258 F.2d 622 (2nd Cir., Aug. 14, 1958), court had jurisdiction to give declaratory judgment, even though plaintiff's claimed right as a national was denied outside the U. S.; *Fujii v. Dulles*, 259 F.2d 866 (9th Cir., Oct. 10, 1958), prior dismissal of suit held not to be on the merits, so not *res judicata*.

*Deportation.* *Dessalernos v. Savoretti*, 356 U. S. 269 (April 14, 1958), alien entitled to have application for suspension of deportation considered; *Bonetti v. Rogers*, 356 U. S. 691 (June 2, 1958), at time of entry under Anarchist Act as amended by Internal Security Act of 1950, alien was not Communist, so not deportable; *Leng May Ma v. Barber*, 357 U. S. 185 (June 16, 1958), detention of alien pending determination of admissibility is not an "entry"; alien present by parole and eventually found ineligible is not entitled to benefits of act allowing suspension of deportation because of danger of persecution; *Rogers v. Quan*, 357 U. S. 193 (June 16, 1958), companion case to *Leng May Ma*, *supra*; *Karayannis v. Brownell*, 251 F.2d 882 (D.C. Cir., Nov. 12, 1957), divorce decree annulling marriage between American woman and alien because of fraud of husband not alone sufficient to authorize deportation; *Williams v. Mulcahey*, 253 F.2d 709 (6th Cir., Dec. 17, 1957), evidence supported finding of conscious choice in joining the Communist Party; *Jimenez v. Barber*, 252 F.2d 550 (9th Cir., Jan. 30, 1958), when delay was caused by alien's non-diligent resort to administrative and court proceedings, there was no abuse of discretion in denying order prohibiting deportation; *Brownell v. Anzalone*, 252 F.2d 844 (D.C. Cir., Feb. 13, 1958), although finding for alien was based solely on the complaint and answer, ambiguous record necessitated a remand; *Schleich v. Butterfield*, 252 F.2d 191 (6th Cir., Feb. 14, 1958), evidence sufficient to show meaningful association with Communist Party; *Cabrera v. Savoretti*, 252 F.2d 294 (5th Cir., Feb. 14, 1958), not abuse of discretion to deny voluntary departure where aliens worked in violation of terms of their temporary admissions; *Estrada-Ojeda v. Del Guercio*, 252 F.2d 904 (9th Cir., Feb. 19, 1958), Mexican citizen admitted lawfully to the United States subject to deportation as person likely to become public charge; *Bowdidge v. Lehman*, 252 F.2d 366 (6th Cir., Feb. 24, 1958), summary judgment rule requiring notice for hearing applicable to summary dismissal by court on own motion; *Anselmo v. Hardin*, 253 F.2d 165 (3rd Cir., Feb. 25, 1958), doctrine of *res judicata* applied to judgment granting alien freedom from deportation under Act of 1917, precluding further deportation proceedings under Act of 1924; *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir., Feb. 27, 1958), retrospective application of Immigration and Nationality Act of 1952 is not unconstitutional; *Chanan Din Khan v. Barber*, 253 F.2d 547 (9th Cir., March 11, 1958), willfully attempting to evade income tax on occasions twelve months apart is not part of a "single scheme" within statute providing for deportation of aliens convicted of two crimes involving moral turpitude not arising out of a single scheme; *Gonzalez-Jimenez v. Del Guercio*, 253 F.2d 420

(9th Cir., March 14, 1958), no abuse of discretion to deny alien permission to reapply for admission based on past experience with said alien; *Frank v. Rogers*, 253 F.2d 889 (D.C. Cir., March 20, 1958), in suit seeking review of deportation proceedings, alleged alien entitled to a trial *de novo* on issue of citizenship; *De Bernardo v. Rogers*, 254 F.2d 81 (D.C. Cir., March 27, 1958), crime of unlawful entry involves "moral turpitude"; whether due process requires counsel to be appointed not decided; *Wellman v. Butterfield*, 253 F.2d 932 (6th Cir., April 9, 1958), evidence sufficient to show meaningful association with the Communist Party; *Alexiou v. Rogers*, 254 F.2d 782 (D.C. Cir., April 10, 1958), no abuse of discretion and replacement of hearing officer not improper; *U. S. ex. rel. Milanovic v. Murff*, 253 F.2d 941 (2d Cir., April 11, 1958), statute providing for deportation to "country from which he came" has reference to country where alien had an abode or had intention of returning; *Barber v. Hong*, 254 F.2d 382 (9th Cir., April 14, 1958), alien entering without inspection subject to deportation; *Sciama v. Del Guercio*, 255 F.2d 50 (9th Cir., April 28, 1958), whether alien intended to remain when he entered on visitor's visa is question for trial; *Cartellone v. Lehmann*, 255 F.2d 101 (6th Cir., April 29, 1958), District Court acted properly in inquiring as to fairness of hearing and support of the evidence under the Administrative Procedure Act; *Foundoulis v. Lehmann*, 255 F.2d 104 (6th Cir., May 12, 1958), consideration of eligibility of alien seaman for quota preference under statute beyond scope of deportation hearing; *Hegerich v. Del Guercio*, 255 F.2d 701 (9th Cir., May 12, 1958), abuse of discretion in denying voluntary departure; *Quintana v. Holland*, 255 F.2d 161 (3rd Cir., May 23, 1958), action by Attorney General not timely brought as to rescission of suspension of deportation; *Pimental-Navarro v. Del Guercio*, 256 F.2d 877 (9th Cir., June 12, 1958), although no basis for disturbance of judgment against alien, due to extreme hardship, case remanded to see if discretionary relief can be granted; *Cadby v. Savoretti*, 256 F.2d 439 (5th Cir., June 12, 1958), alien not entitled to discretionary relief under 1917 Act and was governed by 1952 Act which gave him no relief; *Skaros v. Brownell*, 162 F.Supp. 63 (W.D.N.Y., Sept. 19, 1957), plaintiff required to file amended complaint to show nationality in order to dismiss deportation proceedings; *Fougherouse v. Brownell*, 163 F.Supp. 580 (D.Ore., Jan. 10, 1958), adequate notice of hearing and evidence adequate to support order of deportation for membership in the Communist Party; *Caiozzo v. Dist. Director of Immigration*, 158 F. Supp. 872 (S.D. N.Y., Feb. 14, 1958), where alien, because of willful failure to advise authorities of his address, was not eligible for suspension of deportation, he was not eligible for voluntary departure; *Granado Almeida v. Murff*, 159 F.Supp. 484 (S.D.N.Y., Feb. 17, 1958), wide discretion in Special Inquiry Officer as to withholding deportation on grounds of possible persecution; *Mendoza-Rivera v. Del Guercio*, 161 F.Supp. 473 (S.D.Cal., C.Div., Feb. 24, 1958), marihuana is not a "narcotic drug" within statute authorizing deportation of alien for mere possession; *Harris v. U. S. Department of Justice*, 161 F.Supp. 59 (E.D.Mich., S.D., March 13, 1958), sufficient

evidence as to remaining beyond period of permit; *Tutrone v. Shaughnessy*, 160 F.Supp. 433 (S.D.N.Y., March 24, 1958), petty larceny not crime of moral turpitude; *Rojas-Gutierrez v. Hoy*, 161 F.Supp. 448 (S.D.Cal., C.D., April 25, 1958), conclusion that marihuana is not "narcotic drug" within the immigration statute is not patently erroneous; *Bong Youn Choy v. Barber*, 162 F.Supp. 629 (N.D.Cal., S.Div., May 26, 1958), evidence sufficient to show entry into U. S. without visa and membership in Communist Party; *Cammarata v. Sahli*, 163 F.Supp. 125 (E.D.Mich., S.Div., June 17, 1958), failure to reopen deportation proceeding against alien who was confined to penal institution during period for which good moral character is required is not abuse of discretion; *Tadashi Miyaki v. Robinson*, 257 F.2d 806 (7th Cir., July 8, 1958), cert. denied, U. S. Sup. Ct., 79 S.Ct. 155, 358 U. S. 894 (Nov. 17, 1958), discretion exercised properly against suspension of deportation; *Holz v. Del Guercio*, 259 F.2d 84 (9th Cir., April 14, 1958), evidence established no valid entry document; *Kwong Hai Chew v. Rogers*, 257 F.2d 606 (D.C. Cir., May 7, 1958), Immigration and Naturalization Service must be moving party and bear the burden of proof; *Brunner v. Del Guercio*, 259 F.2d 583 (9th Cir., May 20, 1958), no finding that selective service form was voluntarily executed with full knowledge of its effect; *Clair v. Barber*, 258 F.2d 558 (9th Cir., June 23, 1958), Board's action denying suspension of deportation not arbitrary; *Bisaillon v. Hogan*, 257 F.2d 435 (9th Cir., July 1, 1958), conviction of willfully making false statement on passport application is conviction of crime involving "moral turpitude"; *Tandaric v. Robinson*, 257 F.2d 895 (7th Cir., Aug. 12, 1958), Board has authority to reopen hearing to produce additional proof and alien not denied due process; *Memishoglu v. Sahli*, 258 F.2d 350 (6th Cir., Aug. 13, 1958), alien on student non-immigration visa ineligible for suspension of deportation since he applied for relief from military service; *Holzapfel v. Wyrsh*, 259 F.2d 890 (3rd Cir., Oct. 9, 1958), conviction under State sex offender's act is not within "conviction of crime involving moral turpitude"; *Dabrowski v. Holland*, 259 F.2d 449 (3rd Cir., Oct. 10, 1958), no abuse of discretion in denying stay of deportation; *Tomaselli v. Lehmann*, 260 F.2d 519 (6th Cir., Oct. 16, 1958), section of law dealing with narcotic drug traffic by aliens operates retrospectively; *Lu v. Rogers*, 164 F.Supp. 320 (D.C., March 31, 1958), alien not deportable unless country to which deported gives consent, even though U. S. maintains no diplomatic relations with said country; *Heikkila v. Barber*, 164 F.Supp. 587 (N.D.Cal., S.D., July 1, 1958), although conduct of official shocked the court, the letter of the law was followed and authorities were free to deport alien; *U. S. ex rel. Piperkoff v. Murff*, 164 F.Supp. 528 (S.D.N.Y., July 30, 1958), no right to avoid deportation by later act of court in recommending alien not be deported for conviction of two crimes involving moral turpitude; *Williams v. Sahli*, 166 F.Supp. 734 (E.D.Mich., S.D., Sept. 26, 1958), statute governing relief by suspension of deportation strictly construed, and not abuse of discretion even though great hardship results.

*Naturalization. Application of Mirzoeff*, 253 F.2d 671 (2nd Cir., Feb.

10, 1958), alien native of Russia and citizen of Iran (neutral), who applied for relief from military service but was never classified or obtained such relief, not permanently disbarred from citizenship; *U. S. v. Chan Chick Shick*, 254 F.2d 4 (2nd Cir., March 20, 1958), alien not present in U. S. for more than one year immediately consecutive to a lawful admission not entitled to naturalization; *Budzislowski v. U. S.*, 254 F.2d 136 (9th Cir., April 15, 1958), trial court could, without further proceedings, correct error induced by Government's arguments; *Jubran v. U. S.*, 255 F.2d 81 (5th Cir., May 7, 1958), alien bound by intelligent election of exemption from military service, even though listing of country as a neutral was wrong; *In Re Terzich's Petition*, 256 F.2d 197 (3rd Cir., June 2, 1958), where alien was arrested and final order of deportation was outstanding, naturalization court had no jurisdiction; *In Re Cerati*, 160 F.Supp. 531 (N.D.Cal., S.D., Sept. 26, 1957), alien electing to claim exemption from service in the armed forces could not restore his eligibility for citizenship by subsequent service; *In Re Field's Petition*, 159 F.Supp. 144 (S.D.N.Y., Feb. 13, 1958), where alien knowingly omitted Russia as place of residence but Immigration Service offered nothing to show this would have resulted in a denial of visa, alien deemed legally admitted and eligible for naturalization; *In Re Mel's Petition*, 159 F.Supp. 136 (E.D.N.Y., Feb. 17, 1958), procurement of visa from Consul in Italy did not entitle alien to any status in regard to loss of U. S. citizenship by reason of serving in a foreign army; *In Re Krause's Petition*, 159 F.Supp. 687 (S.D.Ala., S.D., March 10, 1958), alien unwilling to bear arms against England not entitled to naturalization; *In Re Pinner's Petition*, 161 F.Supp. 337 (N.D.Cal., S.D., March 12, 1958), alien, resident in U. S. one year, who procured employment in the U. S. Air Force abroad but did not, until subsequently, file application to preserve U. S. residence, ineligible for naturalization; *Petition of Burky*, 161 F.Supp. 736 (E.D.N.Y., April 15, 1958), alien who executed application for exemption from military service under treaty with Switzerland ineligible for U. S. citizenship; *In Re Petition of Lum Sum Git*, 161 F.Supp. 821 (E.D.N.Y., April 17, 1958), where alien joined United States Air Force in China he was not within statute, since he was not located in the U. S. or other named areas at the time of enlistment; *In Re Calvo's Petition*, 161 F.Supp. 761 (D.N.J., May 8, 1958), alien not misled by clerk as to his ineligibility for U. S. citizenship resulting from signing application for relief from military service; *In Re Elken's Petition*, 161 F.Supp. 823 (E.D.N.Y., May 8, 1958), alien ineligible for citizenship even though application for exemption from military service was on wrong form and he was not notified of the statutory bar; *In Re Perdiak's Petition*, 162 F.Supp. 76 (S.D.Cal., C.Div., May 19, 1958), evidence sustained no abandonment of children in Hungary and so alien of good moral character; *In Re De Campos' Petition*, 163 F.Supp. 173 (D.N.J., June 19, 1958), evidence established alien knew he was signing away his right to citizenship even though he could neither read nor write English; *In Re Bruce's Naturalization*, 163 F.Supp. 493 (S.D.N.Y., June 30, 1958), circumstances disclosed intelligent waiver of petitioner's right to citizenship; *Application of*

*Kursteiner*, 171 N.Y.S. 2d 684 (Sup. Ct., App. Div., Fourth Dept., March 21, 1958), reply of clerk of local draft board as to alien's relief from military service was not competent *prima facie* proof of ineligibility for citizenship; *Strupp v. Dulles*, 163 F.Supp. 790 (S.D.N.Y., Aug. 9, 1957), naturalized citizen who had expatriated himself must exhaust his administrative remedies; *In Re Sing's Petition*, 163 F.Supp. 922 (N.D.Cal., S.D., June 30, 1958), lawful entry and physical presence not immediate and consecutive with entry into armed forces, so legislative intent favors naturalization; *In Re Kielblock's Petition*, 163 F.Supp. 687 (S.D.Cal., C.D., July 10, 1958), unmarried female alien is of good moral character, although she engaged in sexual intercourse with married man; *In Re Naturalization of Spak*, 164 F.Supp. 257 (E.D.Pa., July 24, 1958), evidence showed no extenuating circumstances for lack of support of child, so alien not of "good moral character"; *Petition for Naturalization of W—*, 164 F.Supp. 659 (E.D.Pa., Sept. 2, 1958), insufficient evidence of good moral character; *Petition for Naturalization of Zaharia*, 166 F.Supp. 314 (S.D.N.Y., Sept. 19, 1958), savings clause of 1952 Act protects alien who previously had five years' continuous residence and then was transferred to foreign country, since he complied with 1940 Act; *Petition for Naturalization of Horvath*, 166 F.Supp. 938 (N.D.W.Va., Oct. 20, 1958), since order of deportability outstanding, petition denied.

*Denaturalization.* *Matles v. U. S.*, *Lucchese v. U. S.*, *Costello v. U. S.*, 356 U. S. 256 (April 7, 1958), affidavit of good cause necessary to initiation of denaturalization proceedings; *U. S. v. Diamond*, 356 U. S. 257, 78 S.Ct. 715 (April 7, 1958), affirming, *Per Curiam*, 255 F.2d 749 (9th Cir., 1957), filing of affidavit showing good cause prior to action for denaturalization is an indispensable requirement; *Nowak v. U. S.*, 356 U. S. 660 (May 26, 1958), to sustain charge of fraudulent procurement of citizenship there must be clear, unequivocal and convincing evidence which does not leave the issue in doubt; *Maisenberg v. U. S.*, 356 U. S. 670 (May 26, 1958), companion decision to *Nowak*, *supra*; *Dulles v. Katamoto*, 256 F.2d 545 (9th Cir., June 6, 1958), dual citizenship allowed, since government has heavy burden of proving otherwise in denaturalization proceeding; *U. S. v. DeLucia*, 256 F.2d 487 (7th Cir., June 18, 1958), evidence justified decree revoking certificate of citizenship granted alien on the grounds of false name, prior convictions, and fraud upon the court; *Stacher v. U. S.*, 258 F.2d 112 (9th Cir., July 15, 1958), evidence sufficient for denaturalization; *U. S. v. Fisher*, 258 F.2d 362 (7th Cir., July 25, 1958), petition dismissed for lack of filing statutory affidavit; vigorous dissent on merits; *U. S. v. Failla*, 164 F.Supp. 307 (D.N.J., July 18, 1958), evidence sufficient, alien waived requirement of filing of affidavit showing good cause by failure to attack promptly.

*Passports.* *Kent v. Dulles*, 357 U. S. 116 (June 16, 1958), reprinted in 53 A.J.I.L. 171 (1959), Secretary of State has no authority to promulgate regulations denying passports to Communists or regulation giving authority to demand a non-Communist affidavit from citizen applying for a passport; *Dayton v. Dulles*, 357 U. S. 144 (June 16, 1958), noted *ibid.*

177, a citizen cannot be denied a passport on ground he was going abroad to advance the Communist cause.

*Miscellaneous.* *U. S. v. Cores*, 356 U. S. 405 (May 19, 1958), alien crewman remaining beyond permit is guilty of continuing offense which may be prosecuted in any district where he is found, even though it is not the district where he was present when his permit expired; *Brownell v. Stjepan Bozo Carija*, 254 F.2d 78 (D.C. Cir., Dec. 5, 1957), entry upon transit visa not unlawful merely because alien intended to take advantage of U. S. law if the opportunity offered itself for him to remain in U. S.; *Cheng Lee King v. Carnahan*, 253 F.2d 893 (9th Cir., March 24, 1958), where alien merchant seaman could not return to land of last residence nor the country of his birth, denial of adjustment of his immigration status without making a determination as to his moral character improper; *Earle v. U. S.* 254 F.2d 384 (2nd Cir., April 21, 1958), departure bond enforceable, notwithstanding alien voluntarily departed prior to the date fixed after admitting failure to comply with conditions of admission; *King v. Carnahan*, 160 F.Supp. 721 (N.D.Cal., S.D., Oct. 5, 1956), where fear of persecution barred return to China, but reason he could not return to Singapore was inability to obtain a visa, alien not entitled to present case to Congress for determination of permanent residence; *Varga v. Ryan*, 160 F.Supp. 113 (D.Conn., July 11, 1957), fact that plaintiff alien was outside the district when defendant received notice of restraining order is immaterial, and question is whether court had jurisdiction of Director when he had ability and authority to grant relief which alien sought under Hungarian Refugee Relief Program; *U. S. v. Bakouros*, 160 F.Supp. 173 (E.D.Pa., March 28, 1958), in prosecution for unlawful re-entry after deportation, crewman's landing permit, issued pursuant to concealment of fact that alien was previously deported, was invalid so that evidence proved defendant guilty of offense charged; *Mantyk v. Sahli*, 161 F.Supp. 199 (E.D.Mich., S.D., March 31, 1958), Attorney General has power to suspend approval of petition granting non-quota status; *U. S. v. Watterworth*, 162 F.Supp. 527 (D.Md., May 2, 1958), prosecution of alien for illegal entry after departure under order of deportation and subsequent return; *In Re Lee Tin Mew*, 162 F.Supp. 812 (D.Hawaii, May 14, 1958), Attorney General properly invoked statutory power and could aid the court in directing individual to appear and testify as to his privilege to reside in the United States; *Dept. of Mental Hygiene v. Renel*, 173 N.Y.S. 2d 231 (Sup. Ct., App. Term, First Dept., March 20, 1958), leave to appeal granted from affirmance of decision that "affidavit of support" executed to induce admission of alien created only a moral obligation to support not enforceable as a contract; *Shikoh v. Murff*, 257 F.2d 306 (2nd Cir., June 27, 1958), marriage to American citizen furnished no basis for adjustment of status due to invalidity of prior divorce; *Ieronimakis v. Spence*, 257 F.2d 874 (4th Cir., June 30, 1958), no abuse of discretion to repatriate seaman suffering from disease requiring several months' treatment; *Kotsampas v. U. S.*, 257 F.2d 64 (6th Cir., July 15, 1958), offense of remaining in U. S. in excess of time permitted by landing permit is

continuing offense for venue purposes; *Jones v. U. S.*, 260 F.2d 89 (9th Cir., Oct. 3, 1958), in prosecution for illegally transporting aliens, multiple punishment for each of the aliens transported at one time is proper; *Siminoff v. Murff*, 164 F.Supp. 34 (S.D.N.Y., July 13, 1958), orders of supervision over deportable aliens not abuse of discretion; *U. S. v. Gagliano*, 166 F.Supp. 601 (E.D.N.Y., Oct. 10, 1958), in prosecution for re-entry without consent, amendment granting blanket permission not given retroactive effect.

#### RECENT SIGNIFICANT GERMAN AND DUTCH DECISIONS \*

##### *Citizenship Act of 1913—loss of citizenship by marriage to a foreigner —Land legislation prior to establishment of Federal Republic— policy of Military Government*

Police authorities issued an expulsion order against a woman resident of Bremen, who had married an American citizen in 1948. The lower administrative courts found that the facts warranted her expulsion, provided she was a foreigner or a stateless person. The appellate court held, however, that she had not lost her German citizenship, because section 17, No. 6, of the German Citizenship Act, providing that a German woman lost her citizenship by marriage to a foreigner, had been repealed by the *Land* Constitution of Bremen of 1947. This Constitution provides that no one shall be discriminated against by reason of sex (Article 2, paragraph 2). The appellate court reasoned that loss of citizenship on the basis of section 17, No. 6, was discriminatory; that the Basic Law removed this discrimination in Article 16; and that, until the Basic Law became effective on May 23, 1949, the question was governed by the Constitution of Bremen. The Federal Administrative Court reversed for the following reasons:

Even if the legislature of Bremen had intended to change the Reich Citizenship Act, it had no power to do so, both under principles of Constitutional law and under occupation law. A member state cannot legislate on rules which determine citizenship of the national state; German citizenship must be regulated uniformly. Even though a German Constitution did not exist at the time of the adoption of the Bremen Constitution, yet Germany existed as a state, and the legislative power of the *Länder* was limited by the existence of that national state.

Occupation law likewise prohibited a *Land* from legislating in the field of national law. This follows from the letter in which the Military Governor gave his approval to the Constitution of the Free and Hanseatic City of Bremen and from the speech which General Clay gave before the Ministers Presidents of the *Länder* in Stuttgart on January 8, 1947, in which he said: "It is clear that state legislation may not extend to the field of national legislation nor contradict it." This is confirmed by the practice of the American Military Government. As a matter of principle the American Military Government did not permit the *Länder* to carry out

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naturalizations or releases from citizenship. Furthermore, when Bavaria intended to legislate with regard to *Land* citizenship, the U. S. Military Government withheld its approval. Thus the U. S. Military Government acted in accordance with the principles which the British Military Government expressly laid down in Ordinance No. 57.

Consequently, when plaintiff married her husband in 1948, section 17, No. 6, of the Reich Citizenship Act was in effect and she lost her German citizenship. Therefore the Police Regulations concerning Foreigners could be applied to her. Federal Administrative Court, May 22, 1958 (BVerwG 1 C 124/56 Bremen). 11 *Neue Juristische Wochenschrift* 1410 (1958).

*Military occupation—Military Government Law No. 52 concerning the Blocking and Control of Property—liability of custodian to owner of blocked property*

The plaintiff company was placed under property control according to Military Government Law No. 52 in the British zone of occupation. The defendant was appointed custodian of the company's property in 1945. The plaintiff sued him for damages on the ground that he had dissipated assets of the company. The lower courts denied the claim on factual and legal grounds. The Supreme Court held that on the facts presented the custodian had not violated his duties toward the plaintiff, but it nevertheless discussed the legal basis for the liability of a custodian under Law No. 52. The Supreme Court reasoned as follows:

The Court of Appeals is of the opinion that the property custodians appointed under Law No. 52 were not liable to the owners, since they had the sole duty to safeguard the interest of the Military Government. The Court of Appeals erred in holding that the defendant custodian acted in the exercise of governmental powers and therefore was protected by the provisions of German law excluding personal liability of public officials for their official acts. The custodian, although appointed by a governmental act, was not a public official in the meaning of German public law; he was not charged with the exercise of public functions, but his activities were exclusively of a private-law nature, i.e., his sole duty was to administer the property which remained the plaintiff's property.

The custodian's personal liability for damages arising from his administration can be based on the Code provisions on torts or on a quasi-contractual relationship created by statute. Tort liability in this case is eliminated by the fact that the statute of limitations has run. But the Court of Appeals erred in denying the existence of a mandate relation (*Geschäftsbesorgungsverhältnis*), according to section 675 of the Civil Code, between the parties. It is true that in this case there was no State law defining the liability of the custodian such as the States in the former American zone of occupation enacted (Bavaria, 1947; Bremen and Baden-Württemberg, 1948; Hesse, 1950). But no legislation was necessary to create such liability; the laws referred to merely clarified an existing liability.

It is a principle of German law that an administrator of another's property who is appointed by an act of government has a duty toward the

owner to manage the property carefully and is liable to him for culpable violations of this duty. This principle applies to trustees in bankruptcy, administrators of estates, guardians, curators, and holders of similar positions. The characteristic which the custodian under Law No. 52 has in common with these persons is the fact that he is charged with the administration of the property of another. The Court of Appeals erred in holding that the custodian under Law No. 52 had to safeguard the interest of the occupying Power exclusively and that thus he had to administer the property not for the owner but rather against him. It is true that in the case here, where the property was blocked because of the political incrimination of the owner, the blocking and appointment of a custodian were directed against the owner, but it does not follow that the custodian did not have to take the interests of the owner into consideration. In many respects the interests of the occupant in preserving the blocked property were identical with those of the owner. Federal Supreme Court, VIIth Civil Division, June 24, 1957 (VII ZR 310/56). 24 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 393.

*Federal Indemnification Law—no claims of Austrian persecutees against Germany*

A persecutee who was an Austrian citizen at the time of the annexation of Austria filed a claim against Germany for damages under the Federal Indemnification Law. The claim was denied, and the denial was upheld by the courts. The Court of Appeals held:

The claim must fail because the persecutee was an Austrian citizen. By Article 23, paragraph 3, of the State Treaty for the Re-establishment of an Independent and Democratic Austria, of July 27, 1955 (see 49 A.J.I.L. Supp. 162), the Austrian Federal Government waived on its own behalf and on behalf of Austrian nationals

all claims against Germany and German nationals outstanding on 8th May, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before 13th March, 1938.

There can be no doubt that according to this provision any claims of Austrian citizens against the German Reich for damages inflicted on them after March 13, 1938, are cut off. The only question that may remain is whether the exception of claims "arising out of contracts and other obligations entered into, and rights acquired, before 13th March, 1938" applies to claims under the Indemnification Law. This question must be answered in the negative.

In order to reach the proper interpretation of Article 23, one must recall the political and economic background of this provision. The victors of the second World War were aware of the fact that reparations which they had imposed upon Germany after the first World War had resulted in a serious disruption of the international economy. They wished to avoid repetition of this mistake, and therefore did not assert any claims for reparations after the collapse of Germany. Instead, they fixed a global

reparation for all damages suffered by the Allies and their nationals from measures of the National Socialist regime. For this purpose all public and private German property situated outside the borders of the German Reich as they existed on December 31, 1937, was, *inter alia*, awarded to the victorious Powers. The Allies in turn obligated themselves to compensate their nationals for all damages which they suffered from measures of the National Socialist government and thus to relieve the German Reich or the Federal Republic of all claims of that kind. This was first done by the Inter-Allied Reparations Agreement in 1946. Similar provisions are contained in the Peace Treaties of the Allies with Italy, Hungary, Rumania, Bulgaria, and Finland. Accordingly, all nationals of these countries are not entitled to any indemnification claims under the Indemnification Law, provided that they had such nationality at the time when the damage occurred.

Since the Allies, in the State Treaty of 1955, likewise granted Austria a global reparation for the damages suffered during the National Socialist regime, by transferring to Austria all German assets situated in Austria (Article 22, No. 11), they intended to impose, and did impose, upon the Austrian Federal Republic the obligation to indemnify its nationals for all damages arising from National Socialist acts of terror. This is the meaning of Article 23. Hence the exceptions made in Article 23 for claims and rights which had arisen prior to March 13, 1938, cannot apply to the reparation of National Socialist wrongs. Court of Appeals of Celle, July 30, 1957 (2 U 196/56 E). 8 *Rechtsprechung zum Wiedergutmachungsrecht* 400 (1957).

*Convention on the Settlement of Matters Arising out of the War and the Occupation—Article 7—criminal jurisdiction of occupying Powers—revocation of parole by German authority*

The appellant, a German citizen, was sentenced to imprisonment by the American High Military Court. After having served part of the sentence he was released on parole. During the period of parole he was given a prison sentence by a German criminal court. Upon recommendation of the Mixed Clemency Advisory Board the Minister of Justice of Hesse revoked his parole. The criminal court to which the prisoner applied for relief held that the revocation was lawful, and the appellate court affirmed on the following grounds:

The judgments and decisions of the courts of the occupying Powers were, as the Federal Supreme Court has consistently held, decisions of foreign courts. They rested upon the power held by the occupants. The Conventions of the Federal Republic with the Three Powers have restored the sovereignty of the Federal Republic, so that the exercise of criminal jurisdiction by German courts is limited only to the extent that the conventions expressly so provide.

Under Article 7, paragraph 1, of the Convention for the Settlement of Matters Arising Out of the War and the Occupation

all judgments and decisions in criminal matters heretofore or hereafter rendered in Germany by any tribunal or judicial authority of the Three Powers or any of them shall remain final and valid for all purposes of German law and shall be treated as such by German courts and authorities.

They must now be executed by German authorities in the same manner as if they were German decisions. The Federal Republic has in this respect become the legal successor of the former occupying Powers and has at the same time assumed responsibility for the persons sentenced. The measures to be taken by the German authorities on the basis of sentences rendered by an occupying Power are not restricted to those persons who were imprisoned at the time when the convention became effective or at the time when a decision has to be made concerning them. Thus Article 7, paragraph 2, of the convention provides expressly that the German authorities must confine in prison until the termination of their sentences persons "who have been or shall be sentenced" by occupation courts or who are held for trial before such courts. According to this wording, there may be among them persons who were not imprisoned at the time when the German authorities took over and the confinement of such persons need not be ordered by the former occupying Power.

Paragraph 6 of Article 7 provides that the Federal Republic shall have the exclusive right to make final decisions in all matters of termination or reduction of sentences, parole, pardon and other acts of clemency regarding German nationals confined in German institutions pursuant to paragraph 2; in cases of persons sentenced for certain offenses against the occupying Power, decisions in favor of such persons may be made only in accordance with the recommendation of the Mixed Clemency Advisory Board established under paragraph 5. Neither this provision nor the rules laid down in the other parts of Article 7 compel the conclusion that the German authorities had merely the power to grant or to deny the acts of clemency mentioned.

It would be illogical if a German prisoner could be released on parole by the German authorities but that parole could not be revoked. If this were so, parole would amount to a definite release; for the Three Powers would no longer have jurisdiction to revoke the parole. The power of the German authorities to revoke a parole results necessarily from the transfer of criminal jurisdiction to them. Court of Appeals of Frankfurt, Order of January 4, 1958 (2 Ws 363/57). 11 *Neue Juristische Wochenschrift* 761.

*Hague Rules of Land Warfare, Article 46—Polish Jewish refugees interned in Shanghai—Germany liable for indemnification*

Plaintiff, a Jew who lived in Poland until the beginning of the war, fled his country and finally reached Shanghai in 1941. There he was interned by the Japanese in the Shanghai-Hongkew Ghetto from May 18, 1943, to August 15, 1945. In 1946 he emigrated to Australia and acquired Australian nationality. He sued for damages under the Federal Indemni-

fication Law, section 160 (deprivation of liberty). The Court of Appeals of Coblenz decided in his favor on these grounds:

The deprivation of liberty which plaintiff suffered was made possible by the fact that plaintiff had lost the protection of the German Reich. He was entitled to such protection as an inhabitant of an occupied country. Germany as the occupying Power had a duty under Article 46 of the Hague Rules of Land Warfare to respect the honor and the rights of family, life, and private property, as well as religious beliefs and practices in the occupied Polish territory. Germany had assumed all governmental power, and the inhabitants of Poland could not look to their own government for protection. Germany's obligation under international law cannot be questioned, as the lower court did, on the ground that the occupation of Poland did not have a definite, internationally recognized character. The application of the Hague Rules is not dependent on these criteria.

The question raised by the defendant state, whether the German Reich had certain obligations to protect Poles in foreign countries, need not be decided here. Plaintiff was in Poland in September, 1939, when the German troops occupied the country. Instead of honoring its obligations under Article 46 of the Hague Rules, the National Socialist government began to persecute the Jewish population and thus drove them to flight. By leaving Polish territory under the pressure of persecution, the Polish Jews definitely lost the protection of the occupying Power to which they were entitled. This is what made possible the subsequent deprivation of liberty which plaintiff suffered in Shanghai. Court of Appeals of Coblenz, July 8, 1958 (3W (Wg) 7/58). 9 *Rechtsprechung zum Wiedergutmachungsrecht* 398 (1958).

*Enemy Property Law of The Netherlands—citizenship of a Polish citizen who was placed on the List of Ethnic Germans—non-recognition of "Fuehrer decree" of October 8, 1939*

Plaintiff, a Polish citizen and resident in 1939, was entered in the List of Ethnic Germans (*Deutsche Volksliste*) in 1942 and thereby acquired German citizenship under the laws then in effect. He resided in Western Germany after 1945. The Netherlands Office of Alien Property (*Beheers-instituut*) vested his assets in Holland and refused to release them on the ground that he was an enemy alien in the meaning of the Netherlands Enemy Property Decree of October 30, 1944. Plaintiff appealed to the competent court, the *Raad voor Rechtsherstel*, which reversed the decision of the *Beheersinstituut*. The court held:

The *Fuehrer* decree of October 8, 1939, concerning the organization and administration of the Eastern territories, effective October 26, 1939, incorporated certain conquered Polish territories into the German Reich. It provided, *inter alia*, that the inhabitants "of German or related blood" were to become German citizens in accordance with further legislation, and that the "ethnic Germans" (*Volksdeutsche*) in these territories became German citizens in accordance with the Reich Citizenship Act. This latter provision can only mean that those persons who were classified as

ethnic Germans obtained German citizenship by virtue of the decree, a fact which could not be altered either by the subordinated legislative authority or by the persons affected themselves. The legislative authority actually interpreted the decree in this way, as is shown, *e.g.*, by the decree of March 4, 1941, concerning the List of Ethnic Germans, which provides in section 3 as follows:

The former citizens of Poland or Danzig who fill the requirements for registration in parts 1 or 2 of the List of Ethnic Germans acquire German citizenship as of October 26, 1939, regardless of the date of registration.

The manner in which these persons became Germans cannot in any fashion be compared to any kind of proceeding for naturalization upon application; in fact, it made German citizens out of citizens of a foreign state merely because they had certain qualifications, possibly even against their wishes. In deciding the question whether they should recognize and apply the enactments referred to, Netherlands courts must take into consideration that the decree of the *Fuehrer* of October 8, 1939, was issued at a time when the state of war between Poland and Germany continued. The provisions cited must therefore be considered as entirely void, since they are in flagrant contradiction to international law. Consequently, the plaintiff has never lawfully acquired German citizenship.

This result is not changed by any statements which the plaintiff himself may have made concerning his German citizenship nor by Article 116, paragraph 1, of the German Basic Law, which defines as a German "within the meaning of this Basic Law" anyone who has German citizenship or who has been received in the territory of the German Reich as it existed on December 31, 1937, as a refugee or expellee of German ethnic origin. Without having to decide whether the plaintiff belongs in any of these categories, we must state that this provision did not confer citizenship upon the refugees and expellees. Article 116, paragraph 1, of the Basic Law is not a provision on citizenship but a rule relating to certain foreigners, designed to grant a special status to these groups in order to safeguard their persons and their property. To treat such persons, who are either stateless or citizens of another state, as citizens of an enemy nation would be contrary to the purpose of the Enemy Property Decree. Raad voor Rechtsherstel, Decision of July 17, 1956 (R 26, 491-S). 11 *Neue Juristische Wochenschrift* 319 (1958), with note by R. Graupner, London.

## BOOK REVIEWS AND NOTES

- Yearbook of the International Law Commission, 1949. Summary Records and Documents of the First Session.* New York: United Nations; Columbia University Press, 1956. pp. vi, 312. Index. \$3.00.
- Yearbook of the International Law Commission, 1950.* Vol. I: *Summary Records, Second Session.* pp. x, 342, Index, \$3.50; Vol. II: *Documents, Second Session.* pp. iv, 387, \$4.00. New York: United Nations; Columbia University Press, 1957, 1958.
- Yearbook of the International Law Commission, 1951.* Vol. I: *Summary Records, Third Session.* pp. viii, 450, Index, \$4.50; Vol. II: *Documents, Third Session.* pp. iv, 146, \$1.50; New York: United Nations; Columbia University Press, 1957.
- Yearbook of the International Law Commission, 1952.* Vol. II: *Documents, Fourth Session.* New York: United Nations; Columbia University Press, 1958. pp. iv, 72. \$ .70.
- Yearbook of the International Law Commission, 1956.* Vol. I: *Summary Records, Eighth Session.* pp. ii, 294, Index, \$3.00; Vol. II: *Documents, Eighth Session.* pp. iv, 303. \$3.00. New York: United Nations; Columbia University Press, 1956.
- Yearbook of the International Law Commission, 1957.* Vol. I: *Summary Records, Ninth Session.* pp. viii, 232, \$2.50; Vol. II: *Documents, Ninth Session.* pp. iv, 147, \$1.75. New York: United Nations; Columbia University Press, 1957, 1958.
- Yearbook of the International Law Commission, 1958.* Vol. II: *Documents, Tenth Session.* New York: United Nations; Columbia University Press, 1958. pp. iv, 140. \$1.50.

The International Court of Justice and the United Nations International Law Commission are making distinguished contributions to the development of international law. The work of the Court has been superbly documented in readily available publications. Until recently the International Law Commission has been poorly served in this respect. Although its valuable documentation could be consulted in scattered depository libraries, its printed publications were few. Most of its documents and all the records of its discussions and proceedings were merely mimeographed in impermanent form and were not for sale anywhere.

By Resolution 987 (X), adopted by the United Nations General Assembly on December 3, 1955, provision was made for the printing of the documents relating to the first seven sessions of the Commission, i.e., the "studies, special reports, principal draft resolutions and amendments," in their original languages (English or French) and for the printing of the Summary Records of the Commission "initially in English." By the same resolution, the Secretary General was requested to arrange for the printing

each year in English, French and Spanish of the current documentation of the Commission and to consult the Commission with respect to the selection and editing of its documents.

At its 8th Session in 1956, the Commission decided that the selection of documents for publication should be under its control and that the records and documents should be published in the form of a *Yearbook of the International Law Commission* consisting of one or two volumes according to the size of the documentation of each session. The Commission considered it indispensable that the final Report of the International Law Commission covering the work of a session be included in the *Yearbook*, although the Report is available separately in five languages.

The first volumes to appear under this program were Volume I of the 1956 *Yearbook* and a single-volume *Yearbook* for 1949, both of which were published in 1956. The established pattern of the *Yearbook* is to include in Volume I the Summary Records of a session and in Volume II the documents, including the annual Report of the Commission. The Summary Records so far published include those of the 1st meeting (1949) through the 133rd (1951), and the 331st (1956) through the 430th meeting (1957). It is expected that the 200-meeting gap will shortly be filled. Although the Commission in its 1956 Report considered it "indispensable" that each *Yearbook* be provided with an index, no Volume II, covering documents, is indexed. Neither volume for 1957 contains an index and the index for Volume I of 1956 is quite inadequate.

The selection of documents for inclusion in the *Yearbooks* is fairly complete. The few documents of the Commission which previously appeared in print, e.g., A/CN.4/1, 2, 4, 5, 6, 7, are not reprinted in the *Yearbook* for 1949. Certain mimeographed lists and memoranda prepared by the U.N. Secretariat are omitted, as are some of the working documents (A/CN.4/W. and A/CN.4/L. series). The substance or textual passages of some of the omitted documents are incorporated in appropriate places in the *Yearbooks*. Each volume of documents contains a list of other documents relating to a particular session of the Commission which are not reproduced. The omissions do not significantly hinder an understanding of the work of the Commission. The editing of the *Yearbook* is excellent.

Whatever doubts may exist in some quarters as to the value of the codification, restatement and progressive development of international law or of the Commission's contributions to that work can be laid at rest by an examination of the results of the 1958 Geneva Conference on the Law of the Sea. The draft treaties opened for signature at Geneva preponderantly reflect the years of preparatory work by the International Law Commission, and even its drafting.

In view of the work under way or still to be initiated in the long-range program of the Commission, the publication of its records should aid it by encouraging more knowledgeable and constructive criticism of its methods of work and of the results of its labors.

HERBERT W. BRIGGS



*Académie de Droit International. Recueil des Cours, 1955.* Vols. I and II (Tomes 87 and 88 of the Collection). Leyden: A. W. Sijthoff, 1956, 1957. Vol. I: pp. x, 573, Index; Vol. II: pp. viii, 525, Index. Fl. 40.00 each.

The lectures at the 1955 session of the Hague Academy of International Law, reprinted in these volumes, were delivered by scholars from the United Kingdom (three), the United States (three), France (two), The Netherlands (one) and Switzerland (one).

Taking the lectures in the order in which they were printed, Dr. C. Wilfred Jenks contributed an unusually interesting analysis of the procedure devised by the I.L.O. for the examination of allegations concerning the infringement of trade union rights ("The International Protection of Freedom of Association for Trade Union Purposes"). Displaying its customary flexibility in the face of governmental nonco-operation with the 1950 Fact-Finding and Conciliation Commission on Freedom of Association, the Governing Body in 1951 established the Committee on Freedom of Association. The 1950 Commission required the consent of the state against which allegations were made in order to institute the necessary investigation. The 1951 Committee, being essentially an advisory body, needs no consent of the government against which complaints are made. Its purpose is to advise the Governing Body whether or not the complaints are worthy of examination by the Governing Body. The bulk of the paper is devoted to an analysis of the "case law" of the Committee which considered complaints against 64 governments. Without being legally bound to do so, most of these governments co-operated with the Committee's examination of the merits of the complaints. Dr. Jenks concludes that the Committee succeeded "in establishing a measure of international accountability by governments for their trade union policies." (Vol. I, p. 104.) This is perhaps an overly optimistic judgment, as is the assertion that "the principle of freedom of association . . . must be regarded as having taken its place among the 'general principles of law recognized by civilized nations.'" (p. 30.) Dr. Jenks' lectures reveal a most interesting field for further research.

In "Recent Developments of the Principle of Domicile in English Law" Professor Norman Bentwich examines the modifications of the applicable English concepts during the twenty years which have elapsed since he first lectured at the Academy on this subject. English courts have abandoned the policy of "splendid isolation" in this matter and have developed the law so as to bring it "into fuller accord with human needs and with the conditions of our time." (Vol. I, p. 122.)

Dr. Georg Schwarzenberger delivered the principal course of lectures on "The Fundamental Principles of International Law." These principles, seven in number, are: sovereignty, recognition, consent, good faith, self-defense, international responsibility, and freedom of the seas. The last two are treated somewhat scantily; the principle of good faith received the fullest treatment and the doctrine of abuse of right, in that context, is particularly interesting. The author contends that there is little sup-

port for this doctrine in practice and that, in fact, it is unnecessary, as the cases in which it has been involved can be explained more adequately on other grounds. When is a principle of international law deserving of being singled out as "fundamental"? The test suggested by the author is that "each of these principles makes an essential contribution of its own to the structure of universal international law" (Vol. I, p. 372), and that without it international law would be inconceivable. However, even within the seven principles there is a hierarchy of relevance. Five of them, to wit, consent, good faith, self-defense, international responsibility and freedom of the seas, "constitute the international public order" (p. 376). Schwarzenberger to the inductive approach, should have chosen to present not equally essential, as "every act of recognition could be expressed in terms of consent." (p. 378.)

It may appear paradoxical that a scholar who is as committed as is Dr. Schwarzenberger, to the inductive approach, should have chosen to present virtually the whole sweep of international law from the standpoint of fundamental principle. To guard against the charge that he lapsed into "deductivism," he is careful to point out, first, that his principles are "an abstraction, and nothing but an abstraction from a number of rules which themselves bear the hall-mark of" one of the law-creating processes (customary international law, treaties and general principles) and, secondly, that it is not permissible "to derive from such abstractions new rules." (pp. 207-208.) An exception is made for such fundamental principles as are incorporated into multilateral treaties like the Covenant of the League of Nations or the Charter of the United Nations. A principle, so incorporated, may become more precisely defined and "instead of being a mere abstraction from legal rules, it may itself become a binding rule of wide scope from which other subordinate rules may be legitimately derived. Whether this is the case is a matter of interpretation of the instrument in question." (p. 213.)

The title of Professor Roger Pinto's lectures, "*La prescription en droit international*," is rather misleading, as he is not concerned with prescription in the technical sense. In fact he argues that international law cannot and should not borrow the principle of prescription from municipal law. In the latter system, prescription "is the daughter of custom." In the former system, custom is sufficient: it creates, changes and erases rules and principles in conformity with its specific juristic character. Thus, paraphrasing Judge Lauterpacht, the author says: "Prescription is but another expression for customary international law." (Vol. I, p. 411.) He is, then, concerned with the elements necessary for the growth of rules of customary international law and these are: effectiveness and recognition. Neither element by itself is sufficient; it is the confluence of effectiveness and recognition which creates new law (p. 426).

Professor J. P. A. François gives an admirable survey of the Permanent Court of Arbitration ("*La Cour Permanente d'Arbitrage, Son Origine, Sa Jurisprudence, Son Avenir*"). It has handled twenty-four cases in the past and some cases are pending. The author sees the possibility of even

greater use of its facilities in the future, if the governments would agree to submit to arbitration disputes between states on the one side and great corporations and individuals on the other. While, according to Article 37 of the Hague Convention for the Pacific Settlement of International Disputes, arbitration "has for its object the settlement of disputes between States," Article 47 creates the possibility of utilizing the services of the Bureau and its expertise for proceedings between governments and individuals or corporations.<sup>1</sup> A precedent for this exists in the case between China and the Radio Corporation of America. Professor François also cites the recommendation of the International Chamber of Commerce, adopted at its 1953 Vienna session,

that the Permanent Court of Arbitration at The Hague should undertake the study of the adaptation of its organization for the purpose of settling disputes between States and individuals. (Vol. I, p. 545.)

Under the title, "*La Crise et les Transformations du Droit des Gens*," Professor Josef L. Kunz, drawing upon his personal experience and vast erudition, presents a general survey of the developments since the first World War. If the crisis in the influence of international law can be traced to insecurity and uncertainty and the division of the world into antagonistic ideological blocs, the transformation is largely due to the fact that, since 1914, international law has been in a state of transition from classic to a new legal order. This transition is largely due to the emergence of international organizations and the prevailing tendency to limit sovereignty as well as the right to resort to war. Without a break in continuity, international law evolved from a decentralized to a relatively centralized order; new limitations upon sovereignty point to a *supra*—rather than a mere *inter*—national legal order. Kunz agrees with De Visscher that the individualistic distribution of power which characterized the 19th-century law of nations continues as a characteristic—and liability—of the new law. There is an air of pessimism in this at once personal and objective review, though in the end Kunz, as Max Huber did before him, expresses the view that the prevailing crisis of international relations will be overcome by a spiritual renaissance.

The power of international tribunals to determine their own competence is the subject of Professor Georges Berlia's lectures ("*Jurisprudence des Tribunaux en ce qui concerne leur Compétence*"). This competence which Professor Berlia calls competence-competence (shades of the German 19th-century concept of sovereignty as "*Kompetenz-Kompetenz*"!) is largely derived from the silence of the *compromis*. Historically it was argued first by the American Commissioner in *The Betsy* and accepted by the Anglo-American Mixed Commission in its award. It was affirmed by the American-Mexican Commission in 1841 and again in the *Alabama Arbitration*. The principle is explicitly declared in Article 48 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, in Article 73 of the 1907 Convention and, finally, in Articles 36

<sup>1</sup> Art. 47, par. 1: "The Bureau is authorized to place its offices and staff at the disposal of the contracting Parties for the use of any special board of arbitration."

of the Statutes of the Permanent Court of International Justice and the International Court of Justice. Professor Berlia points out that states are always free to derogate from this principle, but he does not, in this context, discuss the 1946 Declaration of the United States accepting as compulsory the jurisdiction of the International Court of Justice. The competence-competence of tribunals is limited by the doctrine of the excess of power of the international judge which renders his award null and void. Unless excluded by the will of the parties, the competence-competence of international tribunals now operates as a principle of customary international law.

Dr. Léopold Boissier discusses the Inter-Parliamentary Union, of which he was the Secretary General from 1933 to 1953 (*"L'Union Interparlementaire et sa Contribution au Développement du Droit International et à l'Établissement de la Paix"*). The Union has always been interested in promoting the development of international law and the reduction of armaments. The author traces the important, though not always fruitful, initiatives of the Union in these matters, and in a concluding lecture reviews the work of parliamentarians in furthering the unification of Europe, the co-operation of the Nordic countries and the settlement of the Austro-Italian conflict concerning South Tyrol.

"Responsibility of States for Unlawful Acts of Their Armed Forces" by Alwyn V. Freeman is an important contribution.<sup>2</sup> The author begins with the theory of international responsibility and rejects the view that minor officials cannot engage the responsibility of states. He draws a distinction between acts done from purely personal motives which do not, and acts done ostensibly in the interest of a state which do, engage the responsibility of the state. In practice there has been a tendency to hold states to stricter accountability for acts of soldiers than for acts of other agents. Freeman reviews the responsibility of states for acts of soldiers in times of peace as well as of war. In the latter context he deals in some detail with the changing attitude towards pillage. The 1907 Hague Convention respecting the Laws and Customs of War on Land, in Article 3, extends the scope of peacetime responsibility for pillage and other acts, but does not extend liability to acts other than those prohibited by the convention. Of special interest are the chapters dealing with contemporary problems: responsibility for illegalities committed in friendly countries and in countries under military occupation. Particularly relevant is the United States Foreign Claims Act of 1942, as amended, which generally provides for administrative settlement of claims arising from acts of American service personnel and civilian employees stationed in friendly countries. Freeman discusses briefly the NATO Status of Forces Agreements and the claims procedure provided thereunder. The concluding chapter brings together the various provisions pertaining to claims in the post-World War II peace settlements and the Bonn-Paris Agreements concerning Germany. The responsibility of the belligerent occupant is essen-

<sup>2</sup> The reprint of these lectures "For Private Circulation Only" by A. W. Sijthoff, 1957, contains several appendices of pertinent documentation which are omitted in the *Recueil*.

tially identic with that of the state in peacetime, insofar as, at any rate, "wrongful conduct against the subject of an *allied* country" in occupied territory is concerned (Vol. II, p. 367). Freeman's general conclusion is that there has been a marked trend towards enlargement of the scope of responsibility for acts of soldiers both in times of peace and war, although more in the former than in the latter. In his view, the United States and its Allies "have thrown accustomed limitations upon liability to the winds" in connection with claims against their soldiers stationed in friendly countries (p. 409). Such voluntary advances over general international law are registered in United States legislation referred to above and in the NATO Status of Forces Agreements.

In "Historical Development of International Law," Professor Covey T. Oliver covers some aspects of treaty problems in domestic and international law in a rather cursory fashion. The focus is not clear and the language is rather quaint, although the author disclaims "any desire to create a new jargon or displace accepted terminology" (Vol. II, p. 492; what is "prospective normation"?). Be that as it may, Professor Oliver certainly succeeds in impressing upon the reader the disturbing effect of the Bricker amendment, and he is probably right in presenting it as a phenomenon of a "new isolationism" (p. 436). The practice of several states with reference to treaties is discussed, along with the specific problems which arise in federal states. Very useful will be found the chapters dealing with treaty developments after World War II and with the attitude of American lawyers toward treaty law in general. One will certainly agree with him that, although treaty materials have increased substantially, their "recordation [*sic!*], digesting, cross-referencing, and other research techniques remain under-developed, even in countries like the United States of America, where municipal decisions and statutes are most effectively arranged for legal research purposes" (p. 484). This situation needs improvement.

LEO GROSS

*Annuaire Français de Droit International*, 1957. Vol. III. Paris: Centre National de la Recherche Scientifique, 1958. pp. xxviii, 1000. Index. Fr. 3900.

The third issue of the *Annuaire Français de Droit International* maintains the high expectations founded on previous volumes. Claude Chayet, in "*Les Accords en Forme Simplifiée*," examines French practice with regard to the conclusion of international agreements in the form of exchanges of notes, discussing them both from the point of view of international law and of French constitutional practice. Roberto Ago's distinguished article on positive law and international law is here reproduced in French. Georges Berlia, in his "*Contribution à l'Étude de la Nature de la Protection Diplomatique*," queries whether the classical theory that diplomatic protection is the right of a state rather than the right of the individual continues to explain satisfactorily juridical realities. Other

articles discuss Arab notions of territory and frontiers, French technical assistance to new states, the St. Lawrence waterway.

Of the 1000 pages in the *Annuaire*, 850 pages are devoted to case notes, legal problems of international organizations (with specific attention to European organization), French colonial problems, French jurisprudence and French practice relative to international law, a chronology of international events and a magnificent bibliography of works and articles published in French on questions of international law. It is in this major portion of the volume that the *Annuaire* makes its unique contribution. The enlightening doctrinal notes of individual contributors are too numerous to chronicle here but a grateful reader will conclude that this is a volume to use, a volume to have constantly available for consultation.

HERBERT W. BRIGGS

*Annuaire Suisse de Droit International*, 1956. Vol. XIII. Zurich: Editions Polygraphiques S.A., 1957. pp. 339. Sw. Fr. 29.

The thirteenth volume of the *Swiss Yearbook of International Law* is equally divided between contributions on private and public international law and also between the French and German languages. Professor Max Gutzwiller and Judge André Panchaud report on the Eighth Hague Conference on Private International Law, October 3-24, 1956. The former discusses the transfer of property in case of an international sale, and the latter, the three other topics of the conference: competence of courts in the matter of sale, the duty of (family) support and legalization of official documents. Dr. Gérard Bolla contributes a technical study on "*Le Cinéma et les Droits dits Voisins du Droit d'Auteur*." These rights relate to the performing artists, the producers of phonograph records and the radio senders.

Professor Paul Guggenheim's paper on "The Protection of Investments Abroad by International Law" (in German) is an excellent brief exposition of the problem brought about by changing socio-economic beliefs and the emergence of new, capital-hungry states. Theory and practice are unsure whether to insist on a minimum standard or accept national treatment in case of structural changes in the economy and the concomitant nationalization or expropriation of foreign property. He notes the absence of agreement on a precise definition of the basic concept of "vested rights." The traditional instrument of diplomatic protection faces the difficulty arising from the complex capital structure of modern corporations in determining their nationality. He suggests the possibility of a "*protection diplomatique conjointe*," and greater reliance on the bilateral and multi-lateral treaty as a means of providing more adequate security for investments abroad. Such treaties, following the pattern of recent United States treaties, should include agreed principles concerning investments and transfer of capital and profit. A jurisdictional clause would be highly desirable but difficult to obtain, as states by and large are still reluctant to accept compulsory arbitration.

In "International Law and Civilization" (in German), Professor Dietrich Schindler examines four stages or epochs in the changing pattern of relations between international law and civilization. He concludes, as others have before him, that international law itself is endangered by the disappearance of a common and homogeneous civilization. Civilization is the foundation of international law; international law cannot establish the presupposition of its own existence. In the future, international law will have to take into account the plurality and diversity of civilizations. He agrees with Josef L. Kunz that the task of the science of international law is to explore the great systems of law and in this way discover the general principles of law recognized by the "so-called" civilized nations. Behind and underneath the apparent diversity there may be some common ideas which could serve as a starting point for the development of a new international law.

Very useful is the paper by Dr. Ernest Wolf concerning the recognition practice of Switzerland ("*Le Gouvernement de Fait en Droit Suisse*"). The leading policy statement by Federal Councilor Petitpierre of 1949 and the author present it to be as follows: The foreign policy of Switzerland is concerned with safeguarding its integral neutrality. Therefore, Switzerland will not be first to grant recognition to *de facto* governments nor will it take a position in a struggle between two contenders for control. Switzerland has not recognized any government in Korea and Viet-Nam. The author does not refer to the recognition of the Federal Republic of Germany (or has Switzerland also recognized the East Berlin Government?). The exclusive condition of recognition is effectiveness. Therefore, the Peking Government was recognized rather promptly, but the Soviet Government was not recognized *de facto* until 1941, and not *de jure* until 1946. Obviously even Switzerland is not free from inconsistencies. In the matter of giving effect to the legislation of a *de facto* government, Swiss courts have been guided by the judgment of the Federal Court of December 10, 1924, which declared that Soviet law should be applied in conformity with general principles of private international law, including the exception of public order. Treaties concluded with the Czarist Government are applied unless denounced or, as a measure of retorsion, suspended by the Swiss Government. Switzerland appears to have succeeded in separating the political act of recognition from the judicial function, which is to administer justice according to existing law.

The second part of the *Yearbook* contains judicial decisions, documents and bibliographical notes on public and private law, respectively.

LEO GROSS

*The Development of International Law by the International Court.* By Sir Hersch Lauterpacht. London: Stevens & Sons, Ltd.; New York: Frederick A. Praeger, 1958. pp. xx, 408. Index. £ 3 3 s.

This welcome volume is a revised edition of an earlier essay published by the author in 1934 under the title "The Development of International

Law by the Permanent Court of International Justice." It contains 400 pages of perceptive and enlightening comments on the jurisprudence of the Court, as compared with 100 pages in the earlier volume. Judge Lauterpacht informs us that the manuscript was almost complete when he was elected a Judge of the International Court of Justice in 1954 and that he has not considered it proper to discuss the jurisprudence of the Court since that date.

The volume, "primarily . . . concerned with the more general aspects of judicial method and function," is divided into five parts. In "The Law Behind the Cases," four chapters discuss the Court as an agency for developing international law, the reasons behind the cases, and judicial technique. In Part II, entitled "Judicial Caution," Judge Lauterpacht treats, in four chapters, of judicial restraint in relation to jurisdictional questions, judicial hesitation with reference to recourse to *travaux préparatoires* in the interpretation of treaties, and the appearance of judicial indecision in cases like the *Colombian-Peruvian Asylum Case*. Part III deals with "Judicial Legislation" in five chapters, Part IV, in six chapters, with "The Effectiveness of the Law," and Part V, in five chapters, with "The Court and State Sovereignty."

The amount and the solidity of the contributions made by the Court to the development of international law over the thirty-two-year period covered by this study are placed in clear perspective in these chapters. The familiar jurisprudence of the Court is illumined by Judge Lauterpacht's reflective analyses and by the range and sweep of his enquiring mind. Fully aware of the fact that the Court was designed to decide cases and give legal opinions on particular questions submitted to it, Judge Lauterpacht's present enquiry is directed towards the rôle of the Court in clarifying and developing international law. Seldom is the Court confronted with a case in which "the law" is all on one side and the opposing claim clearly without legal merit. Usually the Court must make "a choice, not easily predictable in advance, between varying and conflicting principles of acknowledged validity." In the performance of this important task it has resort to the guiding principles discussed in the five parts of Judge Lauterpacht's book. These principles are interdependent. An excess of judicial caution might be as harmful to the development of international law as an excess of judicial legislation. It is in his brilliant analysis of the reasons and the law behind the cases that Judge Lauterpacht makes his chief contribution to an understanding of the Court's jurisprudence.

It may not be an anti-climax to add that in addition to being an exciting and thought-provoking essay, the volume is eminently usable. The reviewer has had constant recourse to it for daily tasks.

HERBERT W. BRIGGS

*The Common Law of Mankind.* By C. Wilfred Jenks. New York: Frederick A. Praeger, 1958. pp. xxvi, 456. Index. \$6.00.

No one need be surprised if from different quarters of the Near East and the Far East there should be a protest from time to time against the



binding force of one or other of the established rules of international law. Perhaps the wonder might be that rules developed within the European circle of nations should have come to be accepted so generally by nations completely outside the Grotian tradition and the "natural law" from which Grotius drew his principles. When Webster laid down in 1842 his famous rule that the admission of new states into the international community implied their acceptance of the "principles, laws, and usages" that had obtained currency among civilized states, he little anticipated a United Nations of some 82 Members, many of whom were unknown even by name to the states he described as civilized in that day. Would he demand as much of Uganda today, or of Indonesia, or of Ceylon?

Such, phrased in more simple terms, is the problem Dr. Jenks puts before us. He is concerned to discover if there is a "common law" of mankind to which all nations, European and of European descent, Far Eastern and African, can be expected to subscribe. Contemporary international law, he maintains, can no longer be reasonably presented within the framework of the classical exposition of international law. With this objective he surveys the "progress toward universality" during the past hundred years, the emergence of a formal universal order, and the part played by lawmaking treaties, custom, and judicial precedent in the making of a universal system. The section on the general principles of law recognized by civilized nations is construction analysis of a high order.

For the rest the volume consists of a succession of lectures and papers delivered and written on various occasions, somewhat loosely knit together, but all bearing upon the larger problem of the adaptation of international law to the current needs of the international community—the impact of international organizations on international law, world organization and European integration, international law and colonial policy, atoms for peace, an international regime for Antarctica, international law and activities in space, and craftsmanship in international law.

We are already in debt to Dr. Jenks for his valuable administrative work in connection with the International Labor Office. The present volume places us even more in his debt. For he has thrown light upon what is perhaps the most baffling problem of current international law, how we may maintain the authority of the fundamental principles of international law while modifying specific rules to meet the demands of a new world that has now a higher conception of justice and human rights than that recognized at even so late a time as the Hague Peace Conferences.

C. G. FENWICK

*Völkerrecht und Landesrecht.* By Heinrich Triepel. Leipzig: C. L. Hirschfeld, 1899; reprint by Scientia Antiquariat Aalen, 1958. pp. xii, 447. Index. DM. 39.

It is unnecessary to review this well-known classic which has again been made available through this reprint. Triepel's contributions have stood the test of time—sixty years—remarkably well. The dualistic construc-

tion of the relation between international law and municipal law has still its adherents as well as its opponents. The theory of the "*Vereinbarung*" as a source of international law has been much criticized, but no other theory has so far received general acceptance. The notion that international is a law of co-ordination has been attacked on theoretical grounds, but the opposite idea, namely, that it is a law of subordination, has been so far no more than a theoretical gain, at best.

Triepel, writing sixty years ago, expressed astonishment at the neglect of international law by jurists concerned with various branches of municipal law. He emphatically affirmed that there was a law of nations and that it was different from municipal law. But, he said, even if one denies the existence of a law of nations distinct from municipal law, he cannot gainsay the existence of an order based on morality or custom which regulates the relations between states, and the examination of the relation of such an order to municipal law could not be quite barren of results.

This statement has, as usual, validity for the "deniers of international law" of our day as it had for those of Triepel's day. Triepel's work remains a pioneering achievement. And the investigation of the actual relations between the various branches of municipal law and the ever-growing body of international law still represents a challenge.

LEO GROSS

*Grundprobleme des Internationalen Rechts* [*Fundamental Problems of International Law*]. *Festschrift für Jean Spiropoulos*. Edited by D. S. Constantopoulos, C. Th. Eustathiades, C. N. Fragistas. Bonn: Schimmbusch & Co., 1957. pp. xxxii, 471.

The thirty-six papers in this miscellany in honor of the Greek Judge on the International Court of Justice make some useful contributions to several factual situations, to legal analysis and theory. Three of his colleagues participate: Judge Badawi expatiates on the international status of the Suez Canal; the late Judge Guerrero submits his estimate of the American formula of self-determination of domestic jurisdiction before the Court; and Judge Winiarski reflects on the "*forum prorogatum*" in international law. Edvard Hambro, the former Registrar, puts the *obiter dictum* on the Ihlen Declaration into perspective. Human rights are variously considered: by Yugoslav Juraj Andrassy in general; by Spanish Luis Garcia-Arias with respect to intervention; by Italian Judge Massimo Pilotti on the recourse of individuals to international jurisdictions; and by German Walter Schätzel on "Humanity and International Law." Several aspects of law receive attention: Suzanne Bastid writes on problems in the development of international organizations; Benjamin V. Cohen, on disarmament and international law; Dimitri S. Constantopoulos of Hamburg, on two basic notions of sovereignty; Paul Guggenheim, on *jus naturale* and *gentium* as bases of contemporary international law and order; Baron von der Heydte, on the legal subject and person; Hans Kelsen, on the validity of law; B. Landheer, on a structural approach to international relations;

Rudolf Laun, on the value of positive law; Georg Schwarzenberger, on the interdisciplinary treatment of international law; Julius Stone, on sociological inquiries concerning it; Petros G. Vallindas of Thessalonica, on the general principles of law and the sources of international law; and Kisaburo Yokota of Tokyo, on war as an international crime. Viktor Böhmert of Kiel traces the development of Russian territorial waters. Maurice Bourquin examines Woodrow Wilson's work. Erik Castrén of Helsinki writes of the restitution of the Porkkala naval base; Douglas L. Edmunds, of the administration of foreign estates; Charalambas N. Fragistas of Thessalonica, on international competence in the Hague Conference on Private International Law; the late Gilbert Gidel, of nuclear explosions and the freedom of the sea. Fritz Münch of Berlin deals with world politics in the United Nations. Hans Wehberg contributes a paper on the Stimson Doctrine as a useful principle.

Judge Spiropoulos began his career as a *privatdocent* at Kiel University on June 30, 1927, and the editors gathered these papers to honor his 30th anniversary as a teacher and practitioner of international law. Colleagues and students in about equal numbers responded with studies which in most cases touch on subjects with which Spiropoulos himself has dealt in his writings or in his official capacity.

DENYS P. MYERS

*Volkenrechtelijke Opstellen ter ere van de hoogleraren B. M. Telders, F. M. Baron van Asbeck en J. H. W. Verzijl aangeboden door oud-leerlingen op 26 November 1957.* Zwolle: N. V. Uitgevers-Maatschappij W. E. J. Tjeenk Willink, 1957. pp. xviii, 312. Index. Fl. 17.50.

In honor of the three professors of international law who have served at the University of Leyden during the quarter-century since 1931, this volume of presentation essays was tendered on November 26, 1957, by a group of Leyden graduates who attained their doctorates under the guidance of one or other of these professors. Summaries in English and French are furnished in the case of papers in the Dutch language. Bibliographies of the writings of the three professors honored are appended, as well as an index.

The subjects of the sixteen papers cover a wide range, including international organization and trade, treaties, Grotius, the Suez Canal, aviation. Two articles of more philosophical generality may be noted: C. W. van Santen, "Is a Satisfactory 'Introduction to International Law' Possible?" and J. W. van der Zanden, "Should a State Bring a Legal Dispute before the International Court of Justice When It Has No Jurisdiction?" The latter criticizes the device employed by the United States in 1954 of bringing suit in the International Court against the Hungarian and Soviet governments regarding a private transport plane seized in Hungary on November 19, 1951. This was followed by other instances where suits were instituted, notwithstanding the Court's lack of jurisdiction, as a means of mobilizing world opinion against the defendant states.

EDWARD DUMBAULD

*Die Gleichheit der Staaten: Ein Beitrag zu den Grundprinzipien des Völkerrechts.* By Wilfried Schaumann. Vienna: Springer-Verlag, 1957. pp. x, 160. Index. \$5.25.

*Das Gesetz der funktionellen Verdoppelung: Beitrag zu einer universalistischen Theorie des Internationalprivat- und Völkerrechts.* By Hans Wiebringhaus. Saarbrücken: West-Ost-Verlag, 1955. pp. 157.

Since the early twenties, when Edwin Dickinson and Julius Goebel wrote their treatises on equality of states in international law, Schaumann's book constitutes the first comprehensive new treatment of the topic in question, or so it seems. Unfortunately, a reader expecting thorough discussion of the problems involved, especially in the light of developments in the last thirty years or so, will be disappointed. As a matter of fact, 120 out of 153 pages of text delve into almost every basic problem of international law, *e.g.*, that of "sovereignty," the legal nature of international law individuals as its subjects, recognition, and so forth—*except* that of equality. All that these chapters accomplish in regard to equality (except for a brief historical survey of the doctrine) is to establish a postulate according to which the "egalitarian," *i.e.*, merely mechanical, concept of equality should yield to an "evaluating" one, and that equality should be granted to internally self-determining rather than authoritarian or dictatorially-controlled units; the former should have a *right* to recognition.

Turning to the remaining pages, we are not led beyond what Cromwell Riches offered about twenty years ago in his *Majority Rule in International Organization*. On the contrary, while we might have expected the author at least to bring Riches' findings up to date in regard to the United Nations system, reference to Riches' book merely serves to justify his not dealing at all with details of majority rule in international agencies. Instead, we are told that application of the equality principle is a function of justice, that it means treating what is equal equally, and what is unequal, unequally. This clearly does not lead very far. The study reveals the shortcomings of a natural law approach, whose verbal reference to "sociological" facts fails to conceal the absence of genuinely realistic insight. Such insight, it is believed, can only be attained by placing international law and its basic principles (including that of equality) in the setting of the modern state system, relating the function of law in the international realm to the classical function of the territorial state, which was one of protection through impenetrability. With this function vanishing in our age of atomic interpenetrability, it would have been interesting to explore what functions, if any, law and equality can retain in a transformed environment.

The second work under review shows very similar shortcomings. Even more repetitious than Schaumann's book, Wiebringhaus' volume deals only in its last third with the subject matter at hand: that of "functional duplication" and its rôle in private international law, and even there it hardly contributes to an elucidation of the problem. It is well known how Scelle, in his theory of international law, has tried to use the concept of *dédouble-*

*ment fonctionnel* to fashion a monistic doctrine of law in which international law, utilizing national agents for its own functions, emerges as the highest level of a hierarchically structured, federally conceived, legal universe. Wiebringhaus undertakes to apply the principle of duplication of functions to the field of private international law (conflict of laws), which, as he concludes in the first part of his study, forms part of international law proper, because it deals with "international material." But what is gained by asserting that a national judge who decides a case in which citizens of different countries are involved thereby turns into one exercising "international jurisdiction," or that collision norms are national and international at the same time? This question arises especially if, as the author admits, it is the individual state and its legal system that decide in the final resort which law is applicable; and when he, furthermore, admits that "functional duplication" cannot prevent or alleviate the "legal chaos" resulting from the co-existence of various and often conflicting national "conflict norms," and that, pending the adoption of "world law" in this field, all that can be achieved by viewing the situation in the light of "duplication" is to exhort the national judge to interpret conflict situations in an internationalist rather than a nationalist vein. Not a single question of detail arising in this field and taken up by the author (e.g., that of *renvoi*, or that of *ordre public*), is clarified, let alone solved, by reference to the master concept of functional duplication. Although Georges Scelle, in his preface, claims intrinsic merit for the book, this reviewer regretfully has failed to discover it.

JOHN H. HERZ

*Umowy Wielostronne. Studium z Prawa Traktatowego [Multilateral Treaties. A Study in Treaty Law]*. By Manfred Lachs. Warsaw: Państwowe Wydawnictwo Naukowe (State Scientific Publishing House), 1958. pp. 347. Index. Zł. 36.

This book represents an elaboration and expansion of a series of lectures delivered by the author at the *Académie de Droit International* at The Hague in 1957 on the development and functions of multilateral treaties. The same subject was previously treated by the author in a concise article in the *Annuaire Français de Droit International Public*, 1956. The author, a Professor of International Law at the Warsaw University and Director of the Treaty Department of the Polish Ministry of Foreign Affairs, enjoys abroad a well-deserved reputation as a very able jurist. He has served as Polish delegate to almost every session of the United Nations General Assembly and was three times chairman of its Legal Committee.

In his book he tries to outline the main features of a legal theory of multilateral treaties, a class of international treaties comparatively new in the evolution of international intercourse, and exhibiting certain distinctive features placing them apart from the traditional category of bilateral treaties known since the dawn of history. This is an ambitious and praise-

worthy project and the idea seems basically sound and highly worth while. The author confines himself to the formal legal aspects of the matter, touching only in general terms on the social and economic background, and tries to show the specific legal differences of multilateral treaties. A detailed, lucid and interesting analysis devoted to the controversial problem of reservations to multilateral treaties emphasizes one of the peculiarities of the latter. The matter is presented and discussed under the following headings: birth of multilateral treaties, contents of multilateral treaties, parties to multilateral treaties, mutual relations of parties, accession to multilateral treaties, open and closed treaties, reservations, multilateral treaties and third states, multilateral treaties and recognition, revision and expiration of multilateral treaties, the rôle of multilateral treaties in the evolution of international law, classification of multilateral treaties. The author displays a complete command of the subject matter and a profound and exact knowledge of source material, as well as his usual skill and incisiveness in legal argumentation. Professor Lachs has, in a high measure, achieved the difficult goal he has set himself. If, in several places, he encounters difficulties in his delineation of the specific nature of legal institutions peculiar to multilateral treaties, the reason seems to lie in the fact that he has accepted a too broad and purely quantitative definition of multilateral treaties equating them with any and all treaties entered into by more than two contracting parties (*e.g.*, p. 87). Thus he must deal with a congeries of such heterogeneous things as tripartite political alliances in the old traditional style—the Triple Alliance, the Axis Pact of 1940 or the dormant Balkan Pact of 1954, on the one hand, and the Universal Postal Union, the Genocide Treaty or the United Nations, on the other hand. Such a *mixtum compositum* can hardly yield other than purely formal characteristics, distinguishing its components from bilateral treaties. The difference between two and three contracting parties is not big enough to produce other than formal results. The author, aware of this difficulty, occasionally uses another definition. A multilateral treaty “in the full sense of the term” is one which does not oppose one or several signatories to others, but links all of them by a net of reciprocal rights and obligations (p. 18). This second definition, also intended to be purely formal, comes much closer to the heart of the matter. A study deliberately devoted to multilateral treaties having as their object international legislation and to treaties creating international intergovernmental organizations would certainly disclose many substantive legal traits in addition to those formal ones so ably described by the author. In this case it would be necessary to take into consideration legally binding resolutions of international organs such as, *e.g.*, the disposition of Italian colonies by the United Nations General Assembly. The author must leave them aside, calling them “multilateral documents” (p. 37, footnote 7).

The book also sheds some light on the restrictions hampering scholars in Communist countries and operating even now in Poland after the October, 1956, revolution. The difference between the present and the Stalinist past is great and obvious. Stalin is not quoted by the author at all, Lenin

only once (p. 37), and political and ideological polemics are comparatively few and mild in language. But still the author apparently feels compelled to conform to the position adopted by the Soviet Union on all controversial political issues. For example, he upholds the great Powers' veto and their special privileges and responsibilities in the United Nations (p. 86, footnote 16), but condemns the unanimity rule and veto power as far as reservations to multilateral treaties are concerned (pp. 159-161); upholds in a diluted form the doctrine that only states are subjects of international law and parties to international treaties (pp. 43, 69-71); condemns unequal obligations in bilateral treaties (pp. 73-86), but strongly upholds the validity of reservations to multilateral treaties creating the same result (pp. 154-161). The author speaks about "co-existence of states of different [political] systems" not only as a fact of life but also as a "precondition of validity" of multilateral treaties (p. 189). Co-existence thus becomes one of the "generally binding principles of international law" (p. 189). The North Atlantic Pact is a "separatistic treaty," but the Warsaw Treaty of 1955 is not, because the author feels obliged to take seriously its clause permitting the accession of non-Communist states (p. 112).

As a whole the treatise represents a valuable and lasting contribution to legal science and should command the attention of international jurists in the Western world.

ALEKSANDER WITOLD RUDZINSKI

*Der Abschluss Völkerrechtlicher Verträge im Bundesstaat. Eine Untersuchung zum Deutschen und Ausländischen Bundesstaatsrecht.* By Rudolf Bernhardt. (Max-Planck-Institut für Ausländisches Öffentliches Recht, Beiträge zum Ausländischen Öffentlichen Recht und Völkerrecht, Heft 32.) Köln and Berlin: Carl Heymanns Verlag KG, 1957. pp. xv, 208. DM. 28.

In this comparative study, the author examines with meticulous care and in detail the exercise of the treaty-making power and its domestic legal effects in every contemporary federal state and in Germany since the days of the Holy Roman Empire. In introductory chapters he also considers the international legal status and the treaty-making capacity of federal unions and their members, concluding that there are no restrictions in international law on the capacity of federal unions to enter into treaties, that constitutional limitations on the exercise of the treaty-making power or on the execution of treaties by the central government do not impair that capacity, and that members of federal unions may have the capacity to enter into certain kinds of treaties as international legal persons distinct from the unions to which they belong.

A major part of the book is devoted to a critical analysis of the distribution of the treaty-making power and its exercise in the German Federal Republic. The author regards as unfortunate the present division of the treaty-making power between the Federal Government and the States, and believes that the needs of modern international life require the exclusive concentration of that power in the hands of the Federal authorities.

This opinion appears to be based on theoretical considerations rather than concrete data.

The American reader will note with interest that the traditional American distinction between self-executing and non-self-executing treaties proves to be an extremely useful analytical tool, with which the author, after devising equivalent German terms, operates throughout the book. The author's exposition of the American law on the making and execution of treaties, though generally accurate, betrays a somewhat excessive reliance on secondary sources and is not quite up to date. In particular, he makes no reference to the recent cases on executive agreements (*e.g.*, *Seery v. United States*), and is apparently unaware of recent controversial proposals to permit the States to enter into compacts with foreign countries on certain matters.

This volume, which contains a good bibliography, should be useful to students of federalism as well as of the law of treaties.

O. J. LISSITZYN

*Le Concordat du Reich de 1933 et le Droit des Gens. Quelques Réflexions sur la Question concordataire en Allemagne.* By Eric Suy. Geneva: Institut Universitaire de Hautes Etudes Internationales, 1958. pp. v, 90.

The Concordat concluded between the Holy See and the German Reich in 1933, shortly after Hitler came to power, has, from the beginning, been the subject of heated political and legal controversies. In 1956 the latter entered into their latest, though probably not yet last stage, when the question of the continued validity of the Concordat was raised before the Federal Constitutional Court at Karlsruhe.

The present essay is a competent and judicious analysis of the many and interesting problems of international law which were involved in this *cause célèbre*: the legal nature of concordats, the constitutionality of treaties, the consequences of persistent violations of a treaty, the effect of war and occupation upon treaties, the *clausula rebus sic stantibus*, and last, but not least, the relationship between international and municipal law in general, and in the case of a federal system of government in particular. It is especially on account of the last-mentioned aspect that the case and this monograph deserve the attention of the American student of international law.

ERICH HULA

*De Meervoudige Nationaliteit [Plural Nationality].* By Ko Swan Sik. Leiden: A. W. Sitjhoff, 1957. pp. xiv, 365. Index. Fl. 13.90.

This comprehensive study of plural nationality is the work of a Chinese Indonesian who apparently has pursued advanced studies in The Netherlands. There is considerable interest in this problem in the countries of Southeast Asia, where large numbers of persons of Chinese blood have a dual nationality. China regards as Chinese nationals all persons born



abroad of Chinese fathers; it recognizes the right of expatriation only by special permission of the Chinese Government. The author devotes 35 pages to the causes of plural nationality in Southeast Asia.

Dr. Ko Swan Sik lays the groundwork for his specific study by first discussing the juridical nationality concept and the competence of the state in regulating nationality. Basically, plural nationality is made possible by the fact that international law leaves states almost wholly free in regulating the acquisition and loss of nationality. After an examination of the existence and causes of plural nationality, the author briefly examines the conscious endeavor of some states to create plural nationality in a particular group of states. He concludes that the creation of a truly mutual plural nationality has not been realized by the two groups of states which have sought to achieve this, namely, the Central American states and the Commonwealth of Nations.

The author's conclusions with respect to the solution of the problems arising from multiple nationality rarely depart from those already widely accepted. However, in matters of military service he believes that the individual should be given "the right to choose for himself the country in which he prefers to fulfil his duties," on the ground that this accords also with the state's interests, since unwilling soldiers would not be of much use. This hardly seems a realistic solution.

In his final chapter Dr. Ko Swan Sik discusses the question whether plural nationality should be completely rejected. He is opposed to its dogmatic rejection in all cases. Where there are similar social and economic conditions and common ideals, plural nationality may be a desirable means to create closer bonds among particular states.

This is an excellent analysis and useful survey of an important subject.

AMRY VANDENBOSCH

*Le Statut Juridique de l'Aéronef Militaire.* By Ming-Min Peng. The Hague: Martinus Nijhoff, 1957. pp. vi, 129. Index. Gld. 11.40.

Mr. Peng's book fills only in small part the long-felt need for a serious examination of the status of military aircraft in international law. It is very largely a study of well-known treaties (mostly no longer in force), drafts and opinions of writers of pre-World War II vintage. Almost half the volume is devoted to the elaboration of a definition of military aircraft. The questionable view that a single definition to serve all purposes is possible and desirable is supported only by the strange argument that "there would be great inconveniences in time of war for belligerent and neutral states to be subjected to rules different from those applied in time of peace." The proposed definition of military aircraft reads as follows: "*Aéronefs exploités par un état à des fins militaires ou hostiles.*" Although this definition has the merit of being functional, its vagueness is obvious.

Practice is referred to but rarely, and almost always at second hand. There is no mention, for example, of the considerable number of actual cases bearing on the immunities of intruding foreign military aircraft, or

of the numerous instances of admission of belligerent military transport planes by neutral states during World War II. Mr. Peng is also oblivious of the reversal by the United States of its traditional position on the immunities of members of foreign armed forces, and happily cites writings on this topic which are now obsolete. The poorly-edited bibliography is extensive but not up to date. The book has some value as a handy compendium of the materials it covers.

O. J. LISSITZYN

*Rechtsfragen der Rheinschifffahrt* [*Questions juridiques relatives à la Navigation du Rhin*]. By Herbert Kraus and Ulrich Scheuner. (Schriften des Instituts für Ausländisches und Internationales Wirtschaftsrecht, Vol. 6.) Frankfurt-am-Main: Vittorio Klostermann, 1956. pp. 188. DM. 16.50, paper.

Professor Kraus, emeritus professor at the University of Göttingen, and Professor Scheuner of the University of Bonn, have each drawn up a legal brief on the questions surrounding freedom of navigation, especially as applied to the Rhine under the 1815 Final Act of the Congress of Vienna, the 1831 Mayence Convention, and the 1868 Mannheim Convention. In particular, the two authors are concerned with the question whether freedom of navigation includes the right of *cabotage*—of carrying goods between river ports of the same state; and to the related matter of defining where, under the conventional regime of the Rhine, freedom of navigation ends and the right of each state to regulate commercial activities in its own territory begins.

Kraus doubts that, unless provided for by treaty law, freedom of fluvial navigation has standing as a principle of international law; he finds it to be more of a "slogan" (pp. 12-13). Free navigation of the Rhine rests upon the Mannheim Convention which, like all such treaties, must be interpreted in favor of the state(s) making concessions (pp. 26-31); the Convention enjoins states to "facilitate transportation" (pp. 36-37). This—"freedom of traffic"—is what free navigation implies; "freedom of commerce and of establishment are not included *per se*" (pp. 38-39); for while free navigation fosters trade, freedom to trade cannot be deduced from a grant of free navigation (pp. 40-43). Kraus concludes by ably arguing that *cabotage* is not included under freedom of navigation of the Rhine (pp. 54-69).

Scheuner finds that freedom of navigation for co-riparians has, since the 19th century, become a principle of customary law, at least in Europe, but that this cannot be stretched to include *cabotage* (pp. 120-123). Generally agreeing with Kraus, he finds that only those transactions having to do with the forwarding of goods can be included with freedom of navigation (pp. 128-131). Scheuner's study includes interesting passages on the historical and political background of the questions discussed. "Inherent in the legal regime of any international river," he finds, "is the ever-present need continually to readjust the several interests" (p. 75). Scheuner briefly

surveys conventional fluvial navigation law the world over; but he errs in dismissing Asian rivers (*e.g.*, the Shatt-al-Arab, the Mekong, the Amu Darya) as lacking a history of conventional regulation (pp. 108-109).

The two briefs are instructive, as well as fine examples of legal craftsmanship. They are here presented in the German original (odd-numbered pages) and in French translation (even-numbered pages). The anonymous translator, on the whole, has done well; on certain pages, however, errors mar the French text.

ABRAHAM M. HIRSCH

*I Oekoumenikí diakírixis ton díkaiomáton tou anthrópou* [*The Universal Declaration of Human Rights*]. By Alkis N. Papacostas. Athens: 1956. pp. 203.

This is an exceptional doctoral dissertation, approved by the Pantios Higher School for Political Sciences in Athens, Greece. In 203 finely-printed pages, Alkis N. Papacostas has provided a long overdue discussion in Greek on the subject of the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on December 10, 1948. The author presents the background of the Declaration, analyzes its articles and discusses its implementation. He concludes that the implementation of universal human rights marked no significant progress beyond the Declaration, which in itself is a great step forward in the concept of one world. He argues that the Declaration has legal validity, but emphasizes the view that the unity of the United Nations has been broken and many of its Member States have departed from the letter as well as from the spirit of the Charter.

The author has based his work largely on French sources and has made good use of Pieter N. Drost's *Human Rights as Legal Rights*. The American scholar will find little in this study that is not available in English, except for three pages (188-190), which deal with the Greek implementation of the Rome Convention on Human Rights concluded by the Council of Europe on November 4, 1950. Papacostas cites the case involving Krosby Karres, a U. S. citizen, who appealed to the Council of State in Greece on the strength of the Rome Convention, for the right to establish a center at Delphi on behalf of the "movement of world citizens" without boundaries or restrictions.

It would have been useful had the book included in an appendix the authoritative Greek text of the Universal Declaration of Human Rights, along with the English or French text, for the benefit of the Greek scholar. The book has no index. Its bibliography is wanting, but the work itself is a commendable contribution to the international literature on the Universal Declaration of Human Rights. We might expect from the Greek scholar a special study on the legislation and the implementation of human rights in Greece in relation to national security and public order since World War II.

CHARILAOS G. LAGODAKIS

*The Hungarian Situation and the Rule of Law.* Published in English, German, French and Spanish. The Hague: International Commission of Jurists, 1957. pp. 144.

The International Commission of Jurists is a voluntary association of lawyers independent of governments and "uniting the legal profession irrespective of differing political opinion." They profess to seek promotion of the rule of law in international relations, and protection of the individual from arbitrary government, to enable him to enjoy the dignity of man.

In this volume the Commission published a series of documents concerning the events in Hungary from October, 1956, to April, 1957. The documents include various pronouncements on Soviet intervention, among which Soviet sources rank with others such as the United Nations resolutions on Hungary, Hungarian decrees on criminal procedure issued against participants in the revolution, some data on arrests and executions, *et cetera*. Special stress is laid on the Soviet definition of "aggression," as submitted in its latest form in 1953 to the U.N. International Law Commission, which, if applied, would be a clear condemnation of the Soviet action.

The volume is headed by the text of a resolution unanimously passed by a conference of lawyers, organized by the International Commission of Jurists, condemning violations of international law and of human rights by Soviet authorities and Soviet-installed Hungarian authorities. Provisions of the Charter, those of the Treaty of Peace with Hungary of 1947, and of the Geneva Conventions of 1949 are invoked for such purpose. The correspondence between the Commission and the Hungarian Minister of Justice (the Commission asking for admission of its observers to Hungary) is also published. Although the delegation would have included three former Attorneys General of Britain, the Hungarian authorities refused them entry. Representatives of the Commission, however, submitted their conclusions to the U.N. Special Committee on the Problem of Hungary when the latter was preparing its report to the General Assembly; the draftsmen of this report relied, *inter alia*, on material included and quoted in this volume.

This publication of documents is a most useful if not indispensable collection of source material for anyone who wishes to study the application of international law to events in connection with, and subsequent to, the Hungarian Revolution, and measures, considered repressive, introduced by the Soviet-established Hungarian regime to punish those who fought the Soviet intervention. Together with the United Nations Report on the same problem (which, however, is much more comprehensive), this volume constitutes a valuable contribution to the assessment of the "Hungarian situation" from the point of view of the rule of law, edited by a highly qualified international body of lawyers.

FERENC A. VALI

*A Dieci Anni dal Processo di Norimberga. La Sua Giustificazione.* By Fulvio Paolini. Bologna: Cappelli Editore, 1955. pp. 129. L. 1,000.

The author sets out to evaluate, along juridical and philosophical lines, the Nürnberg Trial and the many controversial questions connected with it. Several chapters are devoted to the problem of *bellum justum*, to relations between individuals, states and international juridical bodies, as well as to the acceptability of *ex post facto* laws affecting war criminals. The author does not shed new light on the problem and takes up a great many pages—at least half the book—in expounding existing theories on the question, and many of the chapters are a succession of quotations cited at considerable length.

The “true answer” to the Nürnberg question is to be sought in a new international humanism, in “greater attention to human interests” and in “recognition of human rights beyond the narrow confines of municipal law.” At Nürnberg

it was crimes against humanity that were punished and we must therefore consider that the judge in question *dicit ius* not as an organ of the State nor of the Community of Nations but in the exercise of a higher function that transcends all sovereignty, so as almost to attain the ultimate aims of justice, captured in the clear purity of its first origins.

It would be absurd, Paolini maintains, “to state that agreements and trials of this kind can make any war of aggression or persecution of minorities impossible for the future, just as it is absurd to believe that the laws of a State can make crime impossible.” “But,” he adds, “no one can doubt that they tend to strengthen international designs for peace and tolerance.” The introductory quotation from Marcus Aurelius—“. . . be content with achieving even slight progress in human affairs and do not consider even the slight progress unimportant”—is well chosen.

GIORGIO PAGNANELLI

*A la Recherche d'un Ordre International.* By John Buchmann. (Publication de l'Université Lovanium de Léopoldville.) Louvain: Éd. E. Nauwelaerts; Paris: Beatrice Nauwelaerts, 1957. pp. 215. Fr. B. 160.

This is essentially a study of international organization by a convinced federalist, but a realist without illusions as to any immediate possibility of achieving what he considers to be the ultimate and only solution to the problem of lasting peace. The author has a typically European interest in basic theoretical concepts, but adds to this the more Anglo-Saxon empirical approach to practical considerations of power politics. Thus we find in his work reminiscences of De Visscher, Kelsen and Morgenthau. His approach to a dissection of the weak body of contemporary international organization is prefaced by a closely-reasoned study of the pertinent problems of general international law, based almost entirely on authorities written in French. Here the author stresses the purely inter-social nature

of the *droit des gens*, its primitive character, and its basic weaknesses: the *dédoublement fonctionnel* of Georges Scelle, its mediacy, its gaps. The author's persistent pessimism in these chapters is tempered by emphasis on current progress toward the humanization of the law, its institutionalization, and some delimitation of the competence of the state. Likewise, the emergence of the individual, if not as a subject of international law, at least as the primary concern of the law, is remarked as a hopeful tendency.

In a second section, the author examines the rôle of power among nations, and underlines the major weaknesses in our present international society. Above all, he decries the tendency of states to utilize international law as an instrument of foreign policy, the predominance of the great Powers, the fallacy of the doctrine of the equality of states, and the persistence of the ancient doctrine of the balance of power. The latter, however, cannot work effectively, if it ever did, in a world divided into two major blocs.

Once again, the author's pessimism is balanced here by his enthusiasm for the extraordinary development of international institutions in this century, and in particular the present hopeful growth of regional and functional systems. Here he notes a few illustrations of veritable supranational institutions, and discovers some tendency to diminish the traditional sovereignty of states in these "bridgeheads of superstatism."

In a final section the author, like so many harassed but still hopeful students of world organization, sees the ultimate solution in some form of federalism. This cannot be achieved tomorrow, however, and can only come about by a progressive but deliberate movement, carefully planned, which should extend first to Europe, then Africa, to the western Atlantic and eventually to the world. But here the nations must go beyond or "*dépasser*" present international law, on the one hand, and power diplomacy and nationalistic passion, on the other. We must surpass the "powerless despotism of the *Ancien Régime* of sovereign state-nations masking as a so-called international order."

Dr. Buchmann, in an admirable synthesis of international politics, international organization and international law, has contributed a study which all specialists in these disciplines will find to be provocative and highly rewarding.

JOHN B. WHITTON

*Organizacje Międzynarodowe [International Organizations]*. By Jacek Machowski. Warsaw: Wydawnictwo Prawnicze, 1956. pp. 299. Index. Zł. 18, paper.

This study of governmental and other international organizations was published in 1956, the year of the Polish "Thaw." Polish authors were able at that time to publish articles and books independent to some extent of the Soviet official line. However, this book could have been a translation of a Soviet treatise on the same subject. All colors are only black and white; there are the wicked imperialists, led by the United States, who subvert international organizations by foul means and try to use them for their own

expansionist aims, and there are virtuous Communist governments, headed by the peace-loving Soviet Union, which only think of peace and the welfare of mankind.

The author provides, however, basic information on the organization and procedures of international institutions; this might be useful for those Poles who do not know Russian and cannot find the same information in Soviet books. A foreign reader will find there very interesting data on Communist-sponsored non-governmental organizations. There are eleven listed in the book, beginning with the World Federation of Trade Unions and ending with the Bureau of the International Conference for the Reduction of Tension in International Relations.

Partly a political propaganda tract, partly a rather elementary collection of data, this book certainly is not a scholarly achievement.

W. W. KULSKI

*Termination of Membership of International Organizations.* By Nagendra Singh. New York: Frederick A. Praeger, 1958. pp. xvi, 210. Index.

This is a very thorough and scholarly treatment of an important problem, although it becomes somewhat pedantic at times without losing a certain amount of idealism. The author, while writing very noticeably under the influence of British scholarship, obviously knows his material thoroughly and has the greatest possible desire to contribute constructively to the solution of his chosen problem.

The subject is discussed in part under the terms of historic international law and in part under the terms of the fundamental instruments of some thirty or more of the various more important international organizations. A good deal of attention is given to the case of China without, it is to be feared, reaching any very helpful solution ("it should be eradicated"—the Chinese problem). At various points there occur contradictions between an almost cynical adhesion to orthodox international law ("One need not object to individual States introducing the element of 'like and dislike' in their practice of granting recognition") and sentimental elements of Indian neutralism.

To repeat, this is a thoroughly interesting, scholarly, and helpful work.

PITMAN B. POTTER

*Revision of the United Nations Charter. A Symposium.* New Delhi: Indian Council of World Affairs; London, New York, Madras: Oxford University Press, 1956. pp. vi, 144. Index. Rs. 6/8; \$1.70.

If the "high noon" of international collaboration in creating a world peace and security organization was reached in 1945 at San Francisco, as suggested by one of the 13 contributors to this symposium on revision of the United Nations Charter, a reading of this excellent collection of com-

ments suggests that the "high tide" of the Charter revision movement was probably reached in 1955-1956. This reviewer, undertaking his pleasant task some three years after most of the articles were written, and two and one-half years after the Indian Council on World Affairs published the collection, is impressed by the fact that, even though there has been no review conference, the United Nations of 1959 is in many respects a different institution than it was four years ago in 1955. For example, while membership problems discussed in most of the papers have not been completely solved, the log jam of applicants has broken, and those now excluded from the organization are a rather select group of victims of the polarization of the United Nations which has taken place over the past 14 years.

The predominant "unofficial view in the Scandinavian countries" in 1956 was "that revision of the Charter [was] not the medicine needed to cure the illness of today's world. . . ." That comment is equally trenchant today. Man-made institutions like the United Nations reflect the world society of which they are a part. Thus the United Nations is the market place for discussion of issues which threaten peace and security. It should not be confused with a social institution capable of cutting, or tying, the Gordian knot of international relations.

With one or two exceptions, the contributions making up this symposium are well done, readable, and provocative. Although there is a good deal of repetition in dealing with certain issues that have given rise to suggested Charter amendments, the symposium serves to focus attention on different national attitudes toward these issues. This is most helpful in enabling one to judge the practicability of a revision conference.

The Indian Council on World Affairs and its Secretary General, Mr. S. L. Poplai, are to be commended for their initiative in bringing the products of such able contributors together in such a handy and useful form.

CARL MARCY

*The United Nations and Dependent Peoples.* By Emil J. Sady. Washington: Brookings Institution, 1956. pp. viii, 205. \$1.50.

This little book—little by comparison with the Brookings mastodon (*The United Nations and Promotion of the General Welfare*) of which, in another published form, it comprises one part—deserves to be on the shelf of all who are interested in the workings of the United Nations machinery under Chapters XI, XII, and XIII of the Charter. The author's rich and varied experience of colonial problems finds reflection in the balance of the work and in his valuable practical insights into the workings of the United Nations system.

The two chapters that form the backbone of the book, entitled, respectively, "The General Assembly and Non-Self-Governing Territories" and "The International Trusteeship System," are well complemented by the two introductory chapters and the concluding chapter, which help to set



the United Nations' functions in the postwar stream of colonial evolution. Specialists will find particularly valuable the thoughtful suggestions for improvements, mainly within the existing constitutional and legal framework, advanced by the author as a contribution to the continuing process of review of the United Nations and its Charter. His excellent treatment of the experience in handling the *Ewe* case deserves particular attention.

There are minor flaws in the presentation, but they detract only slightly from the book's general virtues. That some of the analysis has been bypassed by rapidly moving events since the book's publication, is, of course, no fault of the author's.

LAWRENCE S. FINKELSTEIN

*The Arab Bloc in the United Nations.* By G. Moussa Dib. Amsterdam: Djambatan Ltd., 1956. pp. 128. Index.

Completed in July, 1956, this volume by an Arab scholar seeks to fit the Arab states into the wider framework of the United Nations and the power situation in which the United Nations operates. Chapter I argues that, despite "dispersive forces," the Arabs form a single community. Chapter II, on "The Arabs and Their Problems in the United Nations," is devoted to the Palestine, Libyan and Tunisian questions. Chapter III examines "The Attitude of the Great Powers Towards the Arab States" in the Security Council's handling of the Syrian-Lebanese, Anglo-Egyptian and Palestine issues. Chapter IV is a study of the Arab position on East-West issues, and Chapter V pertains to "Outlets of Solidarity for the Arab States." The concluding section on "The Baghdad Pact and Scientific Know-how versus Colonel Nasser and the Arab People" gives a clue to the author's own orientation. The study as a whole is limited by the fact that it was completed before the Suez crisis of 1956.

To this reviewer, the most interesting part of the book is Chapter IV, the analysis of Arab attitudes on East-West issues (pre-1956 solidarity on issues directly affecting the Arab states and on colonial questions is by now an old story). After examining a substantial number of cases, Dr. Dib concludes that after a period of bloc neutrality lasting through the Second Assembly, the Arab states ceased to operate consistently as a bloc on issues in this category. The reason is to be found in the need for scientific know-how and in differing conceptions of how this know-how is to be attained, what priority it should be given, *et cetera*.

This study is marred by a tendency to make unsupported generalizations (as those on page 13 pertaining to the influence of climate on attitudes), statements which are at best highly controversial (as that "the United Nations pledged itself to give self-determination and self-government to all peoples who are worthy of it" [page 37]), and occasional errors of fact (as the statement that the United Nations Charter forbids the General Assembly to *discuss* security problems concurrently before the Security Council [pp. 82-83]). Nevertheless, it represents an interesting contribution to the literature in the field.

M. MARGARET BALL

*Egypt and the United Nations.* Report of a Study Group set up by the Egyptian Society of International Law. New York: Manhattan Publishing Co., 1957. pp. xii, 197. Index. \$3.00.

Reliable information about Egypt, the Arab world, and the Asian-African countries is in short supply in the United States. So is understanding of them. This slender volume, produced by a committee of distinguished jurists, scholars, and diplomats set up by the Egyptian Society of International Law, under the chairmanship of Dr. Hamid Sultan, Professor of International Law at Cairo University, should contribute to both desiderata. It is one of a series of such national studies brought out under the auspices of the Carnegie Endowment for International Peace.

Candidly and vigorously, but in good temper, the well-documented study traces the emergence of Egypt as a national state, its release from British control, and its relation to the United Nations from the Dumbarton Oaks proposals to about 1954, with passing reference to the more recent Suez crisis and invasion. Egyptian attitudes toward the United Nations fall into four phases: one of faith, hope, and expectation that the new world organization would help it achieve freedom from foreign control; one of disillusionment, resentment, and indifference when the Security Council failed to order Britain out of Egypt and when Israel was established; one of self-reliance in some matters and of co-operation with the states in the Arab League and in the African-Asian group, to achieve objectives under the Charter of special significance for them. In this phase, "neutrality" was born. The study sets forth Egyptian efforts in the United Nations relating to sovereign equality, independence for Arab countries, reduction of imperialism, strict interpretation of domestic jurisdiction, universality of membership, curtailment of abuse of the veto, and extension of the economic and social services of the United Nations. A fourth phase of "guarded hope," of revival of faith in the United Nations, began with the withdrawal of the invasion forces in the recent crisis. So the account ends.

An extensive appendix contains vividly informative resolutions of the Council of the Arab League relating to various issues before the United Nations, translated for the committee by Dr. Boutros-Ghali, Associate Professor of International Law at Cairo University.

The Egyptian Society and the Carnegie Endowment have rendered a valuable service to thoughtful men everywhere in bringing out this enlightening study.

HENRY REIFF

*Britain and the United Nations.* By Geoffrey L. Goodwin. New York: Manhattan Publishing Co., 1957. pp. xiii, 478. Index. \$3.00.

It is a commonplace to observe that an international institution may fail, not because it is inherently defective in its mechanisms and in its aims, but simply because its members do not find it to their national inter-

rest to make it work when in a particular instance the institution may decide against them. Such surely was the case with the League of Nations, and such may without doubt be the case with the United Nations under corresponding conditions.

To the end of clarifying the attitudes and policies of the different Members of the United Nations a series of volumes was initiated by the Carnegie Endowment for International Peace; and the present volume is an attempt to assess the "impact," as the author describes it, of the United Nations upon the content and conduct of British foreign policy. The foreign policy of over a half-dozen other countries has been similarly treated in other volumes,<sup>1</sup> and the series as a whole should give us an insight as to the practical defects of the Charter and the modifications of national policy needed to overcome them.

So wide is the field covered by the volume, the "case studies" covering nine separate issues: Iran, Syria and Lebanon, Greece, the Italian colonies, Palestine, the Anglo-Iranian oil dispute, Indonesia, China, and the Korean War, that only a general indication is possible. The *de facto* revision of the Charter, that is, the concrete measures resulting in a practical revision, is contrasted with the formal amendment or *de jure* revision. Here the study widens and contains valuable comments upon the larger issues before the Security Council and the General Assembly.

A closing word of warning is that certain "harsh realities" resulting from the clash of interests in a society of sovereign states "cannot be removed by formal amendment of the Charter. It is what states do at the United Nations and not the precise institutional pattern that matters most."

C. G. FENWICK

*Japan and the United Nations.* Report of a Study Group set up by the Japanese Association of International Law. New York: Manhattan Publishing Co., 1958. pp. xv, 246. Index. \$3.00.

Japan was admitted into the United Nations only toward the end of 1956, under circumstances briefly mentioned in the closing paragraphs of the present study. Necessarily, then, this study of *Japan and the United Nations*, in the Carnegie Endowment series of *National Studies on International Organization*, has a highly academic character. It is not concerned with policy positions adopted by the Japanese Government *after* Japan had been admitted into the United Nations, nor does it reflect the activities or influences of Japan in that body after admission.

The principal core of the study, which was organized along lines similar to those employed by the American Council on Foreign Relations, is Part I: "Development of Japan's Attitude Toward the United Nations" (pp. 1-95). Successive chapters of Part I trace the principal threads of Japanese *attitudes* (as distinguished from policies) toward foreign relations be-

<sup>1</sup> See this JOURNAL, p. 490, and below, and reviews appearing in Vol. 51, p. 447 (1957), and Vol. 52, pp. 561, 562 (1958).

tween 1945 and 1953—Japan's relations to SCAP permitting her no independent foreign policy for most of the period. The authors review the attitudes of the Japanese press, statements of attitude by government leaders, and debates in the Diet to show the extent to which reference was made to the remote United Nations during periods described by the following chapter titles: "Occupation" (1945-1948), "Rise of Neutralism" (1948-1950), "The Korean War" (1950-1951), and "Peace Treaty and Security Treaty" (1951-1953). The first part of the work is followed by a rather uninspired evaluation of the structure and activities of the United Nations, conducted in the spirit of a general commentary on various provisions of the Charter rather than from the point of view of specific Japanese foreign policy objectives or attitudes.

The work is carefully done. Its principal value lies in its analysis of the general currents affecting Japan's attitudes toward the external world since 1945 rather than with specific patterns of Japan's relations with the United Nations as an operational mechanism. The authors could have done nothing more.

H. ARTHUR STEINER

*NATO and the Future of Europe.* By Ben T. Moore. New York: Harper & Brothers for the Council on Foreign Relations, 1958. pp. xv, 263. Index. \$4.50.

The essential importance of this book lies in the author's examination of some of the problems recently facing NATO against the background of postwar Western European experience in devising new inter-state relationships and, conversely, his discussion, in the perspective of the wider North Atlantic Community, of the movement of Western Europe towards greater unity through the establishment of novel international institutions. If the result does not always achieve a clarity sufficient to banish wonder that no similar effort has hitherto been made, it offers many thoughtful and provocative ideas deserving the serious attention not only of those who see in European-Atlantic developments the most fruitful postwar experiments in international organization.

To his task the author, now Associate Director of the Twentieth Century Fund, brings a decade of government experience in the making of American policy concerning the subject of the book, augmented by opportunity for contemplation as a Carnegie Research Fellow of the Council on Foreign Relations. Moreover, although the analysis and conclusions are his alone, in preparing this work Mr. Moore also benefited from consultation with a Council study group including in its membership men of wide range of experience with reference to NATO and the European organizations.

In the light of recurring emphasis on the necessity of re-thinking NATO in the face of developments in science, technology and politics that have revolutionized world affairs in the decade since the North Atlantic Treaty was signed, the book is made particularly timely by the author's thesis offering a way out of the present strategic dilemma of NATO. On the

premise that "... the nations of Western Europe and the North Atlantic area cannot continue to separate their strategic alliances and their economic organizations," Mr. Moore urges the establishment of a European Nuclear Defense Union as the core of a more meaningful NATO military effort. EURATOM now makes such a development technologically feasible and militarily valid, he argues. The experience of "Little Europe" in evolving a sense of community across national frontiers through an attack on postwar economic problems gives, he believes, an air of political reality to his proposal in contradistinction to that for an integrated Atlantic Community. The author nevertheless acknowledges the existence of many difficulties confronting the establishing of a European Nuclear Defense Union, not the least of which are British reluctance to participate in a continental union for any purpose and the consequent prospect of German predominance in such an arrangement. These considerations proved in fact to be of determining significance with reference to the 1952-1954 attempt to develop an effective European security organization (the European Defense Community).

On behalf of this thesis there is reasserted the argument which has underlain American postwar support of European integration, namely, that by lessening dependence on the United States, European union might in the long run be expected to strengthen the Atlantic Community where the greater power realities clearly lie. The line of argument is that the United States, confronted by a Europe more nearly its equal, might thus come to see the necessity of devising Atlantic institutions of greater effectiveness, a development which this country has thus far resisted and which, in view of the predominant power of the United States in the Atlantic Community, manifestly cannot occur without American support. This is clearly reasoning worthy of serious consideration.

It may be asked, however, whether this is not an argument which makes it too easy for the United States to cling to its established ways. Our support of various types of European integration offers little to challenge the more effective use of American power and influence *vis-à-vis* our European allies, many of whom continue to expect from us imaginative initiatives that indicate recognition on our part that power connotes responsibility. Although it is indubitably true that the American people are not at present prepared to enter into novel political relationships within the Atlantic Community, it is doubtful that public understanding of the need to do so will grow as this country stands by and watches Western Europeans struggle with the challenge the twentieth century is offering to the adequacy of the national state. It should, moreover, be observed that the author perceives that the capacity of the United States to influence the course of developments in Europe is limited. This raises the question whether we should not be moving forward *with* our European friends, rather than standing on the sidelines cheering them on.

Inasmuch as the exploration of new directions for United States policy towards NATO and European union was the principal function of the

Council on Foreign Relations study group, from whose deliberations this book emerged, it may not be inappropriate to point out that the book is disappointing in its failure to come to grips with the non-military aspects of the Soviet threat to the North Atlantic Community, perception of which has steadily grown. Emphasis here, as elsewhere, is on the economic and military developments within the Community, the latter analyzed with particular effectiveness in light of the implications for the alliance of the continuing revolution in weapon technology. Although the political challenge offered by the Soviets is recognized, no attempt is made to suggest the elements of imaginative policies that might be expected to constitute effective responses to this novel challenge confronting the free world.

The careful reader will likewise be aware that, in its consideration of the evolution of postwar European political institutions, the book does not avoid the pitfalls too commonly characteristic of discussions of the legal aspects of such novel organizations as the Coal and Steel Community, for example, or the imprecise connotations of such phrases as "degree of federalism" and "national economic sovereignty." And while there is real merit in the effort of the author to wrestle in the Atlantic context with the meanings of the commonly used terms, "alliance" and "community," it can be argued that greater clarity might be achieved by considering these concepts in relation to political organization, the emergence of which among national states is the predominant and persistent characteristic of twentieth-century international relations.

Too infrequently, in studies such as this, is it articulated that while the substance and goals of such organization may be military, economic, social or political, the institutions themselves and the processes by which they are established and through which they function, are essentially political. It should not be overlooked, however, that the author sees that

... nuclear weapons may have made impossible an alliance which does not look forward to a thorough-going surrender of national sovereignty.

It is by flashes of insight such as this, perhaps even more than by the volume of data he has brought into manageable compass, that the author makes a valuable contribution to greater understanding of a complex and difficult subject which has thus far been too little analyzed by scholars.

RUTH C. LAWSON

*Det Europæiske Kul-og Stålfællesskab. Folkeretlige studier over internationalt samarbejde.* By Paul Henning Fischer. Copenhagen: Ejnar Munksgaard, 1957. pp. 340. Index. D. Kr. 38.

This is a comprehensive and scholarly study of the European Coal and Steel Community, with particular reference to the international law aspects of a functional international organization. Submitted for the doctorate in jurisprudence at the Faculty of Law of the University of Copenhagen, this dissertation was successfully defended in October, 1957.

The author, who has had some academic experience, is an officer in the Danish Ministry of Foreign Affairs.

In sixteen chapters, extensively supported by all the pertinent official documentation, and analyses and commentaries by many writers in several languages (see the bibliography, pp. 311-331), Dr. Fischer presents an impressive study of the Coal and Steel Community. It is to be regretted that the book was not published in a major language, although the concise summary in English (pp. 297-310) enables a larger audience to appreciate the significance of this contribution to the growing literature on the E.C.S.C. Without question, this is a major work on the subject, and the first exhaustively to depict it from the viewpoint of international law.

In the first three chapters Fischer relates the history and background of the treaty and its conclusion, the institutions of the E.C.S.C., and their powers. Chapter IV analyzes the norms of legal behavior, and the next three chapters discuss these norms for the obligations of enterprises, Member States, and between enterprises and Member States. In Chapter VIII the author makes observations on whether individuals can be subjects of international law. Sovereignty and self-government, capacity for action, and the concept "supra-national" are then treated, after which the constitutional problems in connection with the treaty are covered. The functional principle is examined in Chapter XIII, and there follows a comparative appraisal of federal states and international organizations.

Dr. Fischer adheres to the dualistic conception of the relation between international law and municipal law and does not believe that the existence of the E.C.S.C. necessitates any revision of the fundamental concepts of international law (see his conclusions, Chapter XVI, pp. 268-296). Although he notes that individuals to some extent become subject to the E.C.S.C. jurisdiction, "there has been no basic structural change in the international community." He also concludes that it is "a characteristic feature of the E.C.S.C. that the influence of the Member States has been reduced," but the Community "cannot be defined as a federal state or a federation; it is an organization *sui generis* with federal elements." Finally,

It would not be justifiable to maintain that the E.C.S.C. is the ideal type of organization for international co-operation. No such ideal type can be devised because one type may be effective in one specific functional field, for a certain combination of states and under a specific political combination, and yet prove ineffective if one or more factors were different. The political realities are more important than the structure of an organization.

Fischer is well aware of the fact that international planning must "often yield to the multifarious and unforeseeable exigencies arising in international relations."

The present study was concluded in December, 1955. In his preface (dated June, 1957) the author indicates that later developments have partially altered some of his conclusions. He acknowledges, moreover

(pp. 279-281), that the E.C.S.C. should be evaluated in the light of its short-term and long-term objectives, but that in view of its brief existence no such evaluation can yet be undertaken.

ERIC C. BELLQUIST

*The Projected Arab Court of Justice: A Study in Regional Jurisdiction with Specific Reference to the Muslim Law of Nations.* By Ezzeldin Foda. The Hague: Martinus Nijhoff, 1957. pp. xvi, 258. Index. Gld. 19.

This study, presented as a doctoral dissertation at the University of Leyden, is from the pen of an official in the Secretariat General of the Arab League. He had access to the unpublished documents of the League and has utilized almost all the official published material that has bearing on the subject. He has approached the problem from both the standpoint of the Western theory and practice of the modern law of nations and the standpoint of the basic principles of the Muslim law of nations.

The book is divided into three parts. Part I is in the main devoted to a study of the various plans laid down for the establishment of the Arab League and the various divergent official views as to its legal and political nature. He also discusses the modes of peaceful settlement under the Arab Pact and the problem of compulsory arbitration. He failed to make use of several earlier studies on the Arab League, particularly the one published in this JOURNAL (Vol. 40, p. 756, October, 1946), which has bearing on the legal nature of the Arab League. Part II, entitled "Ideological Problems in Connection with the establishment of a Court for the Arab World," discusses in detail some of the traditional Islamic concepts of state and sovereignty, of public law and the relations of the Islamic state with non-Muslim states and territories. While the author has thoroughly studied the Western legal literature on the concepts of sovereignty and the principles of public law, he has not shown equal competence in handling the Islamic classical sources nor precision in his definition and use of the Muslim legal concepts.

Part III is devoted to a discussion of the problems relating to the draft of the proposed Arab Court of Justice, its nature and jurisdiction, and the enforcement of its decisions and orders. His discussion is based on the assumption (previously discussed in Chapter 6) that world organizations should be decentralized and that peace and justice would be more adequately dealt with on the basis of regional decentralization. The author's regional approach to the study of international organizations made him interested in the proposed Arab Court of Justice. He advocates the establishment of such a court to settle disputes of a regional character. This is perhaps one of the most constructive parts of the book, in which he makes a number of valuable suggestions as to how the draft statute of the Arab Court should be revised before its final approval, and how the Court ought to function in order to fit both the regional and world orders.



There are six appendices, including the draft statute of the proposed Court, and a bibliography.

MAJID KHADDURI

*The Legality of Nuclear Weapons.* By Georg Schwarzenberger. Toronto: Carswell Co. Ltd.; London: Stevens & Sons Ltd., 1958. pp. viii, 61. paper: 3 s. 6 d., 65¢; cloth: 10 s., \$1.80.

"[T]he first, and most self-denying, duty of the international lawyer," Dr. Schwarzenberger writes, "is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanized barbarism." Once liberated from this illusion, the international lawyer will be prepared to turn to "legal planning" for a federal World State which will maintain a monopoly of nuclear energy.

This paper, originally delivered as a public lecture at University College, London, and later to be published in *Current Legal Problems, 1958*, exhorts the international lawyer to creativity by demonstrating that nuclear weapons are illegal but that their illegality will not keep them from being used in a "fight for survival." They are illegal because their radiation and fall-out (apparently without regard to whether these are their principal or collateral effects) make them "poisonous" and thereby violative of Article 23(a) of the Hague Regulations of 1907 and of the Geneva Gas Protocol of 1925. Other "law-determining processes," "abstractions from . . . relevant rules of warfare," and rules of international law do not prohibit the weapons, except under special circumstances. On the other hand, their use may be justified by way of reprisals, notwithstanding these prohibitions.

These views, although not beyond exception, are persuasively and eloquently argued in Dr. Schwarzenberger's pamphlet. With one conclusion at least no one can quarrel: existing conventional or customary law will not of itself prevent the use of these most horrible of all weapons.

R. R. BAXTER

*Främmande Valutalag och internationaell privaträtt. Studier i de främmande offentligrättsliga Lagarnas tillämplighet* [*Foreign Exchange Restrictions and Private International Law. Studies in the Enforcement and Recognition of Foreign Confiscatory and Political Laws*]. With a Summary in English. By Lars A. E. Hjernér. The Hague: Martinus Nijhoff, 1956-1957. pp. xii, 712. Index. Gld. 37.50; Kr. 48. *The General Approach to Foreign Confiscations.* By Lars A. E. Hjernér. Stockholm: Almqvist & Wiksell, 1958. pp. 40. Kr. 7.

The "taking" of foreign property by confiscations and other devices, among them the discriminatory operation of foreign exchange control,

has recently been discussed at the 1958 Conferences of the International Bar Association in Cologne and of the International Law Association in New York. It is most gratifying to have now in the writings of the Swedish author an exhaustive and well-documented treatise on the various legal questions involved in the extraterritorial effects of economic emergency measures. The summary in English of the principal work (16 pages) of course cannot give an adequate presentation of the many, often challenging, thoughts and comments on legal writings and on some 1200 court decisions of not less than 16 countries. However, the second booklet (which also appeared as part of the Scandinavian Studies in Law, No. II, 1958, pp. 179-218), shows the methods which the author used in his principal work in describing the repercussions of foreign exchange restrictions on municipal, private and public international law.

Exchange restrictions are rightly conceived as an encroachment upon private economic relations for which the old rules of *lex rei sitae* governing property questions, the proper law of contract and the various concepts of territoriality, do not always afford a just determination. The search for a new approach also led the author to a detailed study of the recognition and enforcement of different types of political laws of territorial application, such as gold clauses and *moratoria*. Here the author observes the specific facts which underly the often conflicting solutions in similar situations by courts of different countries, and he tries to establish standards for a comparative approach.

The author considers the practice of courts in expropriation cases, where the property has been a tangible thing, especially ships, and, rightly stressing the remedial aspects, observes that "property ultimately depends on the assistance which a claimant receives from the community." Among the questions discussed are claims for restitution or damages, effective possession of confiscated property, the legal representative of the creditor or the debtor, if one of them is a nationalized entity, and the confiscation of companies, of their assets or the rights of shareholders. Considerations of public international law are by no means neglected: immunity from foreign jurisdiction, diplomatic recognition, the act of state doctrine, the illegality aspect of confiscatory measures and, most interesting, the use of the nationality test for the purpose of risk distribution.

It is noteworthy that the author attributes to the courts the decisive rôle in granting protection and asylum in private property matters, by means of investigating foreign decrees, not at their face value, but for "the purpose of the application of the decree in the particular situation."

The valuable presentation of method and approach reveals very well the principles and standards which should be considered in any evaluation of many activities of foreign governments, by special legislation or administrative measures, which encroach upon or undermine private property rights.

MARTIN DOMKE

*Jurisdiksjonsvalg og Lovvalg.* By Edvard Hambro. Oslo: Universitetsforlaget, 1957. pp. xvi, 406.

*Partenes autonomi og innføring av ensartet internasjonal privatrett* [*Die Parteiautonomie und die Universelle Vereinheitlichung des Internationalen Privatrechts*]. By Gustav Högtun. Oslo: H. Aschehoug & Co., 1955. pp. xvi, 139 (xi, 129).

In many fields Scandinavian scholarship has contributed more than any other to the progress of law and legal science.<sup>1</sup> It is very fortunate, therefore, that recent Scandinavian publications have facilitated access to this scholarship by adding summaries in one or several of the major Western languages. Högtun's book does more by offering a nearly complete German translation. Fortunately, Hambro's book, too, is rendered more readily accessible to non-Scandinavian readers through other publications.<sup>2</sup> Both books deal with the age-old problem of party autonomy, both unfortunately without reference to American law. While Högtun's work is primarily analytical, Hambro's emphasis is on comparison (between the Nordic laws, and English, French, Swiss and German law).

To the *Restatement of Conflicts of Law* of the American Law Institute the choice of either jurisdiction or law by the parties remains anathema, and American courts are still struggling with this "official" doctrine.<sup>3</sup> But in the light of Nussbaum's and Yntema's studies,<sup>4</sup> the American reader will not be surprised to learn from the books under review that elsewhere party autonomy has always been recognized as one of the primary tenets of private international law. This observation includes Norway, which has been accused incorrectly, as Hambro has shown, of rejecting this precept.<sup>5</sup> Högtun's most important contribution would seem to be his analysis of the questionnaire which he submitted to 500 exporters and importers. Of 250 answers, 65 indicated that their business practice insisted upon express stipulations of applicable law, and 39 reported that contracts occasionally contained such provisions. The great majority favored the seller's law. Hambro's outstanding achievement is his parallel treatment of choice of law and jurisdiction.

ALBERT A. EHRENZWEIG

<sup>1</sup> For unique Scandinavian achievements in the field of tort liability and insurance, see this reviewer's "Full-Aid" Insurance (1954).

<sup>2</sup> See particularly Hambro, "Autonomy in the International Contract Law of the Nordic States," 6 Int. and Comp. Law Q. 589 (1957).

<sup>3</sup> See, in general, Ehrenzweig, Conflict of Laws 11, 145 (1959); *id.*, "Adhesion Contracts in the Conflict of Laws," 53 Col. Law Rev. 1072 (1953).

<sup>4</sup> See, e.g., Nussbaum, Principles of Private International Law 147 ff. (1943); Yntema, "'Autonomy' in Choice of Laws," 1 A. J. Comp. Law 341 (1952).

<sup>5</sup> 2 Rabel, Conflict of Laws 373 (1947).

*The Year Book of World Affairs, 1957.* Vol. 11. Published under the auspices of the London Institute of World Affairs. London: Stevens & Sons Ltd., 1957. pp. xv, 479. Index. £2 2 s.

*The Year Book of World Affairs, 1958.* Vol. 12. London: Stevens & Sons Ltd., 1958. pp. xviii, 472. Index. £2 2 s.

The *Year Book of World Affairs*, under the able editorship of George W. Keeton and Georg Schwarzenberger, has come to have a special place among publications of this kind in the field of international relations, for each volume can be expected to present competent and often provocative analyses and interpretations of current problems in international relations in general or in the foreign policies of specific states, as well as inquiries into the socio-political and theoretical aspects of public policy. The eleventh and twelfth volumes of the *Year Book* maintain the high standard of the series. The 1957 volume contains articles on political aspects of United States foreign policy, issues in Japanese foreign policy, miscalculations in the Suez affair, the United Nations' two standards of conduct *vis-à-vis* power politics, the nature and implications of Soviet aid to underdeveloped countries, concepts of neutrality and of nationalism in contemporary affairs, German reunification, the expanding Commonwealth, the Soviet satellites after Stalin, and a report on the Conference on the Teaching of International Law, held at Geneva in August, 1956.

In the 1958 volume there are articles dealing with foreign policies of India, Pakistan, and Canada, respectively, British views on the economic consequences of the European Common Market, psychological factors in the provision of technical assistance to underdeveloped countries and demographic difficulties of these countries, sources of discontent in the Arab states, the 1955-1957 crisis in international Communism, a re-examination of the Western policy of strategic embargoes, India's quasi-federalism, rival claims to sovereignty in the Antarctic, and new dimensions of research in international relations.

Limitations of space preclude comment on each of the articles published in the volumes for 1957 and 1958, but a sampling may be illustrative of the whole. In the 1957 volume Hans J. Morgenthau argues that foreign policies predicated upon neutralism must be evaluated in terms of national and international political reality rather than "the abstract moral standard of anti-Communism." The United Nations' "position as a plaything between the two colossi of the modern world," according to L. C. Green, is enhanced by its espousal of a double standard in dealing with participants in international disputes. Paul de Visser reports that teachers of international law "should give due attention to the social realities underlying the norms of positive law." Werner Levi, writing in the 1958 volume, sees a change in India's chosen rôle of leader of the Asian bloc since the Hungarian crisis. Susan Strange criticizes the Western policy of strategic trade embargoes and urges its termination. Harold D. Lasswell concludes that an "emerging strategy of inquiry" on a worldwide

(non-Soviet) basis is contributing to the clarification of the decision-making process in international relations.

Each volume includes a bibliographical section in which more than 400 studies and reports by government agencies and international organizations, treatises and other publications, not excluding a selection of biographies and novels, are pithily reviewed in essays on such topics as the economic, institutional, and legal aspects of world affairs.

ALONA E. EVANS

*World Affairs: Problems and Prospects.* By Elton Atwater, William Butz, Kent Forster, Neal Riemer. New York: Appleton-Century-Crofts, 1958. pp. xii, 621. Index. \$6.95.

The teaching of international relations is still undergoing a serious self-appraisal and the flood of new texts in the field gives evidence of self-conscious efforts to devise new approaches to an admittedly cliché-ridden subject. The current volume is rigorously oriented toward expounding contemporary topics relating to conflict; it seeks no unifying conceptual thread, no historical continuity and no single programmatic answers to such issues as: "Does man's nature make war inevitable?" or "Is there a key outlook on world affairs?" These are sample chapter headings; others deal with nationalism, economic resources, technology, democracy, Communism, and techniques for conducting peaceful international relations in similarly worded topical questions relating to immediate issues. Succinct descriptions of key theories, attitudes, institutions, policies and events are followed by alternative programmatic schemes for dealing with them. While useful for teaching undergraduates, this approach comes no closer to providing us with guiding concepts than do most rival current texts.

ERNST B. HAAS

*Internationale Beziehungen. Einführung in die Grundlagen der Aussenpolitik.* By Rudolf Blühdorn. Vienna: Springer-Verlag, 1956. pp. xiv, 391. Index. S. 7.15, paper; S. 7.85, cloth.

Blühdorn's text on international relations is among the first such efforts to be published on the European Continent in the German language. The Continental tradition in this field had been confined to diplomatic history, international law or—more commonly—to the exposition of some ideology under which the actual or desired conduct of states was subsumed. The present volume is very different in tone. In the form of a succinct manual, it treats international relations in terms of psychological and sociological propositions concerning man and human groups, examines various types of states and alternative foreign policies, as well as the ideological and philosophical assumptions on which they rest. As such, the volume combines the best and the worst features of the current American texts in this field; it is comprehensive and anxious to draw on the lessons of all the

social sciences; but it is too diffuse and therefore unwilling to sort the relevant from the irrelevant. While perfectly willing to accept many of Blühdorn's conclusions, this reviewer feels that many of the social science propositions propounded as their basis have long been demonstrated as false or unprovable.

ERNST B. HAAS

*The Use of Force in International Relations.* By A. Appadorai. Bombay: Asia Publishing House, 1958. pp. 124. Index. Rs. 5.75.

This book is a publication of some lectures given at the University of Calcutta in 1957. It may be assumed, therefore, that it was never intended to be an exhaustive legal analysis of the problem of the use of force, but rather a general exposition of certain basic ideas which center around this problem. The three chapter headings, Analysis of the Problem, Peaceful Change and Co-existence, and Collective Security, bear out this assumption and indicate a rather more general treatment of the subject.

The first chapter is a very brief survey of the changing position of war in international relations. The chapter on peaceful change indicates the essential connection between the prohibition of force and the provision of adequate machinery for peaceful change.

The final chapter contains some interesting suggestions on reforms of the Charter necessary to make the United Nations a more effective organization.

D. W. BOWETT

*La Ligne Curzon et la IIe Guerre Mondiale.* By Romain Yakemtchouk. Louvain: Éditions Nauwelaerts; Paris: Béatrice-Nauwelaerts, 1957. pp. 135.

In some respects the title of the work under review is deceiving, for the author's preoccupation is not with the Curzon Line itself, although it does, of course, enter the picture incidentally, but with the history of the diplomatic maneuvers which resulted in the present Polish-Russian frontier being where it currently is. This is in no way a legal study, and the author explicitly denies any desire to draw conclusions on the merits of the various contending parties' cases. As he himself states, the book's only purpose is to set forth all the evidence available concerning how the decision was finally reached to fix that problem child of modern European diplomacy, the eastern frontier of the Polish state, along its present course. In his desire to present exhaustively all the conflicting facts of that confused case, the author may be said to have succeeded to the highest degree: his research is very impressive and the works consulted and cited at length constitute a definitive bibliography in six languages.

The method used is that of a chronological exposé of the problem's various phases of development throughout the years. Surprisingly enough,

there is no background material, except a few very sketchy and uninformative paragraphs on the inter-war situation in the area, with no attention at all to the important and very relevant problem of the genesis and twenty-year history of the Curzon Line between the first and second World Wars, although from the title it would appear to be the very subject of the study. The work opens with the events of 1939, i.e., a description of the Russo-German partition of Poland. Thereafter the reader is led through the maze of Great-Power politics, the gradual deterioration of the unholy alliance, the early concessions to the Polish Government-in-exile made by the Soviets in the opening stages of the German attack, the subsequent stiffening of Moscow's attitude, the reassertion of Soviet demands for the borders sanctioned by the Molotov-Ribbentrop Pact, the final breakdown of Soviet-Polish relations, culminating in the rupture of diplomatic ties between the Kremlin and the London Government and the expedient formation of the Lublin Committee. The most interesting section of the work, because it covers a period of which still too little is understood, is the part dealing with the war years and the frantic efforts of the London Poles to rescue their country from threatening disaster. These must be considered to be the author's most successful chapters, in which he skillfully and convincingly handles a mass of extremely confused evidence against a background of rapidly changing international developments, making good use of the writings of the various actors whose personal decisions contributed so much to the outcome of the controversy.

On the whole this is a very competent and useful study of a fascinating and still potentially troublesome factor in international diplomacy, concerning which there have been all too many biased works and partisan accounts. What is a little disconcerting is the author's tone. Although he is objective in his factual presentation and quite moderate in his arguments, the author affects an unnecessarily bitter and sarcastic tone in writing of all things Russian, disparages everything connected with the London Polish Government and seriously criticizes the rôle of Churchill and Roosevelt and their aides, thus detracting somewhat from the work's value as an objective scholarly study. If one overlooks the author's apparent dislike for, or impatience with, all concerned, despite his own admission that the problem did not have any simple solution and that the actual settlement was probably as just an outcome as could have been expected under the circumstances, the book can be read with real profit.

GEORGE GINSBURGS

*Grundprobleme des Internationalen Wirtschaftsrechts.* By Georg Erler. Göttingen: Verlag Otto Schwartz & Co., 1956. pp. xii, 215. Index. DM. 19.80.

This stimulating, well-organized book sets forth the outlines for a new discipline dealing with the legal regulations of international economic intercourse. The new field of learning, "*Internationales Wirtschaftsrecht*"

(International Economic Law), discusses relevant provisions of international law, including operational regulations and administrative practices of intergovernmental economic organizations, and *national* laws applying to foreign trade and international payments.

After the second World War the most important trading nations of the world engaged in a momentous effort to put international trade on a new basis which would make possible the free movement of goods, services and payments, and promote economic and social progress. Confused currency situations, political cleavages and deep-seated differences in social organization and political philosophy increased the intrinsic complexity of this task. The initial enthusiasm to create a workable system of free trade is well illustrated by the fact that the basic instruments of the two monetary organizations, the World Bank and the International Monetary Fund, were drafted at Bretton Woods with the participation of a large Soviet delegation, headed by a People's Commissar. The Soviets did not ratify the new financial scheme, and a few important arrangements (*e.g.*, the International Trade Organization) remain uncompleted. An impressive network of intergovernmental arrangements, however, has been agreed to by (mostly) non-"iron-curtain" nations in the area of international economic intercourse. They contain substantive regulations such as international scrutiny of exchange rates, most-favored-nation treatment, international control of trade and payment restrictions, and other provisions deeply intruding into spheres of traditional national sovereignty. Whereas in the area of "political" intercourse national governments display excessive sensitiveness in defense of their "domestic domains," they accepted (and frequently welcomed) within the framework of the new organizations interference in their budgetary, exchange, and trade policies. New legal situations and new legal categories result from the operation of such international arrangements as the International Monetary Fund, the General Agreement on Tariffs and Trade, the Organization for European Economic Co-operation. Domestic legal procedures and administrative practices of national governments are adapted to fit the new international positions. The operation and effect of the *new* international arrangements are the principal subjects of Professor Erler's study.

The first two chapters of the volume deal with methodological problems of international economic law and its development up to the second World War. The third chapter discusses post-World War II policies toward the elimination of all kinds of restrictive practices on a worldwide basis and within the framework of regional arrangements, especially in the European sphere. The fourth and fifth chapters consider the operation of actual international economic arrangements and the effect of their work on national policies. The sixth chapter analyzes new legal forms and categories, especially in the field of public administration, national and international.

Professor Erler's timely study is worthy of special commendation because it presents in a coherent form an important sector of national and international law hitherto not systematically treated, and accompanies it by a careful discussion of the legal principles involved. This presentation en-



ables the reader to review and re-evaluate a number of traditional concepts of national and international law from the aspect of the new organizational developments. The book shows a sophisticated awareness of contemporary economic problems and of their historic antecedents, and a skill in compressing (and perhaps somewhat oversimplifying) a complex body of material.

ERVIN P. HEXNER

*Economic Co-operation in Europe. A Study of the United Nations Economic Commission for Europe.* By David Wightman. New York: Frederick A. Praeger; Toronto: British Book Service (Canada) Ltd., 1956. pp. xii, 288. Index. \$5.00.

Mr. Wightman, a lecturer on economic history at the University of Birmingham, was awarded the prize of the Carnegie Endowment for International Peace for this study on problems of international organization. The book contains no law at all, but in the reviewer's opinion it would be difficult to find a study which more succinctly and competently explores one of the many areas of international relations in which multilateral activity is producing the understandings which form the basis of treaties and the legal practices which are developing into international law.

The United Nations Economic Commission for Europe has acquired a reputation for producing the most reliable analyses of the situation in all Europe and for achieving much co-ordination through its technical committees on coal, steel, raw materials and the engineering industry, timber, housing and the building industry, agriculture, electric power and inland transport. Mr. Wightman points out that the supply of reliable data to the practical members of these technical committees enables them to arrive at a consensus on methods of conducting business. The resulting pattern of production, distribution and consumption reveals aspects of questions that become subjects of international agreement. The contributions of the coal and steel committees to the evolution and functioning of the European Coal and Steel Community illustrate how this tilling of the soil assists the growth of international machinery operating under law and administering specific parts of it.

DENYS P. MYERS

*Foreign Aid Reexamined.* Edited by James W. Wiggins and Helmut Schoeck. Washington, D. C.: Public Affairs Press, 1958. pp. x, 250. Index. \$5.00.

Here is the sharpest attack by the academic community today upon the whole United States foreign economic aid policy. Mounted by fourteen scholars, the assault fires at the very foundations of the arguments used by Government officials, certain economists, American exporters, and philanthropists to encourage the grant or loan of millions of dollars to foreign countries for their "economic development." Contributing to the concerted doubt about the efficacy of the United States economic aid programs

are four economists, three anthropologists, three sociologists, two political scientists, one historian, and one demographer. Although the book is a collection of papers prepared for a symposium held at Emory University, and although the editors suggest that the social scientists gathered there held various attitudes towards foreign aid, the total effect is to question with stark evidence the purposes of a policy now ingrained in American literature and Congressional appropriations.

J. Fred Rippy begins with an historical perspective that bares the bones of United States benevolence to other nations: charity as a public policy, the banker's bleat for extending credit, the exporter's need for overseas markets, and the self-interest of the bureaucrat paid handsomely for distributing American funds. Elgin Groseclose accuses the proponents of foreign economic aid, who maintain that economic growth abroad will reduce aggression, of being unwitting captives of the very Marxian dialectic they deny. George Murdock points out the futility of foreign economic aid as a means of winning friends. William Stokes, in a well-documented piece, indicates that it is not the lack of capital nor the lack of technical know-how that holds back the economic development of Latin America, but the lack of will by the ruling classes to change their social values.

Helmut Schoeck takes such publicists as Gunnar Myrdal and Barbara Ward to task for their "rhetoric of inequality" and their wrong perceptions of socio-economic reality on the international plane. Wilson Schmidt, Peter Bauer, and Gottfried Haberler analyze foreign aid in economic terms: the mythology of "social overhead" now current among advocates of foreign aid; the crushing effects of compulsory saving and development planning upon underdeveloped countries; and the menaces to economic stability and growth that arise from governmental intervention.

Warren Thompson, Alfred Smith, and H. G. Barnett show the inherent limitations on "westernization" in the underdeveloped countries, due to population problems, faulty natural resources, and inadequate community participation in planning, while Justus Kroef and David Rowe conclude with case studies of Indonesia and China.

The importance of this book for students of international law lies in its blunt contradiction that America has nothing but capital to export and that economic development is a panacea for the world's many ills. Many pages intimate that the security of private property, sanctity of contracts, a freedom of individual choice, and material incentives to work, in a respectable, law-abiding society also count for the progress of nations. There is reason to doubt with James Wiggins that "economic development of underdeveloped lands is so simple, so free of undesirable effects, and so certain in techniques as it has been described elsewhere." This book will certainly raise the hackles of a thousand enthusiastic sponsors of U. S. foreign economic assistance, but, as a cogent counterweight, it deserves reading.

GERARD J. MANGONE

*The United States in World Affairs 1957.* By Richard P. Stebbins and the Research Staff of the Council on Foreign Relations. New York: Harper & Brothers, 1958. pp. xi, 411. Index. \$5.50.

This volume, like its predecessors in the series initiated by the Council on Foreign Relations in 1931, is a skillful and objective review of United States participation in international affairs during a calendar year. Relative emphasis is indicated by the titles of the seven chapters: Introducing 1957; Foreign Policy in Washington; Europe and the East-West Struggle; The "Southern Gap" and Africa; Breathing Spell in the Far East; Growing Pains in the Americas; and The Space Age Begins. A striking fact, apparent from the chapter notes, is that two sources, namely, the *Department of State Bulletin* and the Council's annual publication, *Documents on American Foreign Relations*, are alone almost sufficient for the purposes of such a review. A valuable feature of the book, filling to some extent the gap that resulted from the discontinuance, some years ago, of one of the departments of this JOURNAL, is the chronology (pp. 372-393) of world events of special significance in connection with the foreign relations of the United States.

EDGAR TURLINGTON

*American Nationalism. An Interpretative Essay.* By Hans Kohn. New York: Macmillan Co., 1957. pp. xii, 272. Index. \$5.00.

Four fifths of Professor Kohn's "essay," as he calls it, deal with the origins, nature, and evolution of American (U. S.) nationalism. The concluding chapter deals with international aspects of the problem. This leading contemporary student of nationalism (his *Idea of Nationalism* appeared in 1944) is naturally interested chiefly in that subject itself, not so much in international relations. Indeed, some of the concluding paragraphs and passages sound a little bit like President Eisenhower—not that they are any the less true or important on that account. So: "American nationalism faces a continuing difficult reorientation before new expanding horizons" (p. 228). It is to be hoped that Professor Kohn will finally get around to doing a volume on nationalism in international relations today, with due attention to the Kremlin, New Delhi, and Jakarta.

PITMAN B. POTTER

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## PERIODICAL LITERATURE OF INTERNATIONAL LAW AND RELATIONS

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ELEANOR H. FINCH

## OFFICIAL DOCUMENTS

### CONVENTION ON THE INTERGOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION \*

*Signed at Geneva March 6, 1948; in force March 17, 1958; proclaimed by the President of the United States June 2, 1958*

The States parties to the present Convention hereby establish the Intergovernmental Maritime Consultative Organization (hereinafter referred to as "the Organization").

\* Department of State, Treaties and Other International Acts Series, No. 4044. Instruments of acceptance have been deposited by Argentina, Australia, Belgium, Burma, Canada, Republic of China, Dominican Republic, Ecuador (with declaration), France, Greece (with statement), Haiti, Honduras, Iran, Ireland, Israel, Italy, Japan, Liberia, Mexico (with reservation), The Netherlands, Norway (with statement), Pakistan, Panama, Switzerland (with reservation), Turkey, United Arab Republic, the United Kingdom, the United States (with reservation and understanding), and the U.S.S.R.

In a note accompanying the instrument of ratification, deposited with the Secretary-General of the United Nations on Aug. 9, 1951, the Belgian Minister for Foreign Affairs stated that the ratification was valid only for the metropolitan territories and that the territories of the Belgian Congo and the Trust Territories of Ruanda-Urundi were expressly excluded.

Following is the text of the declaration made by Ecuador at the time of deposit of her instrument of acceptance of March 6, 1948:

[Translation] "The Government of Ecuador declares that the protectionist measures adopted in the interests of its National Merchant Marine and the Merchant Fleet of Greater Colombia (Flota Mercante Grancolombiana), the vessels belonging to which are regarded as Ecuadorian by reason of the participation of the Government of Ecuador in the said Fleet, are measures the sole object of which is to promote the development of the National Merchant Marine and of the Merchant Fleet of Greater Colombia and are consistent with the purposes of the Intergovernmental Maritime Organization, as defined in article 1 (b) of the Convention. Accordingly, any recommendations relating to this subject that may be adopted by the Organization will be re-examined by the Government of Ecuador."

Following is the text of the reservation made by Mexico at the time of deposit of her instrument of acceptance of March 6, 1948:

[Translation] "The Government of the United States of Mexico, in accepting the Convention on the Intergovernmental Maritime Consultative Organization, on the understanding that nothing in the said Convention is intended to change national legislation relating to restrictive business practices, expressly states that its acceptance of the above-mentioned international instrument neither has nor shall have the effect of altering or modifying in any way the application of the laws against monopolies in the territory of the Republic of Mexico."

Following is the text of the reservation made by Switzerland at the time of deposit of her instrument of ratification of March 6, 1948:

[Translation] "In depositing its instrument of ratification of the Convention on the Intergovernmental Maritime Consultative Organization (IMCO), Switzerland makes

## PART I

## PURPOSES OF THE ORGANIZATION

## ARTICLE 1

The purposes of the Organization are:

- (a) to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation;
- (b) to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;
- (c) to provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;
- (d) to provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or Specialized Agency of the United Nations;
- (e) to provide for the exchange of information among Governments on matters under consideration by the Organization.

## PART II

## FUNCTIONS

## ARTICLE 2

The functions of the Organization shall be consultative and advisory.

the general reservation that its participation in the work of IMCO, more particularly as regards that organization's relations with the United Nations, cannot exceed the bounds implicit in Switzerland's status as a perpetually neutral State. In conformity with this general reservation, Switzerland wishes to make a particular reservation both in respect of the text of article VI as incorporated in the agreement, at present in draft form, between IMCO and the United Nations, and in respect of any similar clause which may replace or supplement that provision in the said agreement or in any other arrangement."

Following is the text of the reservation and understanding made by the United States at the time of deposit of her instrument of acceptance of Aug. 17, 1950: "It being understood that nothing in the Convention on the Intergovernmental Maritime Consultative Organization is intended to alter domestic legislation with respect to restrictive business practices, it is hereby declared that ratification of that Convention by the Government of the United States of America does not and will not have the effect of altering or modifying in any way the application of the anti-trust statutes of the United States of America."

## ARTICLE 3

In order to achieve the purposes set out in Part I, the functions of the Organization shall be:

- (a) subject to the provisions of Article 4, to consider and make recommendations upon matters arising under Article 1 (a), (b) and (c) that may be remitted to it by Members, by any organ or Specialized Agency of the United Nations or by any other intergovernmental organization or upon matters referred to it under Article 1 (d);
- (b) to provide for the drafting of conventions, agreements, or other suitable instruments, and to recommend these to Governments and to intergovernmental organizations, and to convene such conferences as may be necessary;
- (c) to provide machinery for consultation among Members and the exchange of information among Governments.

## ARTICLE 4

In those matters which appear to the Organization capable of settlement through the normal processes of international shipping business the Organization shall so recommend. When, in the opinion of the Organization, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organization shall, at the request of one of those Members, consider the matter.

## PART III

## MEMBERSHIP

## ARTICLE 5

Membership in the Organization shall be open to all States, subject to the provisions of Part III.

## ARTICLE 6

Members of the United Nations may become Members of the Organization by becoming parties to the Convention in accordance with the provisions of Article 57.

## ARTICLE 7

States not Members of the United Nations which have been invited to send representatives to the United Nations Maritime Conference convened in Geneva on the 19th February 1948, may become Members by becoming parties to the Convention in accordance with the provisions of Article 57.

## ARTICLE 8

Any State not entitled to become a Member under Article 6 or 7 may apply through the Secretary-General of the Organization to become a

Member and shall be admitted as a Member upon its becoming a party to the Convention in accordance with the provisions of Article 57 provided that, upon the recommendation of the Council, its application has been approved by two-thirds of the Members other than Associate Members.

#### ARTICLE 9

Any territory or group of territories to which the Convention has been made applicable under Article 58, by the Member having responsibility for its international relations or by the United Nations, may become an Associate Member of the Organization by notification in writing given by such Member or by the United Nations, as the case may be, to the Secretary-General of the United Nations.

#### ARTICLE 10

An Associate Member shall have the rights and obligations of a Member under the Convention except that it shall not have the right to vote in the Assembly or be eligible for membership on the Council or on the Maritime Safety Committee and subject to this the word "Member" in the Convention shall be deemed to include Associate Member unless the context otherwise requires.

#### ARTICLE 11

No State or territory may become or remain a Member of the Organization contrary to a resolution of the General Assembly of the United Nations.

### PART IV

#### ORGANS

#### ARTICLE 12

The Organization shall consist of an Assembly, a Council, a Maritime Safety Committee, and such subsidiary organs as the Organization may at any time consider necessary; and a Secretariat.

### PART V

#### THE ASSEMBLY

#### ARTICLE 13

The Assembly shall consist of all the Members.

#### ARTICLE 14

Regular sessions of the Assembly shall take place once every two years. Extraordinary sessions shall be convened after a notice of sixty days whenever one-third of the Members give notice to the Secretary-General that they desire a session to be arranged, or at any time if deemed necessary by the Council, after a notice of sixty days.

## ARTICLE 15

A majority of the Members other than Associate Members shall constitute a quorum for the meetings of the Assembly.

## ARTICLE 16

The functions of the Assembly shall be:

- (a) to elect at each regular session from among its Members, other than Associate Members, its President and two Vice Presidents who shall hold office until the next regular session;
- (b) to determine its own rules of procedure except as otherwise provided in the Convention;
- (c) to establish any temporary or, upon recommendation of the Council, permanent subsidiary bodies it may consider to be necessary;
- (d) to elect the Members to be represented on the Council, as provided in Article 17, and on the Maritime Safety Committee as provided in Article 28;
- (e) to receive and consider the reports of the Council, and to decide upon any question referred to it by the Council;
- (f) to vote the budget and determine the financial arrangements of the Organization, in accordance with Part IX;
- (g) to review the expenditures and approve the accounts of the Organization;
- (h) to perform the functions of the Organization, provided that in matters relating to Article 3 (a) and (b), the Assembly shall refer such matters to the Council for formulation by it of any recommendations or instruments thereon; provided further that any recommendations or instruments submitted to the Assembly by the Council and not accepted by the Assembly shall be referred back to the Council for further consideration with such observations as the Assembly may make;
- (i) to recommend to Members for adoption regulations concerning maritime safety, or amendments to such regulations, which have been referred to it by the Maritime Safety Committee through the Council;
- (j) to refer to the Council for consideration or decision any matters within the scope of the Organization, except that the function of making recommendations under paragraph (i) of this Article shall not be delegated.

## PART VI

## THE COUNCIL

## ARTICLE 17

The Council shall consist of sixteen Members and shall be composed as follows:

- (a) six shall be governments of the nations with the largest interest in providing international shipping services;



- (b) six shall be governments of other nations with the largest interest in international seaborne trade;
- (c) two shall be elected by the Assembly from among the governments of nations having a substantial interest in providing international shipping services, and
- (d) two shall be elected by the Assembly from among the governments of nations having a substantial interest in international seaborne trade.

In accordance with the principles set forth in this Article the first Council shall be constituted as provided in Appendix I to the present Convention.

#### ARTICLE 18

Except as provided in Appendix I to the present Convention, the Council shall determine for the purpose of Article 17 (a), the Members, governments of nations with the largest interest in providing international shipping services, and shall also determine, for the purpose of Article 17 (c), the Members, governments of nations having a substantial interest in providing such services. Such determinations shall be made by a majority vote of the Council including the concurring votes of a majority of the Members represented on the Council under Article 17 (a) and (c). The Council shall further determine for the purpose of Article 17 (b), the Members, governments of nations with the largest interest in international seaborne trade. Each Council shall make these determinations at a reasonable time before each regular session of the Assembly.

#### ARTICLE 19

Members represented on the Council in accordance with Article 17 shall hold office until the end of the next regular session of the Assembly. Members shall be eligible for re-election.

#### ARTICLE 20

(a) The Council shall elect its Chairman and adopt its own rules of procedure except as otherwise provided in the Convention.

(b) Twelve members of the Council shall constitute a quorum.

(c) The Council shall meet upon one month's notice as often as may be necessary for the efficient discharge of its duties upon the summons of its Chairman or upon request by not less than four of its members. It shall meet at such places as may be convenient.

#### ARTICLE 21

The Council shall invite any Member to participate, without vote, in its deliberations on any matter of particular concern to that Member.

#### ARTICLE 22

(a) The Council shall receive the recommendations and reports of the Maritime Safety Committee and shall transmit them to the Assembly and,

when the Assembly is not in session, to the Members for information, together with the comments and recommendations of the Council.

(b) Matters within the scope of Article 29 shall be considered by the Council only after obtaining the views of the Maritime Safety Committee thereon.

#### ARTICLE 23

The Council, with the approval of the Assembly, shall appoint the Secretary-General. The Council shall also make provision for the appointment of such other personnel as may be necessary, and determine the terms and conditions of service of the Secretary-General and other personnel, which terms and conditions shall conform as far as possible with those of the United Nations and its Specialized Agencies.

#### ARTICLE 24

The Council shall make a report to the Assembly at each regular session on the work of the Organization since the previous regular session of the Assembly.

#### ARTICLE 25

The Council shall submit to the Assembly the budget estimates and the financial statements of the Organization, together with its comments and recommendations.

#### ARTICLE 26

The Council may enter into agreements or arrangements covering the relationship of the Organization with other organizations, as provided for in Part XII. Such agreements or arrangements shall be subject to approval by the Assembly.

#### ARTICLE 27

Between sessions of the Assembly, the Council shall perform all the functions of the Organization, except the function of making recommendations under Article 16 (i).

### PART VII

#### MARITIME SAFETY COMMITTEE

#### ARTICLE 28

(a) The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest shipowning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.

(b) Members shall be elected for a term of four years and shall be eligible for re-election.

#### ARTICLE 29

(a) The Maritime Safety Committee shall have the duty of considering any matter within the scope of the Organization and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety.

(b) The Maritime Safety Committee shall provide machinery for performing any duties assigned to it by the Convention, or by the Assembly, or any duty within the scope of this article which may be assigned to it by any other intergovernmental instrument.

(c) Having regard to the provisions of Part XII, the Maritime Safety Committee shall have the duty of maintaining such close relationship with other intergovernmental bodies concerned with transport and communications as may further the object of the Organization in promoting maritime safety and facilitate the co-ordination of activities in the fields of shipping, aviation, telecommunications and meteorology with respect to safety and rescue.

#### ARTICLE 30

The Maritime Safety Committee, through the Council, shall:

- (a) submit to the Assembly at its regular sessions proposals made by Members for safety regulations or for amendments to existing safety regulations, together with its comments or recommendations thereon;
- (b) report to the Assembly on the work of the Maritime Safety Committee since the previous regular session of the Assembly.

#### ARTICLE 31

The Maritime Safety Committee shall meet once a year and at other times upon request of any five of its members. It shall elect its officers once a year and shall adopt its own rules of procedure. A majority of its members shall constitute a quorum.

#### ARTICLE 32

The Maritime Safety Committee shall invite any Member to participate, without vote, in its deliberations on any matter of particular concern to that Member.

### PART VIII

#### THE SECRETARIAT

#### ARTICLE 33

The Secretariat shall comprise the Secretary-General, a Secretary of the Maritime Safety Committee and such staff as the Organization may

require. The Secretary-General shall be the chief administrative officer of the Organization, and shall, subject to the provisions of Article 23, appoint the above-mentioned personnel.

#### ARTICLE 34

The Secretariat shall maintain all such records as may be necessary for the efficient discharge of the functions of the Organization and shall prepare, collect and circulate the papers, documents, agenda, minutes and information that may be required for the work of the Assembly, the Council, the Maritime Safety Committee, and such subsidiary organs as the Organization may establish.

#### ARTICLE 35

The Secretary-General shall prepare and submit to the Council the financial statements for each year and the budget estimates on a biennial basis, with the estimates for each year shown separately.

#### ARTICLE 36

The Secretary-General shall keep Members informed with respect to the activities of the Organization. Each Member may appoint one or more representatives for the purpose of communication with the Secretary-General.

#### ARTICLE 37

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials. Each Member on its part undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

#### ARTICLE 38

The Secretary-General shall perform such other tasks as may be assigned to him by the Convention, the Assembly, the Council and the Maritime Safety Committee.

### PART IX

#### FINANCES

#### ARTICLE 39

Each Member shall bear the salary, travel and other expenses of its own delegation to the Assembly and of its representatives on the Council, the Maritime Safety Committee, other committees and subsidiary bodies.

## ARTICLE 40

The Council shall consider the financial statements and budget estimates prepared by the Secretary-General and submit them to the Assembly with its comments and recommendations.

## ARTICLE 41

(a) Subject to any agreement between the Organization and the United Nations, the Assembly shall review and approve the budget estimates.

(b) The Assembly shall apportion the expenses among the Members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon.

## ARTICLE 42

Any Member which fails to discharge its financial obligation to the Organization within one year from the date on which it is due, shall have no vote in the Assembly, the Council, or the Maritime Safety Committee unless the Assembly, at its discretion, waives this provision.

## PART X

## VOTING

## ARTICLE 43

The following provisions shall apply to voting in the Assembly, the Council and the Maritime Safety Committee:

- (a) Each Member shall have one vote.
- (b) Except as otherwise provided in the Convention or in any international agreement which confers functions on the Assembly, the Council, or the Maritime Safety Committee, decisions of these organs shall be by a majority vote of the Members present and voting and, for decisions where a two-thirds majority vote is required, by a two-thirds majority vote of those present.
- (c) For the purpose of the Convention, the phrase "Members present and voting" means "Members present and casting an affirmative or negative vote." Members which abstain from voting shall be considered as not voting.

## PART XI

## HEADQUARTERS OF THE ORGANIZATION

## ARTICLE 44

- (a) The headquarters of the Organization shall be established in London.
- (b) The Assembly may by a two-thirds majority vote change the site of the headquarters if necessary.
- (c) The Assembly may hold sessions in any place other than the headquarters if the Council deems it necessary.

## PART XII

## RELATIONSHIP WITH THE UNITED NATIONS AND OTHER ORGANIZATIONS

## ARTICLE 45

The Organization shall be brought into relationship with the United Nations in accordance with Article 57 of the Charter of the United Nations as the Specialized Agency in the field of shipping. This relationship shall be effected through an agreement with the United Nations under Article 63 of the Charter of the United Nations, which agreement shall be concluded as provided in Article 26.

## ARTICLE 46

The Organization shall co-operate with any Specialized Agency of the United Nations in matters which may be the common concern of the Organization and of such Specialized Agency, and shall consider such matters and act with respect to them in accord with such Specialized Agency.

## ARTICLE 47

The Organization may, on matters within its scope, co-operate with other inter-governmental organizations which are not Specialized Agencies of the United Nations, but whose interests and activities are related to the purposes of the Organization.

## ARTICLE 48

The Organization may, on matters within its scope, make suitable arrangements for consultation and co-operation with non-governmental international organizations.

## ARTICLE 49

Subject to approval by a two-thirds majority vote of the Assembly, the Organization may take over from any other international organizations, governmental or non-governmental, such functions, resources and obligations within the scope of the Organization as may be transferred to the Organization by international agreements or by mutually acceptable arrangements entered into between competent authorities of the respective organizations. Similarly, the Organization may take over any administrative functions which are within its scope and which have been entrusted to a government under the terms of any international instrument.

## PART XIII

## LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

## ARTICLE 50

The legal capacity, privileges and immunities to be accorded to, or in connection with, the Organization, shall be derived from and governed by the General Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on

the 21st November, 1947,<sup>1</sup> subject to such modifications as may be set forth in the final (or revised) text of the Annex approved by the Organization in accordance with Sections 36 and 38 of the said General Convention.

#### ARTICLE 51

Pending its accession to the said General Convention in respect of the Organization, each Member undertakes to apply the provisions of Appendix II to the present Convention.

### PART XIV

#### AMENDMENTS

#### ARTICLE 52

Texts of proposed amendments to the Convention shall be communicated by the Secretary-General to Members at least six months in advance of their consideration by the Assembly. Amendments shall be adopted by a two-thirds majority vote of the Assembly, including the concurring votes of a majority of the Members represented on the Council. Twelve months after its acceptance by two-thirds of the Members of the Organization, other than Associate Members, each amendment shall come into force for all Members except those which, before it comes into force, make a declaration that they do not accept the amendment. The Assembly may by a two-thirds majority vote determine at the time of its adoption that an amendment is of such a nature that any Member which has made such a declaration and which does not accept the amendment within a period of twelve months after the amendment comes into force shall, upon the expiration of this period, cease to be a party to the Convention.

#### ARTICLE 53

Any amendment adopted under Article 52 shall be deposited with the Secretary-General of the United Nations, who will immediately forward a copy of the amendment to all Members.

#### ARTICLE 54

A declaration or acceptance under Article 52 shall be made by the communication of an instrument to the Secretary-General for deposit with the Secretary-General of the United Nations. The Secretary-General will notify Members of the receipt of any such instrument and of the date when the amendment enters into force.

### PART XV

#### INTERPRETATION

#### ARTICLE 55

Any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall

<sup>1</sup> 33 United Nations Treaty Series 261.

be settled in such other manner as the parties to the dispute agree. Nothing in this article shall preclude the Council or the Maritime Safety Committee from settling any such question or dispute that may arise during the exercise of their functions.

#### ARTICLE 56

Any legal question which cannot be settled as provided in Article 55 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

### PART XVI

#### MISCELLANEOUS PROVISIONS

#### ARTICLE 57

##### *Signature and Acceptance*

Subject to the provisions of Part III the present Convention shall remain open for signature or acceptance and States may become parties to the Convention by:

- (a) Signature without reservation as to acceptance;
- (b) Signature subject to acceptance followed by acceptance;
- or
- (c) Acceptance.

Acceptance shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

#### ARTICLE 58

##### *Territories*

- (a) Members may make a declaration at any time that their participation in the Convention includes all or a group or a single one of the territories for whose international relations they are responsible.
- (b) The Convention does not apply to territories for whose international relations Members are responsible unless a declaration to that effect has been made on their behalf under the provisions of paragraph (a) of this article.
- (c) A declaration made under paragraph (a) of this article shall be communicated to the Secretary-General of the United Nations and a copy of it will be forwarded by him to all States invited to the United Nations Maritime Conference and to such other States as may have become Members.
- (d) In cases where under a trusteeship agreement the United Nations is the administering authority, the United Nations may accept the Convention on behalf of one, several, or all of the trust territories in accordance with the procedure set forth in Article 57.



## ARTICLE 59

*Withdrawal*

(a) Any Member may withdraw from the Organization by written notification given to the Secretary-General of the United Nations, who will immediately inform the other Members and the Secretary-General of the Organization of such notification. Notification of withdrawal may be given at any time after the expiration of twelve months from the date on which the Convention has come into force. The withdrawal shall take effect upon the expiration of twelve months from the date on which such written notification is received by the Secretary-General of the United Nations.

(b) The application of the Convention to a territory or group of territories under Article 58 may at any time be terminated by written notification given to the Secretary-General of the United Nations by the Member responsible for its international relations or, in the case of a trust territory of which the United Nations is the administering authority, by the United Nations. The Secretary-General of the United Nations will immediately inform all Members and the Secretary-General of the Organization of such notification. The notification shall take effect upon the expiration of twelve months from the date on which it is received by the Secretary-General of the United Nations.

## PART XVII

## ENTRY INTO FORCE

## ARTICLE 60

The present Convention shall enter into force on the date when 21 States of which 7 shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention in accordance with Article 57.

## ARTICLE 61

The Secretary-General of the United Nations will inform all States invited to the United Nations Maritime Conference and such other States as may have become Members, of the date when each State becomes party to the Convention, and also of the date on which the Convention enters into force.

## ARTICLE 62

The present Convention, of which the English, French and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who will transmit certified copies thereof to each of the States invited to the United Nations Maritime Conference and to such other States as may have become Members.

## ARTICLE 63

The United Nations is authorized to effect registration of the Convention as soon as it comes into force.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed the present Convention.

Done at Geneva this sixth day of March 1948

[Here follow signatures, subject to acceptance, on behalf of the governments of Argentina, Australia, Belgium, Chile, Colombia, Egypt, Finland, France, Greece, India, Ireland, Italy, Lebanon, The Netherlands,<sup>2</sup> Poland, Portugal, Switzerland, Turkey, the United Kingdom, and the United States.

The Convention was also signed later on behalf of the Federal Republic of Germany.]

#### APPENDIX I

(Referred to in Article 17)

##### COMPOSITION OF THE FIRST COUNCIL

In accordance with the principles set forth in Article 17 the first Council shall be constituted as follows:

- (a) The six Members under Article 17 (a) being
 

Greece	Sweden
Netherlands	United Kingdom
Norway	United States
- (b) The six Members under Article 17 (b) being
 

Argentine	Canada
Australia	France
Belgium	India
- (c) Two members to be elected by the Assembly under Article 17 (c) from a panel nominated by the six Members named in paragraph (a) of this Appendix.
- (d) Two members elected by the Assembly under Article 17 (d) from among the Members having a substantial interest in international seaborne trade.

#### APPENDIX II

(Referred to in Article 51)

##### LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

The following provisions on legal capacity, privileges and immunities shall be applied by Members to, or in connection with, the Organization

<sup>2</sup> In a communication received by the United Nations Secretariat on Oct. 3, 1949, from the Permanent Representative of The Netherlands to the United Nations, it was stated that "the participation of the Netherlands in this Convention includes Indonesia, Surinam and the Netherlands West Indies."

In a further communication received by the Secretary-General of the United Nations on July 12, 1951, from the Permanent Representative of The Netherlands to the United Nations, it was stated that "the participation of the Netherlands in the aforesaid Convention, from 27 December 1949, no longer includes the territories under the jurisdiction of the Republic of Indonesia but includes Surinam, the Netherlands Antilles (formerly the Netherlands West Indies) and Netherlands New Guinea."

pending their accession to the General Convention on Privileges and Immunities of the Specialized Agencies in respect of the Organization.

Section 1. The Organization shall enjoy in the territory of each of its Members such legal capacity as is necessary for the fulfilment of its purposes and the exercise of its functions.

Section 2. (a) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and the exercise of its functions.

(b) Representatives of Members, including alternates and advisers, and officials and employees of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Section 3. In applying the provisions of Sections 1 and 2 of this Appendix, the Members shall take into account as far as possible the standard clauses of the General Convention on the Privileges and Immunities of the Specialized Agencies.

Certified true copy.

For the Secretary-General:

KERNO

## INTERNATIONAL CONVENTION ON CERTAIN RULES CONCERNING CIVIL JURISDICTION IN MATTERS OF COLLISION

*Signed at Brussels, May 10, 1952; in force November 20, 1955 \**

The High Contracting Parties,

Having recognised the advisability of establishing by agreement certain uniform rules relating to civil jurisdiction in matters of collision, have decided to conclude a convention for this purpose and thereto have agreed as follows:

### ARTICLE 1

(1) An action for collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft, can only be introduced

- (a) either before the court where the defendant has his habitual residence or a place of business;
- (b) or before the court of the place where arrest has been effected of the defendant ship or of any other ship belonging to the defendant which can be lawfully arrested, or where arrest could have been effected and bail or other security has been furnished;
- (c) or before the court of the place of collision when the collision has occurred within the limits of a port or in inland waters.

(2) It shall be for the plaintiff to decide in which of the courts referred to in § (1) of this article the action shall be instituted.

(3) A claimant shall not be allowed to bring a further action against the same defendant on the same facts in another jurisdiction, without discontinuing an action already instituted.

### ARTICLE 2

The provisions of Article 1 shall not in any way prejudice the right of the parties to bring an action in respect of a collision before a court they have chosen by agreement or to refer it to arbitration.

### ARTICLE 3

(1) Counterclaims arising out of the same collision can be brought before the court having jurisdiction over the principal action in accordance with the provisions of Article 1.

\* Great Britain, Misc. No. 13 (1953), Cmd. 8954. The convention has been ratified by France, Spain, Yugoslavia (with reservation), Egypt (with reservation), Portugal (with reservation) and the Holy See. The following states have deposited instruments of adherence: Burma, Cambodia (with reservation), Costa Rica (with reservation), Haiti, Switzerland, and Viet-Nam.

(2) In the event of there being several claimants, any claimant may bring his action before the court previously seized of an action against the same party arising out of the same collision.

(3) In the case of a collision or collisions in which two or more vessels are involved nothing in this convention shall prevent any court seized of an action by reason of the provisions of this convention from exercising jurisdiction under its national laws in further actions arising out of the same incident.

#### ARTICLE 4

This convention shall also apply to an action for damage caused by one ship to another or to the property or persons on board such ships through the carrying out of or the omission to carry out a manœuvre or through non-compliance with regulations even when there has been no actual collision.

#### ARTICLE 5

Nothing contained in this convention shall modify the rules of law now or hereafter in force in the various contracting states in regard to collisions involving warships or vessels owned by or in the service of a state.

#### ARTICLE 6

This convention does not affect claims arising from contracts of carriage or from any other contracts.

#### ARTICLE 7

This convention shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17th October, 1868.

#### ARTICLE 8

The provisions of this convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to states of the High Contracting Parties.

Provided always that

- (1) As regards persons interested who belong to a non-contracting state, the application of the above provisions may be made by each of the contracting states conditional upon reciprocity;
- (2) Where all the persons interested belong to the same state as the court trying the case, the provisions of the national law and not of the convention are applicable.

#### ARTICLE 9

The High Contracting Parties undertake to submit to arbitration any disputes between states arising out of the interpretation or application of this convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

## ARTICLE 10

This convention shall be open for signature by the states represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

## ARTICLE 11

This convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding states of the deposit of any such instruments.

## ARTICLE 12

(a) This convention shall come into force between the two states which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This convention shall come into force in respect of each signatory state which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that state.

## ARTICLE 13

Any state not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this convention.

The accession of any state shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding states of such notification.

The convention shall come into force in respect of the acceding state six months after the date of the receipt of such notification but not before the convention has come into force in accordance with the provisions of Article 12(a).

## ARTICLE 14

Any High Contracting Party may three years after the coming into force of this convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

## ARTICLE 15

Any High Contracting Party shall have the right to denounce this convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

## ARTICLE 16

(a) Any High Contracting Party may at the time of its ratification of or accession to this convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this article extending the convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the convention shall cease to extend to such territory and the convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding states of any notification received by it under this article.

Done in Brussels, in a single original in the French and English languages, the two texts being equally authentic, on May 10, 1952.

[Here follow signatures on behalf of the Federal Republic of Germany, Belgium, Brazil (ad referendum), Denmark, Spain (ad referendum), France, Greece, Italy, Monaco, Nicaragua, United Kingdom, Yugoslavia (with reservation and subject to ratification). The convention was later signed on behalf of Egypt (with reservation), the Holy See, Lebanon and Portugal (with reservation)].

**INTERNATIONAL CONVENTION FOR THE UNIFICATION  
OF CERTAIN RULES RELATING TO PENAL JURIS-  
DICTION IN MATTERS OF COLLISION OR  
OTHER INCIDENTS OF NAVIGATION**

*Signed at Brussels, May 10, 1952; in force November 20, 1955 \**

The High Contracting Parties,

Having recognised the advisability of establishing by agreement certain uniform rules relating to penal jurisdiction in matters of collision or other incidents of navigation, have decided to conclude a convention for this purpose and thereto have agreed as follows:

**ARTICLE 1**

In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the state of which the ship was flying the flag at the time of the collision or other incident of navigation.

**ARTICLE 2**

In the case provided for in the preceding article, no arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying.

**ARTICLE 3**

Nothing contained in this convention shall prevent any state from permitting its own authorities, in cases of collision or other incidents of navigation, to take any action in respect of certificates of competence or licenses issued by that state or to prosecute its own nationals for offences committed while on board a ship flying the flag of another state.

**ARTICLE 4**

This convention does not apply to collisions or other incidents of navigation occurring within the limits of a port or in inland waters.

Furthermore the High Contracting Parties shall be at liberty, at the time of signature, ratification or accession to the convention, to reserve to them-

\* Great Britain, Misc. No. 13 (1953), Cmd. 8954. The convention has been ratified by France (with reservation), Spain (with reservation), Yugoslavia, Egypt (with reservation), Portugal (with reservation) and the Holy See. The following states have deposited instruments of adherence: Burma, Cambodia (with reservation), Costa Rica (with reservation), Haiti, Switzerland, and Viet-Nam.



selves the right to take proceedings in respect of offences committed within their own territorial waters.

#### ARTICLE 5

The High Contracting Parties undertake to submit to arbitration any disputes between states arising out of the interpretation or application of this convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

#### ARTICLE 6

This convention shall be open for signature by the states represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

#### ARTICLE 7

This convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding states of the deposit of any such instruments.

#### ARTICLE 8

(a) This convention shall come into force between the two states which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This convention shall come into force in respect of each signatory state which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that state.

#### ARTICLE 9

Any state not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this convention.

The accession of any state shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding states of such notification.

The convention shall come into force in respect of the acceding state six months after the date of the receipt of such notification but not before the convention has come into force in accordance with the provisions of Article 8 (a).

#### ARTICLE 10

Any High Contracting Party may three years after the coming into force of this convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

## ARTICLE 11

Any High Contracting Party shall have the right to denounce this convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

## ARTICLE 12

(a) Any High Contracting Party may at the time of its ratification or accession to this convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the convention shall extend to any of the territories for whose international relations it is responsible. The convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this article extending the convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the convention shall cease to extend to such territory and the convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding states of any notification received by it under this article.

Done at Brussels, in a single copy, May 10, 1952, in the French and English languages, the two texts being equally authentic.

[Here follow signatures on behalf of the Federal Republic of Germany, Belgium, Brazil (ad referendum), Denmark, Spain (with reservation and ad referendum), France (with reservation), Greece, Italy, Monaco, Nicaragua, United Kingdom (with reservation), Yugoslavia (subject to ratification and accepting reservation under Article 4). The convention was later signed on behalf of Egypt, the Holy See, Lebanon, and Portugal.]

In signing the convention the United Kingdom Delegation made the following reservation:

"1. Her Majesty's Government in the United Kingdom reserve the right not to apply the provisions of Article 1 of this Convention in any case where there exists between Her Majesty's Government and the Government of any other State an agreement which is applicable to a particular collision or other incident of navigation and is inconsistent with that Article.

"2. Her Majesty's Government in the United Kingdom reserve the right under Article 4 of this Convention to take proceedings in respect of offences committed within the territorial waters of the United Kingdom."

## INTERNATIONAL CONVENTION RELATING TO THE ARREST OF SEA-GOING SHIPS

*Signed at Brussels, May 10, 1952; in force November 20, 1955 \**

The High Contracting Parties,

Having recognised the desirability of determining by agreement certain uniform rules of law relating to the arrest of sea-going ships, have decided to conclude a convention for this purpose and thereto have agreed as follows:

### ARTICLE 1

In this convention the following words shall have the meanings hereby assigned to them:

- (1) "Maritime claim" means a claim arising out of one or more of the following:
  - (a) damage caused by any ship either in collision or otherwise;
  - (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
  - (c) salvage;
  - (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
  - (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
  - (f) loss of or damage to goods including baggage carried in any ship;
  - (g) general average;
  - (h) bottomry;
  - (i) towage;
  - (j) pilotage;
  - (k) goods or materials wherever supplied to a ship for her operation or maintenance;
  - (l) construction, repair or equipment of any ship or dock charges and dues;
  - (m) wages of Masters, Officers, or crew;
  - (n) Master's disbursements, including disbursements made by ship-  
pers, charterers or agents on behalf of a ship or her owner;
  - (o) disputes as to the title to or ownership of any ship;

\* Great Britain, Misc. No. 13 (1953), Cmd. 8954. The convention has been ratified by France, Spain, Yugoslavia (with reservation), Egypt (with reservation), Portugal (with reservation) and the Holy See. The following states have deposited instruments of adherence: Burma, Cambodia (with reservation), Costa Rica (with reservation), Haiti, Switzerland, and Viet-Nam.

- (p) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.
- (2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.
- (3) "Person" includes individuals, partnerships and bodies corporate, governments, their departments, and public authorities.
- (4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

#### ARTICLE 2

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this convention shall be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

#### ARTICLE 3

(1) Subject to the provisions of paragraph (4) of this article and of Article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1, (1) (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any one of such jurisdictions or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the court or other appropriate judicial authority of that state, unless the claimant can satisfy the court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this convention,

but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims.

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

#### ARTICLE 4

A ship may only be arrested under the authority of a court or of the appropriate judicial authority of the Contracting State in which the arrest is made.

#### ARTICLE 5

The court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1 (1) (o) and (p). In such cases the court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest.

In default of agreement between the parties as to the sufficiency of the bail or other security, the court or other appropriate judicial authority shall determine the nature and amount thereof.

The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitation of liability of the owner of the ship.

#### ARTICLE 6

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

#### ARTICLE 7

(1) The courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such courts, or in any of the following cases, namely:

- (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;

- (b) if the claim arose in the country in which the arrest was made;
- (c) if the claim concerns the voyage of the ship during which the arrest was made;
- (d) if the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, signed at Brussels on 28rd September, 1910;
- (e) if the claim is for salvage;
- (f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a court having jurisdiction so to decide; and the court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made or to arbitration, the court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17th October, 1868.

#### ARTICLE 8

(1) The provisions of this convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the state of her flag by a person who has his habitual residence or principal place of business in that state.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or otherwise, such third party shall, for the purpose of this convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

#### ARTICLE 9

Nothing in this convention shall be construed as creating a right of action, which, apart from the provisions of this convention, would not arise under the law applied by the court which had seisin of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on Maritime Mortgages and Liens, if the latter is applicable.

#### ARTICLE 10

The High Contracting Parties may, at the time of signature, deposit of ratification or accession, reserve

- (a) the right not to apply this convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of Article 1, but to apply their domestic laws to such claims;
- (b) the right not to apply the first paragraph of Article 3 to the arrest of a ship, within their jurisdiction, for claims set out in Article 1, paragraph (q).

#### ARTICLE 11

The High Contracting Parties undertake to submit to arbitration any disputes between states arising out of the interpretation or application of this convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

#### ARTICLE 12

This convention shall be open for signature by the states represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

#### ARTICLE 13

This convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding states of the deposit of any such instruments.

#### ARTICLE 14

(a) This convention shall come into force between the two states which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This convention shall come into force in respect of each signatory state which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that state.

#### ARTICLE 15

Any state not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this convention.

The accession of any state shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding states of such notification.

The convention shall come into force in respect of the acceding state six months after the date of the receipt of such notification but not before the convention has come into force in accordance with the provisions of Article 14 (a).

#### ARTICLE 16

Any High Contracting Party may three years after the coming into force of this convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

#### ARTICLE 17

Any High Contracting Party shall have the right to denounce this convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

#### ARTICLE 18

(a) Any High Contracting Party may at the time of its ratification of or accession to this convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the convention shall extend to any of the territories for whose international relations it is responsible. The convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this article extending the convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the convention shall cease to extend to such territory and the con-



vention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding states of any notification received by it under this article.

Done in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

[Here follow signatures on behalf of the Federal Republic of Germany (ad referendum), Belgium, Brazil (ad referendum), Spain (ad referendum), France, Greece, Italy, Monaco, Nicaragua, United Kingdom (with reservation), Yugoslavia (with reservation and subject to ratification). The convention was later signed on behalf of Egypt (with reservation), the Holy See, Lebanon, and Portugal.]

In signing the convention the United Kingdom Delegation made the following reservation:

“Her Majesty’s Government in the United Kingdom reserve the right not to apply the provisions of this convention to warships or to vessels owned by or in the service of a State.”

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# INTERHANDEL: THE COURT'S JUDGMENT OF MARCH 21, 1959, ON THE PRELIMINARY OBJECTIONS OF THE UNITED STATES

BY HERBERT W. BRIGGS

*Editor-in-Chief*

In its Judgment of March 21, 1959, on the Preliminary Objections of the United States,<sup>1</sup> the International Court of Justice held, by a vote of 9 to 6, that the Swiss application of October 2, 1957, requesting the Court to decide that the United States was under an obligation to restore the vested American assets of Interhandel or to submit the dispute to arbitration or conciliation, was inadmissible because Interhandel had not yet exhausted local remedies available in the United States courts.

Interest in the case is not confined to this part of the decision, but extends to the important findings of the Court on several jurisdictional questions, including the invocation by the United States of the notorious Connally reservation of

- (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*.<sup>2</sup>

The decision of the Court that the Swiss claims were inadmissible for non-exhaustion of local remedies presumes that the Court had sufficient jurisdiction to reach the issue of admissibility and the Court therefore dealt with the various jurisdictional issues first. Although the serious threat posed to the Court's jurisdiction by the invocation of the peremptory domestic jurisdiction reservation might have warranted dealing with it before coming to other objections to jurisdiction—a course urged in some of the separate and dissenting opinions—the Court first considered objections *ratione temporis*.

## FIRST PRELIMINARY OBJECTION

In its application and in its final principal submissions to the Court, the Swiss Government asked the Court to adjudge and declare

that the Government of the United States of America is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel).

<sup>1</sup> *Switzerland v. United States*, [1959] I.C.J. Rep. 6. See p. 671 below.

<sup>2</sup> T.I.A.S., No. 1598; 1957-1958 I.C.J. Yearbook 212. Italics added. See also Herbert W. Briggs: "The United States and the International Court of Justice: A Re-Examination," 53 A.J.I.L. 301, 306 ff. (1959); "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice," 93 Hague Academy Recueil des Cours 223, 328 ff. (1958, in press); "Towards the Rule of Law? United States Refusal to Submit to Arbitration or Conciliation the Interhandel Case," 51 A.J.I.L. 517 (1957).

In its final submissions of November 3, 1958, the Swiss Government requested, alternatively, "that in case the Court should not consider that proof of the non-enemy character of the property" of Interhandel had been furnished, the Court should designate an expert to examine and give an expert opinion on the relevant documents, including those at the disposal of American courts and the Sturzenegger Bank records seized by the Swiss Government, "for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation" which had been vested as enemy property by the United States.<sup>3</sup>

In its final alternative submissions, the Swiss Government requested, in part:

should the Court uphold one or the other of the preliminary objections of the United States of America, to declare its competence in any case to decide whether the United States of America is under an obligation to submit the dispute regarding the validity of the Swiss Government's claim either to the arbitral procedure provided for in Article VI of the Washington Accord of 1946,<sup>4</sup> or to the Arbitral Tribunal provided for in the 1931 Treaty of Arbitration and Conciliation,<sup>5</sup> or to the Conciliation Commission provided for in the same Treaty, and to fix the subsequent procedure.<sup>6</sup>

In the face of these submissions, the United States maintained the preliminary objections deposited with the Court on June 16, 1958, and emphasized that they "are directed against all of the Alternative as well as the Principal Submissions made on behalf of the Government of Switzerland."<sup>7</sup> By its First Preliminary Objection the United States asked the Court to judge and decide

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1946, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective.<sup>8</sup>

Noting that the declaration by which the United States accepted the compulsory jurisdiction of the Court had entered into force August 26, 1946, and was, by its terms, limited to disputes "hereafter arising," and that the United States was contending that the dispute arose in 1945,<sup>9</sup> the Court briefly summarized "the facts and circumstances as submitted by

<sup>3</sup> [1959] I.C.J. Rep. 9, 12.

<sup>4</sup> Not yet published by the United States in T.I.A.S. For English text, see 14 Dept. of State Bulletin 1121-1124 (1946), and Exhibit 28, Appendix, Interhandel Case, Preliminary Objections of the Government of the United States of America, deposited with the Court, June 16, 1958. For French text, see *Affaire de l'Interhandel*, Annexes au Mémoire du Gouvernement de la Confédération Suisse, Annexe 12 (March, 1958).

<sup>5</sup> U. S. Treaty Series, No. 844, Treaty between the United States of America and Switzerland, signed Feb. 16, 1931.

<sup>6</sup> [1959] I.C.J. Rep. 13.

<sup>7</sup> I.C.J., Interhandel Case, Oral Proceedings (Nov. 5 to 17, 1958), I.C.J. Distr. 58/185, p. 149 (Statement of Mr. Loftus Becker, U. S. Agent, Nov. 14, 1958).

<sup>8</sup> [1959] I.C.J. Rep. 10.

<sup>9</sup> *Ibid.* 20.

the Parties which constitute the origin of the present dispute."<sup>10</sup> It found that divergent opinions as to the German or Swiss (*i.e.*, enemy or neutral) character of Interhandel and as to the blocking and liquidation of Interhandel's assets in Switzerland had been the subject of exchanges of views between the Swiss authorities and Allied and American authorities in 1945 and 1946. However, it was not the Swiss assets of Interhandel, nor even "the question of the Swiss or German character of Interhandel" in relation to those assets, which had been submitted to the Court for decision. The "subject of the present dispute" the Court found in the application and principal final submission of the Swiss Government, which sought the restitution of Interhandel's American assets vested by the United States Government. The Court could not see in the Allied-Swiss discussions over the enemy or neutral status of Interhandel or the liquidation of German property in Switzerland "a dispute between Governments which had already arisen with regard to the restitution of the assets claimed by Interhandel in the United States; the facts and situations which have led to a dispute must not be confused with the dispute itself."

Switzerland first formulated her claim against the United States for the restitution of Interhandel's American assets in her note of May 4, 1948, after the decision of the Swiss Authority of Review of January 5, 1948, clearing Interhandel of the charge of German control had, in the opinion of the Swiss Government, acquired the authority of *res judicata*. By its note of July 26, 1948, the United States, in a reply described by itself as its "final and considered view," had rejected the Swiss request. The Court saw here divergent views of the two governments on "a clearly-defined legal question, namely, the restitution of Interhandel's assets in the United States" and found that dispute, *i.e.*, "the dispute now submitted to the Court," to have first arisen on July 26, 1948, the date on which the United States first rejected the Swiss claim, and, consequently, a date subsequent to August 26, 1946.<sup>11</sup>

As for the Swiss alternative submission, the Court found that

the alternative claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement.

The point here in dispute is the obligation of the Government of the United States to submit to arbitration or to conciliation an obligation the existence of which is asserted by Switzerland and denied by the United States. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel's assets in the United States, since the procedure proposed by Switzerland and rejected by the United States was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957.<sup>12</sup>

The Court therefore rejected, by 10 votes to 5, the First Preliminary Objection of the United States. Dissenting on this point were Judges Hack-

<sup>10</sup> *Ibid.* 16-19.

<sup>11</sup> *Ibid.* 21-22.

<sup>12</sup> *Ibid.* 22.

worth,<sup>13</sup> Córdova,<sup>14</sup> Wellington Koo,<sup>15</sup> Sir Percy Spender<sup>16</sup> and Zafrulla Khan (who agreed with Judge Hackworth's separate opinion), although all of them concurred in the Court's Judgment rejecting the Swiss application on the ground of non-exhaustion of local remedies by Interhandel.

The findings of these judges that the dispute arose before August 26, 1946, rest on their unwillingness to restrict their formulation of the dispute to the questions which the parties, particularly Switzerland, the applicant, actually requested the Court to decide. Switzerland had no interest in a decision by the Court merely finding that Interhandel was Swiss and not under German control or that its assets in Switzerland were not under German control. The Swiss Compensation Office and the Swiss Authority of Review had already made such findings, but the United States had informed the Swiss Government in the Memorandum accompanying its note of January 11, 1957, that it would not accept such findings or the Swiss assumption "that, Interhandel being Swiss, its American assets are Swiss."<sup>17</sup>

Despite the contention of the United States that "the one basic issue in this case is, and always has been, whether or not Interhandel was genuinely Swiss and owned the vested stock, or whether it was merely a cloak for I. G. Farben,"<sup>18</sup> examination of the written and oral pleadings reveals that neither party submitted this question to the Court for decision. The United States was challenging the jurisdiction of the Court to decide any issue connected with the case except that it lacked jurisdiction, and the Swiss Government formulated its claim with precision as a request for a judgment that the United States was obligated under international law—on various grounds—to restore Interhandel's American assets, or to submit the dispute to arbitration or conciliation.

Judge Hackworth, however, regarded it as "unrealistic and somewhat artificial" to base conclusions on the distinction between the blocking of Interhandel's Swiss assets and the vesting of her American assets. He stated, in part:

The controversy cannot be separated in two geographical sectors, nor is it divisible by elements of time. The same bone of contention—the enemy or non-enemy status of Interhandel and the *bona fides* of its pretensions—stands out in both phases of the dual controversy. . . . Measured by any yardstick there appears to be no escape from the conclusion that there was a definite dispute between the Parties, a dispute not alone as to the assets of Interhandel in Switzerland but a dispute as to the *status* of Interhandel itself and the *bona fides* of its

<sup>13</sup> *Ibid.* 33–40.

<sup>14</sup> *Ibid.* 41–44.

<sup>15</sup> *Ibid.* 48–53.

<sup>16</sup> *Ibid.* 59–73.

<sup>17</sup> See 36 Dept. of State Bulletin 350–358 (1957).

<sup>18</sup> Interhandel Case, Oral Proceedings (cited note 7 above), p. 6 (Statement of Mr. Becker, Nov. 5, 1958). With this may be contrasted Mr. Becker's admission when he was denying that the Interhandel case came within the terms of the Washington Accord of 1946. "Interhandel's Swiss assets on the one hand, and the claimed American assets of Interhandel on the other hand, are entirely separate issues," he said; the vesting of the GAF shares "was a wartime measure of the United States Government, not a post-war joint investigation of the Allies and Switzerland." *Ibid.*, p. 130 (Nov. 14, 1958).

pretensions *vis-à-vis* I. G. Farben. It was in the wake of this dispute that Switzerland later made claim to assets in the United States said by Switzerland to be neutral property.<sup>19</sup>

The answer given by the Court to this argument was that the earlier dispute was not the one submitted to the Court for its decision: it was the later claim made by Switzerland to Interhandel's American assets which had been submitted to it and this dispute had arisen at a date subsequent to the entry into force of the United States declaration accepting compulsory jurisdiction.

Judge Wellington Koo also thought it

✓ clear that the real subject of the dispute before the Court is the question of the enemy or neutral character of Interhandel and not the restitution of its GAF assets, which is only the object of the Swiss claim; and that it arose before August 26th, 1946.<sup>20</sup>

Judge Sir Percy Spender went even farther afield. He believed that the United States reservation limiting its acceptance to "all legal disputes hereafter arising" should receive "a broad construction" so as not to exceed the intention of the United States. A "dispute" within the meaning of the United States reservation "need not be spelt out or defined with legal exactitude or particularity." If a dispute existed before the exclusion date,

it matters not in what form it may subsequently be presented to the Court or what the legal issues directly connected with and relevant to the dispute may be or become, or what the nature of the relief claimed, *that* dispute is not within the competence of the Court.<sup>21</sup>

However, he could not find that the Swiss Government had anywhere defined the dispute. The precisely formulated Swiss submissions he regarded merely as "two different claims for relief" which refer to "one" dispute, "whatever it was."<sup>22</sup> Disregarding the actual "submissions" of the parties, Sir Percy found that the "essential nature" of the dispute was whether Interhandel was "Swiss" or "German" owned or controlled and "it is that dispute, however described, which is presently before the Court."<sup>23</sup>

Judge Spender's approach raises a serious problem. To what extent can the Court disregard the precisely formulated question submitted to it for decision and feel free to decide some other question? Rosenne summarizes the Court's jurisprudence on the point as follows:

The Rules of the Court lay down that the memorial and counter-memorial (Article 42), as well as preliminary objections (Article 62), shall contain the "submissions," and that the judgment shall also contain the "submissions of the parties" (Article 74). . . . The degree of solemnity which attaches to submissions emphasizes their legal importance as constituting the precise elements upon which the decision is required. The submissions are, indeed, the ultimate concretization

<sup>19</sup> [1959] I.C.J. Rep. 33, 34, 38.

<sup>20</sup> *Ibid.* 53.

<sup>21</sup> *Ibid.* 59-60.

<sup>22</sup> *Ibid.* 61-62.

<sup>23</sup> *Ibid.* 64.



of the difference, and upon their formulation depends the efficacy of the adjudication to resolve the difference between the parties.

Although the decision of the Court is given on the submissions, the Permanent Court established a difference between cases introduced by special agreement and those introduced by application. When the case is introduced by special agreement, it is rather to the terms of that agreement than to the submissions of the parties that the Court must have recourse in establishing the precise point which it has to decide. Where the case is introduced by application, the successive stages of the judicial proceedings will always be based upon those submissions which are contained in the last statement upon which the opposite party was able to base its case.

The Court, he adds, can construe the submissions, but "it cannot substitute itself for the parties and formulate new submissions on the basis of arguments and facts advanced."<sup>24</sup>

#### SECOND PRELIMINARY OBJECTION

(By its Second Preliminary Objection the United States asked the Court to judge and decide

H that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland.

The manner in which the United States argued this objection suggests a lack of understanding of the operation of the condition of reciprocity stipulated in Article 36(2) of the Court's Statute.<sup>25</sup> The United States declaration accepting the compulsory jurisdiction of the Court entered into force August 26, 1946, and was limited to disputes "hereafter arising." The Swiss declaration, effective July 28, 1948, contained no such reservation *ratione temporis*. The United States contended that the condition of reciprocity required the Court to base its jurisdiction on the more limited of two declarations, in this case the United States declaration which was "more limited in scope because of its prohibition of retroactivity."<sup>26</sup> However, the exclusion date in the United States reservation was August 26, 1946; and, in order to obtain the benefit of the date of entry into force of the Swiss declaration, July 28, 1948, the United States advanced two arguments, both of which were based upon erroneous assumptions.

The first argument was that since Switzerland, if respondent, could have invoked the United States reservation *ratione temporis* to exclude disputes arising *after* <sup>27</sup> August 26, 1946, but before July 28, 1948, the United States,

<sup>24</sup> Shabtai Rosenne, *The International Court of Justice* 410 ff. (1957). Citations here omitted.

<sup>25</sup> See Briggs, 93 *Hague Academy Recueil des Cours* 237-268 (1958).

<sup>26</sup> *Interhandel Case*, Preliminary Objections of the Government of the United States of America, deposited with the Court, June 16, 1958, pp. 9-14, at p. 12.

<sup>27</sup> This argument is doubly wrong. A dispute arising *after* August 26, 1946, but before July 28, 1948, would not be excluded from the Court's jurisdiction by either declaration. The Court correctly stated that it was disputes arising *before* August 26, 1946,

by a sort of double or reverse reciprocity, should have the right to exclude such disputes, even though the Swiss declaration contained no reservation *ratione temporis*. The only basis on which this alleged right to invoke a non-existent reservation makes sense is the erroneous assumption that the date of entry into force of a declaration operates as an automatic exclusion of prior disputes even in the absence of a reservation *ratione temporis*, or, as the United States argued the point, that no "retroactive" effect could be given to the Swiss declaration. There is no judicial support for such a contention; and in the *Mavrommatis* Case the Permanent Court of International Justice observed:

The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment.<sup>28</sup>

(The second argument of the United States was that when the Interhandel dispute arose (i.e., before July 28, 1948), no agreement or consensual bond accepting the compulsory jurisdiction of the Court existed between Switzerland and the United States because the Swiss acceptance of compulsory jurisdiction had not yet entered into force; and that the subsequent establishment of such a consensual bond upon the entry into force of the later of a pair of declarations could not be given a retroactive effect.)

The assumptions underlying this argument appear to be: (1) that the critical date for establishing whether there exist two declarations which coincide in conferring jurisdiction on the Court is the date the dispute arose rather than the date on which an application is filed seizing the Court of the dispute; (2) that reciprocity applies to the date of entry into force of the declarations of the parties before the Court; and (3), once again, that the date of entry into force of a declaration operates as an exclusion of prior disputes even in the absence of an express reservation *ratione temporis*.

(In rejecting the Second Preliminary Objection of the United States by a unanimous vote, the Court confined its observations to the operation of reciprocity.<sup>29</sup> Following, without citation, its previous decisions that reciprocity applies not only to declarations but to the reservations limiting their effect, the Court said, in part:

which Switzerland, if a respondent, would have been able to exclude by invoking, on the basis of reciprocity, the United States reservation *ratione temporis*. [1959] I.C.J. Rep. 23.

28 P.C.I.J., Series A, No. 2, p. 35 (1924).

<sup>29</sup> Judge Kojevnikov, although voting with the majority, stated that he was unable to concur with the reasoning of the Court in rejecting the Second Preliminary Objection. In his opinion, it should have been rejected on the factual circumstance that the dispute arose only after July 28, 1948, rather than "on the question of reciprocity, which is of very great importance." [1959] I.C.J. Rep. 31. The Court itself rejected the Second Preliminary Objection in relation to the alternative submission of Switzerland on the factual ground that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957 (*ibid.* 23), but since it had found that the dispute as to restitution of the assets arose on July 26, 1948—two days prior to the date of entry into force of the Swiss declaration—it had to deal with the so-called reciprocity contention of the United States.

Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.<sup>30</sup>

The Court passes over in silence the other American arguments, perhaps because in the *Right of Passage over Indian Territory* Case the Court had clearly held that, although the consensual bond between two states accepting compulsory jurisdiction arises on the date of deposit of the later of two declarations, the critical date for establishing whether two declarations coincide in conferring jurisdiction on the Court is "when a case is submitted to the Court," for "it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations."<sup>31</sup> In finding that the Swiss declaration contained no limitation *ratione temporis*, and by rejecting the United States contention that, because of reciprocity, "the same prohibition against retroactivity [i.e., "hereafter arising"] must, therefore, be read into the Declaration of Switzerland,"<sup>32</sup> the Court sweeps away the Second United States Objection, the contentions advanced in support of it and the assumptions underlying those contentions which, if accepted by the Court, would seriously have crippled the operation of the system of compulsory jurisdiction provided for by Article 36 of the Statute.

#### FOURTH PRELIMINARY OBJECTION

(By its Fourth Preliminary Objection, the United States asked the Court to judge and decide

(a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline and Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.

(Since the Fourth Objection, said the Court, relates to jurisdiction, it must be considered before the Third Objection, which is an objection to admissibility.) The Fourth Objection "really consists of two objections

<sup>30</sup> *Ibid.* 23.

<sup>31</sup> [1957] I.C.J. Rep. 146, 143.

<sup>32</sup> *Interhandel*, Oral Proceedings (cited note 7 above), p. 19 (Statement of Mr. Becker, Nov. 5, 1958).

which are of different character) and of unequal scope.”<sup>33</sup> The Court dealt first with part (b).

*Matters of Domestic Jurisdiction according to International Law*

(By part (b) of this Objection, the United States asked the Court to take jurisdiction<sup>34</sup> to decide that it lacked jurisdiction on the merits concerning the seizure and retention—as distinguished from the sale or disposition—of the vested G.A.F. shares on the ground that such seizure and retention “are, according to international law, matters within the domestic jurisdiction of the United States.” In support of this contention the United States argued that its unilateral determination in time of war that alien property in a domestic corporation is enemy property, and its consequent seizure and detention as such, are matters falling, by international law, within its domestic jurisdiction and not reviewable under any treaty obligations to submit disputes to arbitration or conciliation, nor by the Court.<sup>35</sup>

✓ The Swiss Government, however, challenged the seizure and retention by the United States of the G.A.F. shares on the basis both of customary international law and of Article IV (1) of the Allied-Swiss Washington Accord of May 25, 1946, by which “The Government of the United States will unblock Swiss assets in the United States.”

Following and citing the *Tunis-Morocco Nationality Decrees* Advisory Opinion,<sup>36</sup> the Court confined itself to considering whether the examination of the grounds invoked by the Swiss Government was “excluded from the jurisdiction of the Court for the reason alleged by the United States” or whether they “are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.” The Court found that the Swiss Government asserted the relevance of Article IV of the Washington Accord and the United States contended that Article IV “is of no relevance whatever in the present dispute”; and that the two parties were in disagreement on the meaning of its terms “unblock” and “Swiss assets.” The Court observed:

The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

<sup>33</sup> [1959] I.C.J. Rep. 23–24.

<sup>34</sup> “. . . the United States respectfully submits that the Court, in the exercise of its powers under Article 36, par. 6, of the Statute, should deny its jurisdiction . . .” Interhandel Case, Preliminary Objections of the United States (cited note 26 above), p. 20.

<sup>35</sup> *Ibid.*, pp. 20–25. Cf. Mr. Loftus Becker’s argument “that when the United States decides that property in the United States (here, registered shares in a domestic corporation doing business in the United States) is enemy property as it did when it vested the G.A.F. shares . . . there is no international recourse in the absence of a claim of denial of justice, which has never been made in this case.” Interhandel, Oral Proceedings (cited note 7 above), p. 137 (Nov. 14, 1958).

<sup>36</sup> P.O.I.J., Series B, No. 4, pp. 7 ff. (1923).

Noting that the United States, in support of its argument that "according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision," had cited only authorities and judicial decisions referring to "enemy" property, the Court said:

but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

As for the Swiss alternative submission that the United States was under an obligation to submit the dispute to arbitration or conciliation, the Court found that the "interpretation and application of these provisions relating to arbitration and conciliation" contained in Article VI of the Washington Accord and Article I of the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16, 1931, "involve questions of international law."<sup>37</sup>

The Court therefore rejected, by a vote of 14 to 1, part (b) of the Fourth Preliminary Objection to its jurisdiction. Judge Kojevnikov thought part (b) should have been joined to the merits, if the Court had not upheld the Third Objection.

In arguing part (b) of the Fourth Objection, the United States did not use either "essentially" (the word found in the United States declaration) or "exclusively" to qualify the term "domestic jurisdiction." Judge Lauterpacht expressed the opinion that part (b) of the Fourth Objection was not based on any reservation found in the United States declaration which, he thought, contained only the peremptory domestic jurisdiction reservation. He believed that the "Court, in examining and rejecting that objection on its merits, has held, by implication, that a reservation of that kind is inherent in every Declaration."<sup>38</sup> It may, however, be preferable to conclude that the exclusion of disputes with regard to matters of domestic jurisdiction is implicit in the Statute of the Court and may be raised, even in the absence of a reservation to that effect, both as a jurisdictional plea and as a defense on the merits.<sup>39</sup>

In the light of the arguments advanced by the United States both prior to the submission of the case to the Court<sup>40</sup> and before the Court, the Court's opinion on part (b) of the Fourth Objection will give satisfaction to all those who support the rule of law in international affairs. The contention that an international dispute as to the applicability of treaty provisions and rules of customary international law is nevertheless within the

<sup>37</sup> [1959] I.C.J. Rep. 24-25.

<sup>38</sup> *Ibid.* 121-122.

<sup>39</sup> Cf. Briggs in 53 A.J.I.L. 803-806 (1959).

<sup>40</sup> See U. S. Memorandum of Jan. 11, 1957, 36 Dept. of State Bulletin 350-358 (1957), and Briggs, "Towards the Rule of Law!" 51 A.J.I.L. 517-529 (1957).

domestic jurisdiction of one of the parties was rejected by the Court, on the basis of international law, as a bar to its jurisdiction.

*The Peremptory Domestic Jurisdiction Reservation*

In part (a) of its Fourth Preliminary Objection,<sup>41</sup> the United States invoked its peremptory domestic jurisdiction reservation and stated, in part:

that it has been determined by the United States of America that the sale or disposition of the vested stock in General Aniline and Film Corporation is a matter essentially within its domestic jurisdiction. This determination is not subject to review or approval by any tribunal. . . . Accordingly, the question of the sale or disposition of the shares of General Aniline and Film is not justiciable, and the United States respectfully declines to submit the matter of such disposition or sale to the jurisdiction of the Court. Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946), insofar as the determination of the issues would affect the sale or disposition of the shares.

However, the determination . . . is made only as regards the sale or disposition of the assets.<sup>42</sup>

Noting the limited scope of the invocation by the United States of its peremptory domestic jurisdiction reservation, the Court observed:

During the oral arguments, the Agent for the United States continued to maintain that the scope of part (a) of the Fourth Objection was limited to the sale and disposition of the shares. At the same time, while insisting that local remedies were once more available to Interhandel and that, pending the final decision of the Courts of the United States, the disputed shares could not be sold, he declared on several occasions that part (a) of the Fourth Objection has lost practical significance, that "it has become somewhat academic," and that it is "somewhat moot."

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.<sup>43</sup>

For these reasons the Court therefore, by 10 votes to 5, "finds that it is not necessary to adjudicate on part (a) of the Fourth Preliminary Objection."

Confronted with the peremptory challenge to its jurisdiction by the United States, the Court noted that the way in which the United States invoked and argued the objection restricted it to the Swiss claim for "restitution" of Interhandel's vested assets. In other words, the Court

<sup>41</sup> See above, p. 554.

<sup>42</sup> Interhandel Case, U. S. Preliminary Objections (cited note 26 above), pp. 19-20.

<sup>43</sup> [1959] I.C.J. Rep. 26.

is here implying that the peremptory domestic jurisdiction reservation was not being invoked by the United States with regard to the Swiss alternative submission that the United States is under an obligation to submit the dispute as to the restoration of the assets to arbitration or conciliation. Accepting the United States position that it was relying primarily on the local remedies objection and that the peremptory domestic jurisdiction objection "has lost practical significance," even though still formally maintained, the Court assumed jurisdiction to consider the admissibility of the Swiss claim.

In effect, if not by words, the Court found the peremptory domestic jurisdiction reservation, as invoked, restricted and maintained by the United States, no bar to its jurisdiction. By so doing, the Court avoided making any pronouncement on the validity of the reservation, or of the declaration containing it, and limited its opinion to an implicit finding that the actual determination made thereunder, as "thus presented," did not limit the jurisdiction of the Court to proceed at least to the issue of the admissibility of the Swiss claim.

Of the five judges dissenting from the finding of the Court that it was not necessary to adjudicate an Objection 4(a), Sir Percy Spender thought there was "more than a little practical wisdom to recommend this as a course to follow," but he did not see how the Court could justify deciding upon all other objections and "leave unanswered questions which strike at the very roots of the Court's jurisdiction."<sup>44</sup> The "practical wisdom" to which he adverted may be a reference to the fact that if the Court had held, as he wished it to do, that the entire United States declaration was invalid as an acceptance of the Court's compulsory jurisdiction, because of the invalidity of the peremptory domestic jurisdiction reservation, the Court would, in effect, have been questioning the validity of acceptances of its compulsory jurisdiction by France, Mexico, Liberia, Union of South Africa, Pakistan, The Sudan,<sup>45</sup> and, possibly, the United Kingdom.<sup>46</sup>

Judge Lauterpacht, in a 28-page dissenting opinion—of which he said his 33-page separate opinion in the *Norwegian Loans* Case must be regarded as forming part—questioned whether the Court should "for reasons outside the realm of legal considerations, postpone a decision on the subject." Nor was the Court relieved of its duty because the United States described its objection as "moot." He thought a government "cannot formally maintain an objection and at the same time invite the Court to treat it as being of no importance." If the Court did not reject it, it could subsequently

<sup>44</sup> *Ibid.* 54.

<sup>45</sup> For their peremptory domestic jurisdiction reservations, see 1957-1958 I.C.J. Yearbook 199 ff.

<sup>46</sup> The legal effect of reservation 1 (vi) of the United Kingdom Declaration of Nov. 26, 1958 (see 53 A.J.I.L. 823 (1959)) modifying reservation (v) of its Declaration of April 18, 1957, which excluded from acceptance of compulsory jurisdiction disputes "relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories" is not entirely clear. Cf. E. Lauterpacht, 8 Int. and Comp. Law Quarterly 199-201 (1959).

be raised when convenient, for example, if the case proceeded after an exhaustion of local remedies.<sup>47</sup>

Judges Lauterpacht<sup>48</sup> and Spender<sup>49</sup> agreed that the peremptory United States domestic jurisdiction reservation "as determined by the United States" was invalid because incompatible with the jurisdiction of the Court under Article 36 (6) of its Statute to decide disputes as to its jurisdiction, and because the discretionary nature of the reservation was incompatible with the assumption of a legal obligation accepting compulsory jurisdiction. Since they regarded the reservation as an essential condition of the declaration, and not separable, the invalidity of the reservation entailed, they thought, the nullity of the declaration: the United States had not accepted the compulsory jurisdiction of the Court. Judges Lauterpacht and Spender were alone in expressing this opinion.

President Klaestad<sup>50</sup> (with whom the Swiss Judge *ad hoc* Carry agreed<sup>51</sup>) and Judge Armand-Ugon<sup>52</sup> favored the rejection of Objection 4(a) on the ground that the peremptory domestic jurisdiction reservation was incompatible with Article 36 (6) of the Court's Statute, but they believed that this invalidity did not affect the validity of the United States acceptance of compulsory jurisdiction. Judge Armand-Ugon regarded the United States declaration as consisting of two parts, clearly separable: "acceptance of the Court's jurisdiction and reservations to that acceptance." Judge Klaestad, in view of the Senate debates on the Connally Amendment and the subsequent behavior of the United States in resorting to the Court on various occasions, was "satisfied that it was the true intention of the competent authorities of the United States to issue a real and effective Declaration accepting the compulsory jurisdiction of the Court, though—it is true—with far-reaching exceptions," one of which it "becomes impossible for the Court to act upon," *i.e.*, "as determined by the United States."<sup>53</sup>

Judge Lauterpacht's observation that "the Court has decided, at least provisionally, to proceed on the basis that the Declaration of Acceptance of the United States is a valid legal instrument cognizable by the Court"<sup>54</sup> suggests the thought that, in the light of the divergent views held and expressed on this point, the Court may well have believed that the course of judicial statesmanship lay in treating the determination of domestic jurisdiction actually made by the United States under its reservation as no bar to the Court's jurisdiction, while leaving it to the United States to worry whether the Connally reservation is not more dangerous to United States interests than protective thereof.<sup>55</sup>

<sup>47</sup> [1959] I.C.J. Rep. 98-100.

<sup>48</sup> *Ibid.* 95-119.

<sup>49</sup> *Ibid.* 54-59.

<sup>50</sup> *Ibid.* 75-79.

<sup>51</sup> *Ibid.* 32.

<sup>52</sup> *Ibid.* 90-94.

<sup>53</sup> *Ibid.* 76-77.

<sup>54</sup> *Ibid.* 119.

<sup>55</sup> Cf. C. Wilfred Jenks, *The Common Law of Mankind* 155 (1958): "It is not widely realised that the United States is the only power which can at the present time invoke the protection of compulsory arbitration in respect of claims by its nationals against a wide range of other countries. It is entitled to do so by clauses of a continuing character specifically applying to such cases which were included in the Economic Co-operation



## THIRD PRELIMINARY OBJECTION

The Third Preliminary Objection of the United States asked the Court to decide

(that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts.)

The Court observed that, although framed as an objection to jurisdiction, the Third Objection "must be regarded as directed against the admissibility of the Application of the Swiss Government," since it "would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled."<sup>56</sup>

In point of fact the Court found that when the Swiss Government filed its application of October 2, 1957, before the Court, its national, Interhandel, had an application, made August 6, 1957, for grant of a writ of *certiorari* pending before the United States Supreme Court. Although the United States had on several occasions expressed the opinion to Switzerland that Interhandel had exhausted available local remedies, the Court held the opinion to be unfounded in fact. Since then the Supreme Court had reversed the judgment of the Court of Appeals dismissing Interhandel's suit, the case was still pending in the United States courts, and the "Court must have regard to the situation thus created."

The Court then set forth the purpose of the local remedies rule as follows:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.<sup>57</sup>

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Agreements concluded in connection with the Marshall plan and other measures of international economic and financial assistance. The protection secured by the United States in this manner is limited by the reservations to the United States acceptance of the Optional Clause including the reservation of matters of domestic jurisdiction as determined by the United States; these reservations are applicable to these agreements in virtue of clauses contained therein and can presumably be invoked by either party thereto in its own favour." For examples, see 1948-1949 I.C.J. Yearbook 152 ff.

<sup>56</sup>No judge expressed a contrary view, although Judge Kojevnikov thought the Third Objection should also have been upheld as an objection to jurisdiction. [1959] I.C.J. Rep. 31.

<sup>57</sup>*Ibid.* 27.

([Noting that the Swiss Government did not challenge the rule but "contends that the present case is one in which an exception to this rule is authorized by the rule itself," the Court examined and rejected Swiss contentions that the United States courts are not competent to apply international law in their decisions when necessary. [The Court then rejected a Swiss contention that the claim escaped the requirement of prior exhaustion of local remedies, because what Switzerland was complaining of was the refusal of the United States to implement the decision of the Swiss Authority of Review of January 5, 1948, clearing Interhandel of the charge of being German-controlled, and this failure to implement a decision, which the Swiss regarded as a decision of an international tribunal, was a direct violation of international law, injuring Switzerland's own rights, and not merely a case in which Switzerland was espousing the claim of her national. The Court noted "that to implement a decision is to apply its operative part," and the operative part of the decision of the Swiss Authority of Review merely unblocked Interhandel's assets in Switzerland, whereas the Swiss claim before the Court related to Interhandel's assets in the United States, in which Switzerland was adopting the cause of its national, and "This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies."

The Court then found that the Third Preliminary Objection of the United States also applied to the alternative submission of Switzerland that the United States is under an obligation to submit the dispute to arbitration or conciliation, and observed:

The Court considers that one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand [French: *D'autre part*], the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.<sup>58</sup>

The Court, by 9 votes to 6, therefore "upholds the Third Preliminary Objection and holds that the Application of the Government of the Swiss Confederation is inadmissible."

The six dissenting judges were not in complete agreement. President Klaestad, Judges Armand-Ugon, Lauterpacht, Spiropoulos, and Carry *ad hoc*, dissented on the ground that the local remedies objection should have been joined to the merits in relation to the principal Swiss submission. President Klaestad pointed out that Interhandel's claim in the American courts was based on the United States Trading with the Enemy Act, while

<sup>58</sup> *Ibid.* 29.

the claim of the Swiss Government against the United States was based on a treaty, the Washington Accord, and on the effect of the decision of the Swiss Authority of Review of January 5, 1948, as an international award claimed to have the force of *res judicata* between Switzerland and the United States. These questions, he thought, went to the merits, "to their very roots," and made it impossible to decide, prior to a full hearing on the merits, whether effective local remedies existed in the United States courts on the Swiss claim.<sup>59</sup>

On the holding of the Court that the local remedies rule also applied to the alternative Swiss submission that the United States was under an obligation to submit the case to arbitration or conciliation, President Klaestad, Judges Winiarski, Lauterpacht, and Carry *ad hoc*, dissented. Judge *ad hoc* Carry found the alternative Swiss claim "separate and distinct from the principal claim, since it did not relate to the merits of the dispute but only to the procedure for its settlement. By this claim the Court was invited to pass only upon the arbitrability of the dispute, not on the obligation of the United States to return the assets of Interhandel." The question of the return of the assets would be "within the exclusive jurisdiction of the tribunal to be seised" and the question of the exhaustion of local remedies could arise only before that tribunal and was not applicable to the alternative Swiss claim before the International Court of Justice.<sup>60</sup>

Judge Winiarski also saw in the Swiss alternative submission a distinct claim in which the Swiss Government was seeking a legal remedy for alleged violation of her own rights under treaties "and to that kind of dispute the rule of the exhaustion of local remedies does not apply."<sup>61</sup>

It is not easy to reconcile the Court's statement that "the alternative [Swiss] claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement"<sup>62</sup> with its finding that the local remedies rule applied to the Swiss attempt to find a more appropriate forum than the courts of one party in interest for the determination of the relevant rights and obligations of Switzerland and the United States under international law. The Court reasoned that it was not obvious that United States courts could not appropriately consider relevant questions of international law, and, since the Swiss Government had instituted international proceedings only in the interest of Interhandel, it must await proceedings in the local forum. This assumption that Switzerland's only interest in instituting international proceedings against the United States lay in the claim of her national, Interhandel, against the United States Government, provides the touchstone for an appraisal of the cogency of this part of the Court's opinion.<sup>63</sup>

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<sup>59</sup> *Ibid.* 80-81.

<sup>60</sup> *Ibid.* 32.

<sup>61</sup> *Ibid.* 83-84.

<sup>62</sup> *Ibid.* 22.

<sup>63</sup> A Swiss attempt to modify the Swiss submissions so as to ask, alternatively, for a mere declaratory judgment that the United States refusal to restore Interhandel's

Although the "decision" of the Court was that the Swiss claim was inadmissible for non-exhaustion of local remedies by Interhandel, only Judge Basdevant expressed willingness to confine the adjudication to that point.<sup>64</sup> The Court believed that to reach the objection to admissibility it must first deal with the objections to jurisdiction, and its decisions on those objections are therefore not *obiter dicta*.

The Court's rejection of the First Preliminary Objection, while largely a factual finding, has legal interest in its reiteration of the importance of the submissions of the parties, particularly the applicant, in identifying the dispute submitted for decision, as distinguished from the facts and situations which have led to the dispute.

The Court's decision on the Second Preliminary Objection provides an authoritative clarification of the limits of the operation of the condition of reciprocity contained in Article 36, paragraph 2, of the Statute. The surprising thing is not that the Court unanimously rejected the objection but that the United States should seriously have advanced a contention which Professor Georges Sauser-Hall, the Swiss Agent, could appropriately term "*un véritable tour de passe-passe*."<sup>65</sup>

The decisive rejection by the Court, basing its ruling on the *Tunis-Morocco* Advisory Opinion, of part (b) of the Fourth Preliminary Objection is an important reiteration of the principle (recently challenged in the "three-zone" theory<sup>66</sup>) that, if a dispute relates to a matter governed by principles of international law or by treaties, it cannot, according to international law, fall within the domestic jurisdiction of one of the parties so as to be excluded from the Court's jurisdiction.

With regard to the determination made by the United States under its peremptory domestic jurisdiction reservation that the Court lacked jurisdiction because the United States had reserved the right so to determine, the Court did not grasp the nettle but brushed it aside as "without object at the present stage of the proceedings." In words, it found it unnecessary "to adjudicate" upon it; in fact, the Court itself decided a dispute as to its jurisdiction in spite of the United States attempt to make that "determination" for the Court.

The Pyrrhic victory of the United States in the *Interhandel* Case will have served a useful educational purpose if it leads to the withdrawal of the Connally Amendment reservation.

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vested assets was a violation of international law, was declared inadmissible by the Court "at the present stage of the proceedings" on the ground that it "does not constitute a mere modification; it constitutes a new claim involving the merits of the dispute" and had been tardily introduced after proceedings on the merits had been suspended in order to hear arguments on the U. S. Preliminary Objections. *Ibid.* 19-20.

<sup>64</sup> *Ibid.* 81.

<sup>65</sup> *Interhandel* Case, Oral Proceedings (cited note 7 above), p. 68.

<sup>66</sup> See, for example, Henri Rolin, "Les Principes de Droit International Public," 77 *Hague Academy Recueil des Cours* 377-393 (1950, II).

# THE GENEVA CONFERENCE ON THE LAW OF THE SEA AND THE RIGHT OF INNOCENT PASSAGE THROUGH THE GULF OF AQABA

BY LEO GROSS

*Of the Board of Editors*

Since the United Nations Emergency Force moved in and occupied the heights overlooking the Straits of Tiran, the Gulf of Aqaba has been quiet. Ships, including Israel flag ships, move freely in and out. The right of passage claimed by Israel and other states was discussed in the Security Council in 1954, in the International Law Commission in 1956, in the General Assembly in 1956-57, and again at the Geneva Conference on the Law of the Sea February 24-April 27, 1958, and will be analyzed here. It should be stated at the outset that Israel's boundaries, including the strip at the northern end of the Gulf of Aqaba, are not an issue here. Nor is the Arab claim that a state of war continues to exist pertinent in determining the legal status of the Gulf and the Straits, although it obviously has some bearing on the availability to Israel of the right of "innocent" passage.

## 1. *The Gulf of Aqaba before the Security Council, 1954*

On January 28, 1954, Israel submitted to the Security Council two complaints: one referred to the continued interference by Egypt with ships trading with Israel while passing through the Suez Canal, in contravention of the Security Council resolution of September 1, 1951;<sup>1</sup> and the other concerned interference by Egypt with shipping proceeding to the Israel port of Elath on the Gulf of Aqaba.<sup>2</sup> A draft resolution submitted by New Zealand proposed that "without prejudice to the provisions of the resolution of 1 September 1951, the complaint . . . should in the first instance be dealt with by the Armistice Commission established under the General Armistice Agreement between Egypt and Israel."<sup>3</sup> In the vote on March 29, 1954, this draft resolution was not adopted, there being eight votes in favor (Brazil, Colombia, Denmark, France, New Zealand, Turkey, United Kingdom, United States), two against (Lebanon, U.S.S.R.), and one abstention (China).<sup>4</sup> The debate was largely concerned with the question whether

<sup>1</sup> See Gross, "Passage through the Suez Canal of Israel-Bound Cargo and Israel Ships," 51 A.J.I.L. 530-568, particularly 564-568 (1957).

<sup>2</sup> U.N. Doc. S/3168. Security Council, 9th Year, Official Records, Supp., January-March, 1954, p. 1.

<sup>3</sup> U.N. Docs. S/3188 and Corr. 1, March 19, 1954. *Loc. cit.*, p. 44.

<sup>4</sup> Official Journal, 664th Meeting, March 29, 1954, p. 12. This was the second Soviet veto in the Palestinian question; the first was cast on Jan. 22, 1954, and indicated a shift in the position of the Soviet Union from abstention to active support of the Arab states against Israel.

the 1951 resolution applied to Egyptian interference in the Suez Canal only or was of a general character. Typical of the view held by members of the Council which supported the New Zealand proposal was the observation of the representative of the United States. He quoted paragraph 5 of the 1951 resolution:

Considering that since the armistice regime, which has been in existence for nearly two and half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search, and seizure for any legitimate purpose of self-defense . . .<sup>5</sup>

and said:

In our opinion, this principle is equally applicable to the Suez Canal and to any waters outside the Canal. . . . We believe that the Mixed Armistice Commission, in considering this specific complaint with respect to actions in the Gulf of Aqaba, must be bound not only by the provisions of the General Armistice Agreement but should also act in the light of paragraph 5 of the resolution of 1 September 1951.<sup>6</sup>

Egypt, in the same order of ideas, based its objections to the draft resolution, not on the legal status of the waters involved, but on the alleged rights of belligerency. While admitting the right of innocent passage through territorial waters, the representative of Egypt said:

The passage of contraband of war through the national and territorial waters of Egypt to Israel is certainly not a case of innocent passage. It violates the most explicit provisions of Egyptian law and strengthens Israel's war effort.<sup>7</sup>

It is suggested that no other legal basis was open to the Egyptian representative, as, in reply to an inquiry by the United States Government, he stated that his government had explicitly and formally recognized the right of innocent passage through the Straits of Tiran in the following statement of January 28, 1950:

This occupation (of the Islands of Tiran and Sanafir) being in no sense intended to interfere in any way whatever with innocent traffic through the stretch of sea separating these two islands from the Sinai Coast of Egypt, it goes without saying that this passage, the only practicable one, will remain free, as in the past; which is in conformity with international practice and with recognized principles of international law.<sup>8</sup>

There is no reference here to "national" waters. The above-quoted statement was explicitly included in the United States Memorandum to

<sup>5</sup> U.N. Doc. S/2298/Rev. 1. Official Records, 558th Meeting, Sept. 1, 1951, p. 2.

<sup>6</sup> Official Records, 663rd Meeting, March 25, 1954, p. 2. For statements to the same effect by representatives of Great Britain and France, see *ibid.*, pp. 6, 9.

<sup>7</sup> *Ibid.*, 661st Meeting, March 12, 1954, p. 19. The law referred to is presumably the decision of the Egyptian Council of Ministers of Nov. 28, 1953, enlarging the list of contraband goods to include food. Cf. U.N. Doc. S/3168, note 2 above, at p. 2.

<sup>8</sup> Quoted by the Israel representative in the Security Council, Official Records, 659th Meeting, Feb. 15, 1954, p. 19.

Israel of February 11, 1957,<sup>9</sup> which forms an integral part of the official exchanges between the two governments on the basis of which Israel finally agreed to withdraw from Sharm el Sheikh. The representative of Israel argued in the Security Council on February 15, 1954, with reference to the Strait of Tiran, that

Where a narrow waterway is the only junction between two parts of the high seas, or the only outlet to a part of the high seas, then its international character has to be preserved, and no sovereign rights based upon the doctrine of territorial waters is inherent in any country from the viewpoint of holding up free maritime traffic.<sup>10</sup>

Referring to the Gulf of Aqaba, Israel's position was stated to be as follows:

Any claim by Egypt that in the Gulf of Elath (Aqaba) it is merely exercising the rights of sovereignty in territorial waters would of course be totally frivolous since it is a physical geographical fact that there is no way for a ship to approach any place on the northern shore of that narrow gulf without passing through the territorial waters of any or all of four countries—Egypt, Israel, Jordan and Saudi Arabia.

We should thus arrive at the absurdity that any of those four countries could at any time use its armed force in the straits of Aqaba to prevent a ship from reaching any other of the three littoral States. It is not difficult to conceive what a maritime jungle would be created by such a ludicrous theory. International law and practice on such questions is quite clear and explicit.<sup>11</sup>

Israel's position appeared to rest on the view that the Straits of Tiran constitute an international waterway which is open to navigation in spite of the fact that it passes through the territorial sea of Egypt; and that freedom of navigation through the Gulf is based on the theory of access to the port or ports of the coastal states. The position of the Arab states denying freedom of navigation seemed to have been based either on the existence of a state of war and consequential belligerent rights or on the "national" character of the water involved, without specifying sharply whether this character was attributed to the Straits or the Gulf. Juridically the latter position does not seem very persuasive, particularly in view of the Egyptian assurances of 1950 to the United States. It was, however, developed more concretely by Saudi Arabia which claimed the Gulf as a "closed sea."

## 2. *The Gulf of Aqaba as Mare Clausum*

In a "Memorandum registering the Saudi Arabian Government's legal and historical rights in the Straits of Tiran and the Gulf of Aqaba,"<sup>12</sup> it was claimed that both the Straits and the Gulf constitute an Arab *mare clausum*, and not an international waterway. This is based in the first

<sup>9</sup> "Aide-Memoire Handed to Israeli Ambassador Eban by Secretary of State Dulles, February 11, 1957," U. S. Policy in the Middle East September 1956–June 1957, Documents, p. 290 (Dept. of State Pub. 6505).

<sup>10</sup> Official Records, 659th Meeting, Feb. 15, 1954, p. 18.

<sup>11</sup> Official Records, 658th Meeting, Feb. 5, 1954, p. 16, and *ibid.*, 659th Meeting, Feb. 15, 1954, p. 18.

<sup>12</sup> U.N. Doc. A/3575, April 15, 1957.

place on the configuration of the area: The Gulf is 100 miles long with widths varying between 7 and 14 miles; the entrance does not exceed 9 miles and is "intercepted by the two Islands of Tiran and Sanafir" under Saudi Arabian sovereignty; the only navigable channel lies between the Island of Tiran and the Egyptian shore and does not exceed half a mile or 500 meters.<sup>13</sup> In the second place, Saudi Arabia claimed that the Gulf "is of the category of historical Gulfs that fall outside the sphere of international law." The basis for this is seen in the character of the Gulf as

the historical route to the holy places in Mecca. Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries. Ever since, the Gulf has been an exclusively Arab route under Arab sovereignty. It is due to this undisputed fact that not a single international authority makes any mention whatsoever of the Gulf as an international waterway open for international navigation.<sup>14</sup>

The Saudi Arabian Government might have added, for completeness' sake, which "international authority makes any mention whatsoever" of the Gulf as a historic gulf or bay.<sup>15</sup>

Juridically as well as historically this statement is of dubious value, as it would be difficult to reconcile the sovereignty of the Ottoman Empire over the whole area with "Arab sovereignty" during fourteen centuries. However, it is unnecessary to evaluate its significance, as juridically Saudi Arabia appears to derive the historical character of the Gulf from the Suez Canal Convention of 1888:

... The territorial character of the Gulf, its waters, entrance and straits, was affirmed by the Treaty of Constantinople of 1888 concerning the Suez Canal. Article 10 (par. 3) of the said Treaty specified that the stipulations contained in that Treaty do not apply to the Arabic States lying on the Red Sea and the Gulf of Aqaba. The records of the negotiations leading to the said Treaty clearly reveal that the Gulf of Aqaba and its straits were intended to be excluded from the proposed freedom of international navigation in the Suez Canal, thus acknowledging that the waters of the Gulf, its entrance and straits, are territorial and implying no freedom of international navigation through them.<sup>16</sup>

Finally, the possession of a strip of the Gulf by Israel is "nothing but a military control without sovereignty whatsoever. Israel has no sovereign status in the Gulf of Aqaba."<sup>17</sup>

<sup>13</sup> *Ibid.*, pp. 3-4; see also statement by the representative of Saudi Arabia in General Assembly, 12th Sess., Official Records, 697th Plenary Meeting, Oct. 2, 1957, p. 233, par. 92; and at Geneva Conference on the Law of the Sea, Official Records, Vol. III, First Committee, 3rd Meeting, March 3, 1959, p. 3, par. 30: "The Gulf of Aqaba came under exclusive Arab jurisdiction."

<sup>14</sup> Statement in the General Assembly; *cf.* note 13 above, p. 233, par. 93.

<sup>15</sup> The "Memorandum concerning Historic Bays," prepared by the U.N. Secretariat for the Geneva Conference on the Law of Sea, does not mention the Gulf of Aqaba among the bays regarded as historic bays or claimed as such by the states concerned. U.N. Doc. A/Conf. 13/1 (Sept. 20, 1957), pp. 9-28.

<sup>16</sup> Memorandum, note 12 above, p. 4.

<sup>17</sup> Statement in the General Assembly; *cf.* note 13 above, p. 233, par. 96.



The first and last arguments are interdependent and will be discussed presently. The Suez Canal Convention provides no juridical basis for the asserted "territorial" character of the Gulf. Article 10, paragraph 3, does not have the significance attributed to it by Saudi Arabia. It declares:

It is also understood that the provisions of the four Articles in question [4, 5, 7 and 8] shall in no case stand in the way of measures which the Imperial Ottoman Government considers it necessary to take to assure by its own forces the defense of its other possessions situated on the eastern coast of the Red Sea.<sup>18</sup>

The articles in question—4, 5, 7 and 8—are concerned with the rights and duties of belligerents in the Suez Canal and its approaches and measures of supervision. They are not concerned with freedom of navigation. Assuming, as the Saudi Arabian Government does, that the Convention relates to the Gulf, then the opposite conclusion from that drawn by Saudi Arabia appears more plausible. The principle of freedom of navigation in time of war and peace is established by Article 1 of the Convention. As this article is not excluded by Article 10, paragraph 3, it would follow, on the basis of the Saudi Arabian assumption, that it applies equally in the Suez Canal and the Gulf of Aqaba. Thus, far from supporting the claim to the "territorial character" of the Gulf, the Convention, if it applies at all, would negate it and substantiate the Israel claim to freedom of navigation, which is asserted by the United States and other maritime Powers as well.

Turning now to the first and last Saudi Arabian arguments, it can be admitted that historical titles are not unknown in international law. The International Court of Justice, in the Anglo-Norwegian Fisheries dispute, held:

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.<sup>19</sup>

The historic title to a gulf or bay was affirmed by the Central American Court of Justice in its Judgment of March 9, 1917.<sup>20</sup> The Court held:

<sup>18</sup> The Suez Canal Problem July 26–September 22, 1956, p. 19 (Dept. of State Pub. 6392).

<sup>19</sup> Fisheries Case (United Kingdom v. Norway), Judgment of Dec. 18, 1951. [1951] I.C.J. Rep. 116, at 130. See also 46 A.J.I.L. 348, at 358, 366, 369 (1952).

<sup>20</sup> The Republic of El Salvador v. The Republic of Nicaragua, 11 A.J.I.L. 674–730 (1917).

The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as co-owners of its waters, except as to the littoral marine league which is the exclusive property of each . . .<sup>21</sup>

The Court arrived at the conclusion that the Gulf of Fonseca "belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua" on the theory

that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.<sup>22</sup>

Three pillars, then, support the historic character of the Gulf of Fonseca: first, immemorial possession established by the Spanish Crown in 1522 and continued by the three successor states;<sup>23</sup> secondly, the *animus domini* "both peaceful and continuous"; and, finally, acquiescence by other nations. It will be noted, however, that the Court did not attribute to the waters in the Gulf the character of internal waters and therefore did not exclude the right of innocent passage. The doctrine, even in the case of historic bays the coasts of which belong to a single state, does not seem to be unanimous whether the waters are to be regarded as "internal waters," thus excluding the right of innocent passage, or partly as "internal waters" and partly as territorial sea.<sup>24</sup> In the latter case there would presumably be a right of innocent passage in the territorial sea.<sup>25</sup>

It is doubtful whether the claim to the Gulf of Aqaba as a closed sea meets these three tests. Immemorial possession could not easily be established, although, in a sense, all the four states abutting on the Gulf may be

<sup>21</sup> *Ibid.* at 716; see also 707.

<sup>22</sup> *Ibid.* at 705.

<sup>23</sup> On this point the Court said: "The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion—from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821—then under the Federal Republic of the Center of America, which in that year attained its independence and sovereignty down to 1839; and, subsequently, on the dissolution of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defense, both the Gulf and its archipelago, which nature had indented in that important part of the continent, in the form of a gullet." *Ibid.* at 700.

<sup>24</sup> Memorandum concerning Historic Bays, note 15 above, at 63–79.

<sup>25</sup> See 3 Gidel, *Le Droit International Public de la Mer* 606 (1934). Gidel interprets the Judgment of the Central American Court in the Fonseca case in this sense.

considered as successors to the Ottoman Empire. Did the Ottoman Empire, however, manifest "*animus domini*" and was the claim to regard the Gulf as Turkish acquiesced in by other nations? Unless the advocates of the Gulf as a closed sea prove both *animus* and recognition at the time the area was under Ottoman sovereignty, the states which emerged from the progressive dismemberment of the Ottoman Empire did not succeed to a historical title to the gulf or bay. In this respect the Gulf of Aqaba situation presents no analogy at all to the Gulf of Fonseca. Failing this, it would be necessary to show that a "historic" claim arose and was recognized some time after the emergence of Egypt and Saudi Arabia as independent states and the creation of the British Mandate in Palestine out of which developed both Jordan and Israel. This would be a hopeless task and in fact has not been attempted. Egypt's official declaration of 1950 stands in the way of any such attempt. Certainly since the establishment of Israel in 1948 there has been neither a "peaceful and continuous" *animus* nor acquiescence by other nations. Unlike in the case of the Gulf of Fonseca, where all littoral states assert a historic title against outsiders, in the Gulf of Aqaba Saudi Arabia is asserting a claim against one of the littoral states, with general support from Jordan, and Egypt being precluded from supporting it.<sup>26</sup> In this respect, too, there is no analogy whatsoever between the juridical situation of the Gulf of Fonseca and the Gulf of Aqaba.

Certainly, the Gulf of Aqaba could be transformed into a closed sea by agreement among all the littoral states and recognition by other nations. As the then Secretary of State, Mr. John Foster Dulles, said: "If the four littoral States which have boundaries upon the Gulf should all agree that it should be closed, then it could be closed."<sup>27</sup> Whether in such a case the littoral states would also agree to consider the entire body of water in the Gulf or only that part outside their respective territorial seas as included in co-ownership is probably not decisive. In the case of the Gulf of Fonseca the Court assumed that Nicaragua and El Salvador exercised sovereignty individually in the maritime belts.<sup>28</sup> In principle, it would appear that the existence of belts of territorial seas, insofar as the littoral states in their relations *inter se* are concerned, is not incompatible with the character of a gulf or bay as a closed sea *erga omnes*.<sup>29</sup> The enactment of

<sup>26</sup> At the Geneva Conference on the Law of the Sea, the representative of Jordan expressed "his complete agreement with the observations made by the representative of Saudi Arabia" and his hope that Israel's possession of a share of the coast "would prove transient." Official Records, Vol. III, First Committee, 8th Meeting, March 7, 1958, p. 18, pars. 6 and 7. The representative of Egypt stated that, contrary to the assertion of the representative of Israel, "no single aspect of the Palestine question had yet been the object of any settlement whatever." *Ibid.*, p. 67, par. 9.

<sup>27</sup> News Conference Statements by Secretary of State Dulles, Feb. 19, 1957. United States Policy in the Middle East September 1956-June 1957, p. 299 (Dept. of State Pub. 6505). But see 3 Gidel, *Le Droit International Public de la Mer* 604, where the author considers acquiescence by other states as essential even in such a case.

<sup>28</sup> See note 20 above, at 711, and also the fifteenth question and the answer, at 694.

<sup>29</sup> For the opposite view see Charles B. Selak, Jr., "A Consideration of the Legal Status of the Gulf of Aqaba," 52 A.J.I.L. 660-698, at 693 (1958).

regulations concerning the extent of the territorial sea does not necessarily militate against a historic claim to the Gulf of Aqaba, as all states but Jordan have a coast outside the Gulf. However, the Fisheries Act No. 25 of December 2, 1943, which in Article 2 defines the territory of "Trans-jordan" as including that part of the sea lying within three miles from the low-water line and is maintained in force by Jordan, which has no other coastline,<sup>30</sup> would be a strong indication that, in the juridical view of Jordan or of the British Mandatory Administration at any rate, the historic character of the Gulf was an afterthought.

Recognition or acquiescence by third states was considered as an element in the historic title to the Gulf of Fonseca in addition to *animus* and "immemorial possession." Recognition or acquiescence or absence of protest appears to be a necessary ingredient, since a claim to a historic sea or bay appears as an encroachment upon the principle of the freedom of the high seas, or, as the International Court of Justice put it in the above-quoted passage, as "a derogation from the rules in force." Certainly the burden of proof with respect to all the elements of a historic title rests with the government or governments which claim it.<sup>31</sup> Certainly in the case of the Gulf of Aqaba this proof would be difficult to furnish in view of the successive changes in the number of the coastal states.<sup>31a</sup> The discussion at the Eleventh Session of the General Assembly on the Gulf of Aqaba failed to disclose any evidence of recognition. In any event the weight of such evidence, if it could be adduced, would have to be measured against the opposite view of Israel, which has emerged as one of the coastal states.

The Central American Court of Justice based its finding, among other factors, on the "many interests of vital importance" of the Gulf of Fonseca to the coastal states. The concept of "vital bays," that is of bays which are claimed as national or internal waters on the ground of the vital interests of the coastal state or states, does not seem to have any basis in the practice of states or in the doctrine.<sup>32</sup> Even if the concept were acceptable, it would be extremely difficult, in practice, to establish as national or internal the waters of a "vital bay" in the absence of agreement among the coastal states. There is obviously no such agreement with respect to the

<sup>30</sup> U.N. Legislative Series, Laws and Regulations on the Regime of the Territorial Sea, p. 522 (Sales No.: 1957.V.2).

<sup>31</sup> Memorandum concerning Historic Bays, note 15 above, at 91. See also *ibid.* 83-85, for doctrinal views regarding the requirement of recognition or acquiescence, and 98-102 for an analysis of the judgment of the International Court of Justice with respect to this requirement. See also the Japanese proposal of April 1, 1958, relating to Art. 7, par. 4, which, in defining historic bays, combines the elements of usage and recognition: "The term 'historic bays' means those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States." U.N. Doc. A/Conf. 13/O.1/L. 104, Conference on the Law of the Sea, Official Records, Vol. III, First Committee, p. 241.

<sup>31a</sup> According to Alexander Melamid, "Legal Status of the Gulf of Aqaba," 53 A.J.I.L. 412-413 (1959), there would seem to be no basis whatever for any historic or exclusive title to the Gulf in any of the riparian states.

<sup>32</sup> Memorandum concerning Historic Bays, note 15 above, at 85-88.

Gulf of Aqaba, although this gulf may well be vital to all or some of the coastal states. However, the interest which is considered as "vital" by them is not identic.

In conclusion, it is one thing to claim a bay as historic but another to establish a valid claim. The International Law Commission, in view of the inherent difficulties, did not attempt to include a definition of historic bays in its draft.<sup>83</sup> The Geneva Conference itself did not fill the gap. Instead it adopted a resolution recognizing the juridical importance of historic waters, including historic bays, and requested the General Assembly of the United Nations "to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the result of such study to all States Members of the United Nations."<sup>84</sup> However, the Conference may be deemed to have implicitly rejected the claim to the Gulf of Aqaba as a historic gulf or bay when it adopted paragraph 4 of Article 16 of the Convention on the Territorial Sea, which has been generally regarded as fitting that particular gulf.<sup>85</sup>

### 3. *The Juridical Status of the Gulf of Aqaba before the International Law Commission*

The question was raised by the Government of Israel in connection with the provisional articles concerning the regime of the territorial sea adopted by the International Law Commission at its Seventh Session in 1955. Article 18 provided that the coastal state may take measures in the territorial sea "to protect itself against any act prejudicial to its security" and for the same reason may even "suspend temporarily and in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential." Article 18, paragraph 4, on the other hand, read:

There must be no suspension of the innocent passage of foreign vessels through straits normally used for international navigation between two parts of the high seas.<sup>86</sup>

The Government of Israel, in commenting on this, pointed out that, while agreeing with the substance, it objected to the arrangement which made it appear as if the freedom of navigation through straits were a derogation from the sovereignty of the littoral state or states, whereas it considered the latter subordinate to the former. Accordingly,

What this means is that where access to a given port—whether an existing one or one which at some future date a State may wish to establish—is only possible by traversing a strait (in the geographical sense), then it is quite immaterial whether that strait is or is not within the

<sup>83</sup> See Statement by Professor François, Expert to the Secretariat of the Conference, U.N. Doc. A/Conf. 13/C.1/L.10. U.N. Conference on the Law of the Sea, Official Records, Vol. III, First Committee, p. 69, pars. 13, 14.

<sup>84</sup> U.N. Doc. A/Conf. 13/L.56, p. 8 (April 30, 1958). *Loc. cit.*, Vol. II, Plenary Meetings, p. 145.

<sup>85</sup> *Cf.* pp. 586-587 below.

<sup>86</sup> General Assembly, 10th Sess., Official Records, Supp. No. 9 (A/2934); and 50 A.J.I.L. 232 (1956).

waters classed as territorial sea of one or more of the littoral States, or what is the legal nature (gulf, bay, high seas) of the waters on which the harbour is situated. In such circumstances the right of passage for the ships of all nations, and quite regardless of their cargo, is and must remain absolutely unqualified, and the littoral State or States have no right whatsoever, so long as the matter is not regulated by Convention, to hinder, hamper, impede or suspend the free passage of those ships. The same rule is also true as regards warships.<sup>37</sup>

It is reasonably clear that the Government of Israel commented not so much on the legal status of straits in general and passage through them from one part of the high sea to another as on the legal status of a specific kind of strait, namely, that which affords the only navigable access to a port in a gulf or bay. In short, it set forth its view concerning the Straits of Tiran and the Gulf of Aqaba with emphasis on the right of access.

The International Law Commission weighted the provisions in Article 18 heavily, probably too exclusively in favor of the littoral state's right of protecting its security.<sup>38</sup> This imbalance was corrected to some extent at the Geneva Conference. In the Commission the comments submitted by Israel were recognized as referring to the Gulf of Aqaba, the position of which, in the view of the *Rapporteur*, Professor François, was "exceptional—possibly unique."<sup>39</sup> He also pointed out that

paragraph 4 of Article 18 related to straits between two parts of the high seas, and so did not apply to the Gulf of Aqaba which, though open to the high seas at one end, merely gave access to a port at the other.<sup>40</sup>

Faris Bey el-Khourri agreed that the case was "exceptional" but, disagreeing with Israel, said:

A port was not a natural feature existing from time immemorial, and if a State saw fit to establish a port at a point to which the only access was through the territorial waters of other States, it must accept the consequences. It was always open to the State in question to establish a port elsewhere or to conclude agreements with the other coastal States on the question of access to the port.<sup>41</sup>

Sir Gerald Fitzmaurice disagreed. In his view

vessels would in any case enjoy the right of innocent passage through a gulf consisting entirely of the territorial waters of coastal States to a port belonging to a third State. He wondered whether the situation envisaged by the Israel Government was not already covered by article 18.<sup>42</sup>

<sup>37</sup> U.N. Doc. A/CN.4/99/Add. 1; 2 I.L.C. Yearbook 1956, pp. 52, 56; 50 A.J.I.L. 998 at 1005 (1956). The comment concluded as follows: "The interests of the international community must here have absolute predominance over those of the littoral States whose territorial waters have to be traversed in making for a given harbour. In this respect the passage through straits of this character is assimilated to the high seas themselves."

<sup>38</sup> See Myres S. McDougal, "The Crisis of the Law of the Sea," 67 Yale Law Journal 546 (1958), on the conflict between "internationalist" and "provincial" myopia.

<sup>39</sup> 336th Meeting, June 13, 1956, 1 I.L.C. Yearbook 1956, Summary Records of its 8th Sess., April 23–July 4, 1956, p. 202, par. 89.

<sup>41</sup> *Ibid.*, par. 93.

<sup>42</sup> *Ibid.*, par. 94.

After a brief and desultory discussion the Commission decided that "the question raised by the Israel Government related to an exceptional case which did not lend itself to the formulation of a general rule."<sup>43</sup> However, in its Report on the Eighth Session the Commission included the following comment to Article 17 (formerly Article 18):

The question was asked what would be the legal position of straits forming part of the territorial sea of one or more States and constituting the sole means of access to a port of another State. The Commission considers that this case could be assimilated to that of a bay whose inner part and entrance from the high seas belong to different States. As the Commission felt bound to confine itself to proposing rules applicable to bays, wholly belonging to a single coastal State, it also reserved consideration of the above-mentioned case.<sup>44</sup>

This comment, along with the Commission's draft of Article 17, was before the Geneva Conference, which did not adopt it. It was also, prior to the Conference, available to the Members of the United Nations during the Eleventh Session in 1956-1957 of the General Assembly, when Israel's demand for free and unimpeded passage through the Straits of Tiran and the Gulf of Aqaba was discussed in connection with its withdrawal from the Sinai Peninsula.

What the Commission appeared to be saying can be summarized under five heads:

1. The Straits of Tiran were not straits within the meaning of Article 17, paragraph 4, because they did not connect two parts of the high seas but a part of the high sea with a gulf or bay; therefore Article 17, paragraph 4, prohibiting the suspension of innocent passage did not apply.
2. The Straits of Tiran could be assimilated to a bay bordered by several states; therefore Article 17, paragraph 4, did not apply.
3. States had a right of innocent passage through the territorial seas of other states under Article 16, but a coastal state was authorized by the Commission to suspend temporarily such passage "in definite areas of its territorial sea" under Article 17, paragraph 3.
4. Inasmuch as the only navigable channel in the Straits of Tiran and the Gulf of Aqaba to the Israel port of Elath passed through territorial seas, therefore access to that port could be suspended by the coastal states concerned under Article 17, paragraph 3.
5. Be that as it may, it was not the task of the Commission to lay down rules for particular or even unique cases.

4. *The Juridical Status of the Gulf of Aqaba before the Eleventh Session of the General Assembly 1956-1957*

Attempts to clarify the juridical status of the Straits of Tiran and the Gulf of Aqaba were made by Israel and a number of other Members in connection with the withdrawal of Israel from the Sharm el Sheikh area. It is not necessary to trace the deliberations of the General Assembly through its various phases, though it may be useful to indicate the principal juridical

<sup>43</sup> *Ibid.*, par. 102.

<sup>44</sup> General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159), p. 20.

arguments for and against the right of free and unimpeded passage claimed by Israel.

A key to the understanding of the debates appears to be the views expressed by the Secretary General. In a note dated January 15, 1957, he stated:

The international significance of the Gulf of Aqaba may be considered to justify the right of innocent passage through the Straits of Tiran and the Gulf in accordance with recognized rules of international law.<sup>45</sup>

This statement, which appeared fully to endorse the position of Israel, was somewhat modified in the Secretary General's Report dated January 24, 1957, in which, after repeating it, the following was added:

However, in its Commentary to Article 17 of the articles of the law of the sea (A/3159, p. 20), the International Law Commission reserved consideration of the question "what would be the legal position of straits forming part of the territorial sea of one or more States and constituting the sole means of access to the port of another State." This description applies to the Gulf of Aqaba and the Straits of Tiran. A legal controversy exists as to the extent of the right of innocent passage through these waters.<sup>46</sup>

On the other hand, after reviewing the Security Council resolution of September 1, 1951, in which the Council called upon Egypt to terminate the restrictions which it imposed on shipping through the Suez Canal destined for Israel,<sup>47</sup> the Secretary General declared that

. . . it may be held that, in a situation where the armistice régime is partly operative by observance of the provisions of the Armistice Agreement concerning the armistice lines, possible claims to rights of belligerency would be at least so much in doubt that, having regard for the general international interest at stake, no such claim should be exercised in the Gulf of Aqaba and the Straits of Tiran.<sup>48</sup>

The Secretary General thus formulated three propositions: First, there was a right of innocent passage through the Straits and the Gulf; secondly, there was a controversy as to the extent of this right; and thirdly, no belligerent rights should be exercised in the Gulf and the Straits. These views were to weigh heavily in the subsequent debate, although different delegations attached different weight to each of them. The second proposition, a palpable truism, was invested with an importance which appears to be quite out of proportion to its real significance. For "legal controversy" exists not merely regarding the right of innocent passage but also regarding a good deal of the law of the sea and international law in general. It is also remarkable that the positive statement made by the Commission, to wit,

<sup>45</sup> U.N. Doc. A/3500, p. 5, par. 14. General Assembly, 11th Sess., Official Records, Annexes, Agenda Item 66, p. 44. The Secretary General added that he "has not considered that a discussion of the various aspects of this matter, and its possible relation to the action requested in the General Assembly resolutions on the Middle East crisis, falls within the mandate established for him in the resolution of 4 November (1956)."

<sup>46</sup> U.N. Doc. A/3512, p. 8, par. 24. Annexes, Agenda Item 66, p. 49.

<sup>47</sup> On this subject see Leo Gross, "Passage through the Suez Canal of Israel-Bound Cargo and Israel Ships," 51 A.J.I.L. 530-568 (1957).

<sup>48</sup> U.N. Doc. A/3512, p. 9, par. 28. Annexes, Agenda Item 66, p. 50.



that "this case could be assimilated to that of a bay whose inner port and entrance from the high seas belong to different states," was virtually passed over with silence. Had this statement been given its due weight, the Members might have found it easier to disentangle the situation, for if there is a rule of international law regarding which there is practically no controversy, it is the rule that bays and gulfs with several littoral states, "however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted." Such gulfs and bays "are in time of peace and war open to vessels of all nations, including men-of-war."<sup>49</sup> Had this principle been taken as the starting point, the issues which remained for consideration would have been confined to the question of innocent passage and possibly the question of belligerent rights in a state of armistice.

Regarding freedom of passage, in and out of the Assembly debates, two schools of thought emerged. One, led by the United States, supported the Israeli position of freedom of passage, and the other, led by India, opposed it. The United States Government in an *Aide-Mémoire* handed to Israeli Ambassador Eban by Secretary of State Dulles on February 11, 1957, stated:

With respect to the Gulf of Aqaba and access thereto—the United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto.

After recalling the Egyptian declaration of January 28, 1950, with respect to freedom of passage through the Straits,<sup>50</sup> the *Aide-Mémoire* continued:

In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States, on behalf of vessels of United States registry, is prepared to exercise the right of free and innocent passage and to join with others to secure general recognition of this right.<sup>51</sup>

This declaration, which President Eisenhower stated "related to our intentions, both as a Member of the United Nations and as a maritime power having rights of our own,"<sup>52</sup> was decisive. The first part of it was

<sup>49</sup> 1 Oppenheim, *International Law* 508 (8th ed., H. Lauterpacht, 1955). See also Gidel, *op. cit.* 593-608.

<sup>50</sup> See p. 565 above.

<sup>51</sup> United States Policy in the Middle East Sept. 1956-June 1957, Documents, p. 290 (Dept. of State Pub. 6505).

<sup>52</sup> White House News Statement issued at Thomasville, Georgia, Feb. 17, 1957. *Ibid.*, p. 293. The position of the U. S. Government was restated in the Statement by the Department of State of June 27, 1957, which was delivered to the Washington missions of the eleven Arab nations in reply to their collective démarche submitted to the Secretary of State on May 24, 1957, on the problems of Algeria, Palestine, the Gulf of Aqaba and the Suez Canal. The writer is indebted for copies of these statements to the Chief, Historical Division, Department of State, and the Arab States Delegations Office, respectively. Parts of the American statement were printed in the New York Times, June 29, 1957. With respect to the U. S. position concerning the Gulf of Aqaba, see also the Circular sent by the Department of State on June 5, 1957, to Clarence G. Morse, Maritime Administrator, Department of Commerce, and Ralph E. Casey, American Merchant Marine Institute, New York, N. Y., in which the Department declared: "A denial of free and innocent passage through those waters [i.e., the Straits of Tiran and the Gulf

repeated textually by the Foreign Minister of Israel in announcing on March 1, 1957, Israel's plans for full withdrawal from the Sharm el Sheikh area,<sup>58</sup> and the representative of the United States repeated textually all relevant parts of the statement at the same meeting of the Assembly, with this addition:

These views are to be understood in the sense of the relevant portions on the law of the sea of the report of the International Law Commission covering the work of its eighth session from 23 April to 4 July 1956 (A/3159).<sup>54</sup>

The American view was endorsed in substance though in varying formulas by the representatives of France,<sup>55</sup> Costa Rica,<sup>56</sup> the United Kingdom,<sup>57</sup> Italy,<sup>58</sup> The Netherlands,<sup>59</sup> New Zealand,<sup>60</sup> Australia,<sup>61</sup> Belgium,<sup>62</sup> Canada,<sup>63</sup>

of Aqaba] to vessels of United States registry should be reported to the nearest available United States diplomatic or consular officer." 37 Dept. of State Bulletin 112 (1957). This Circular referred to the Notice to Mariners No. 44 of Oct. 29, 1955, by the U. S. Hydrographic Office, which repeats the substance of the "Ports and Lighthouses Administration Circular to Shipping No. 4 of 1955," issued by the Director General, Rear Admiral Youssef Hammad. According to this Egyptian Circular, by "Orders dated 7th of July 1955, issued by the Minister of War and the Commander-in-Chief of the Armed Forces, the Regional Boycotting Office for Israel is appointed to be the sole authority for issuing permission to vessels to pass through the Egyptian Territorial Waters in the Gulf of Aqaba." The Circular requires notification of at least 72 hours prior to the entry of the vessel into the Gulf of Aqaba. *Ibid.* 113. The State Department's Circular would seem to indicate that U. S. vessels need not comply with the Egyptian requirement.

<sup>53</sup> 666th Plenary Meeting. General Assembly, 11th Sess., Official Records, p. 1276, par. 11. The Minister added the words: ". . . in accordance with the generally accepted definition of those terms in the law of the sea." See also the statement by the Israeli representative at the 668th Meeting, March 8, 1957. *Ibid.*, p. 1325, par. 252.

<sup>54</sup> *Ibid.*, p. 1277, par. 33.

<sup>55</sup> *Ibid.*, p. 1280, pars. 58, 59.

<sup>56</sup> *Ibid.*, p. 1281, par. 72.

<sup>57</sup> *Ibid.*, 667th Meeting, p. 1284, par. 13.

<sup>58</sup> *Ibid.*, p. 1287, par. 51.

<sup>59</sup> *Ibid.*, p. 1288, pars. 56-61. The detailed reasoned statement by the representative of The Netherlands bears quoting in full: "First, inasmuch as the Gulf of Aqaba is bordered by four different States and has a width in excess of the three miles of territorial waters of the four littoral States on either side, it is, under the rules of international law, to be regarded as part of the open sea. Secondly, the Straits of Tiran consequently are, in the legal sense, straits connecting two open seas, normally used for international navigation. Thirdly, in regard to such straits, there is a right of free passage even if the straits are so narrow that they fall entirely within the territorial waters of one or more States. This rule was acknowledged by the International Court of Justice in the case of the Corfu Channel (Judgment of December 15, 1949; I.C.J. Reports 1949, p. 244) and also by the International Law Commission in its report for 1956 (A/3159). Fourthly, if a strait falls entirely within the territorial waters of one or more of the littoral States, there is still a right of innocent passage, but then the littoral States have the right, if necessary, to verify the innocent character of the passage. Fifthly, this right of verification, however, does not exist in those cases where the strait connects two parts of the open sea. It must, therefore, be concluded that all States have the right of free and unhampered passage for their vessels through the Straits of Tiran."

<sup>60</sup> *Ibid.*, p. 1292, par. 103.

<sup>61</sup> *Ibid.*, p. 1594, par. 124.

<sup>62</sup> *Ibid.*, p. 1296, par. 139.

<sup>63</sup> *Ibid.*, p. 1298, par. 148. It should be noted, however, that Canada's position was based on political rather than legal considerations, as in its view the Assembly should not attempt to determine legal rights in the Gulf and the Straits.

Norway,<sup>64</sup> Sweden,<sup>65</sup> Denmark,<sup>66</sup> and Iceland.<sup>67</sup> An opposite view was taken by several Members, though for reasons which are far from clear. The representative of the Soviet Union spoke of "a gross violation of the indisputable rights of Egypt and other Arab States in relation to the territorial waters of the Gulf of Aqaba and the Straits of Tiran."<sup>68</sup> In the opinion of the delegate of Iraq "we cannot consider passage through the Gulf as different from the passage of the refugees to their own homes."<sup>69</sup> The representative of Colombia, in a reasoned statement weighing the "commercial right" of passage against "the right of security," argued that the latter, "that is to say, the State's right to control navigation in its territorial waters must prevail."<sup>70</sup> On the other hand, he also argued "that no country has the right to prevent passage if it is innocent. A country may control it, regulate it, in order to ensure that the passage is innocent; but if it is established that the passage is innocent we would consider it an abuse of right to prevent passage."<sup>71</sup> This raises the issue of what constitutes innocent passage, to which the representative of India devoted some remarks. He contended, first, that the Gulf of Aqaba was an "inland sea";<sup>72</sup> secondly, that it would "be possible for Egypt, in agreement with Saudi Arabia, to fill up the Gulf of Aqaba";<sup>73</sup> and thirdly, that Article 17, paragraph 4, of the International Law Commission's draft articles concerning the law of the sea, did not apply to the Gulf because it does not connect two high seas;<sup>74</sup> and, finally, without disputing the right of innocent passage, that

this right of innocent passage, so-called, actually means that, first of all, one must prove innocence. Innocence depends upon the character of the party claiming the passage; it depends upon the purpose of the passage, and also upon the freight that is carried.<sup>75</sup>

The opinions put forward by India's representatives were not unchallenged. The United Kingdom representative pointed out that the Straits of Tiran were bordered by two countries—Egypt and Saudi Arabia—and not by Egypt alone and that the Gulf of Aqaba was surrounded by four littoral states.<sup>76</sup> The delegate of Italy challenged India's opinion concerning innocent passage and stated correctly, it is believed, that

<sup>64</sup> *Ibid.*, p. 1300, par. 196. Norway's position was somewhat akin to that of Canada's in holding that the legal status of these waters "should be dealt with only by a legal body."

<sup>65</sup> *Ibid.*, p. 1303, par. 224.

<sup>66</sup> *Ibid.*, par. 234.

<sup>67</sup> *Ibid.*, 668th Meeting, p. 1319, par. 187.

<sup>68</sup> *Ibid.*, 667th Meeting, p. 1297, par. 159.

<sup>69</sup> *Ibid.*, p. 1294, par. 116.

<sup>70</sup> *Ibid.*, p. 1290, par. 78.

<sup>71</sup> *Ibid.*, p. 1291, par. 88. It may be noted here that the representative of Iraq fully subscribed to the statements made by the representatives of Colombia and India. *Ibid.*, p. 1293, par. 116.

<sup>72</sup> *Ibid.*, 665th Meeting, p. 1269, par. 49.

<sup>73</sup> *Ibid.*, p. 1270, par. 56. In his enthusiasm, the delegate of India overlooked the remaining littoral states, Jordan and Israel.

<sup>74</sup> *Ibid.*, p. 1271, par. 62.

<sup>75</sup> *Ibid.* At the 667th Meeting the representative of India specifically declared that access to the Gulf through the Straits of Tiran "cannot be arranged except with Egypt's consent," inasmuch as the waters in the Straits are Egypt's territorial waters. *Ibid.*, p. 1301, par. 210. In his view, it was not within the province of the General Assembly to decide legal controversies. *Ibid.*, p. 1269, par. 48, and p. 1301, par. 209.

<sup>76</sup> *Ibid.*, p. 1284, par. 12.

This interpretation would nullify the rule of innocent passage, since it is obvious that, if it were valid, the littoral States would no longer have the duty of justifying their refusal of passage to a vessel on specific occasions and for specific reasons; rather, it would rest with the vessel to prove that its passage was innocent.<sup>77</sup>

The question of what constitutes innocent passage was debated at some length at the Geneva Conference on the Law of the Sea and clarified along the lines indicated by the delegate of Italy.

With regard to the question of belligerent rights in a state of armistice, there also emerged two positions, although the affirmative view was not pressed for obvious reasons. Though this particular issue is not directly relevant to the question of the legal status of the Gulf and the Straits, it may be useful to refer to it briefly. As on the issue of the right of passage, the United States position on belligerency was accepted by a substantial number of Members.

The position of the United States was made clear in the *Aide-Mémoire* of February 11, 1957, in which it declared that, after Israel's withdrawal, the United States "has no reason to assume that any littoral State would under these circumstances obstruct the right of free and innocent passage."<sup>78</sup> In stronger terms President Eisenhower stated on February 20, 1957, as follows:

We should not assume that if Israel withdraws, Egypt will prevent Israeli shipping from using the Suez Canal or the Gulf of Aqaba. If unhappily, Egypt does hereafter violate the Armistice Agreement or other international agreements, then this should be dealt with firmly by the society of nations.<sup>79</sup>

The representative of the United States declared in the General Assembly:

Once Israel has completed its withdrawal in accordance with the resolutions of the General Assembly, and in view of the measures taken by the United Nations to deal with the situation, there is no basis for either party to the Armistice Agreement to assert or exercise any belligerent rights.<sup>80</sup>

Several Members, including France,<sup>81</sup> the United Kingdom,<sup>82</sup> Italy,<sup>83</sup> New Zealand,<sup>84</sup> Belgium,<sup>85</sup> Canada,<sup>86</sup> and Sweden,<sup>87</sup> spoke in the same vein. In

<sup>77</sup> *Ibid.*, p. 1287, par. 51.

<sup>78</sup> United States Policy in the Middle East Sept. 1956-June 1957, Documents, p. 291 (Dept. of State Pub. 6505).

<sup>79</sup> Radio and television address by President Eisenhower, Feb. 20, 1957. *Loc. cit.*, p. 307.

<sup>80</sup> 666th Meeting, March 1, 1957. General Assembly, 11th Sess., Official Records, Plenary, p. 1278, par. 36. Cf. also p. 1277, par. 32.

<sup>81</sup> *Ibid.*, p. 1280, par. 60.

<sup>82</sup> *Ibid.*, 667th Meeting, p. 1284, par. 14.

<sup>83</sup> *Ibid.*, p. 1287, par. 50.

<sup>84</sup> *Ibid.*, p. 1292, pars. 99-101.

<sup>85</sup> *Ibid.*, p. 1296, par. 140. The Belgian representative based his view also on the Charter itself: "I pointed out on 1 February that each party to the Armistice Agreement must, in accordance with one of its fundamental provisions, refrain completely from any aggressive action against the people or the armed forces of the other. This is, moreover, an overriding principle of the Charter, except, of course, in the case of self-defence against armed aggression."

<sup>86</sup> 660th Meeting, Feb. 26, 1957. *Ibid.*, p. 1203, par. 48.

<sup>87</sup> 667th Meeting, March 4, 1957. *Ibid.*, p. 1303, par. 225.

this context reference should be made also to the statement by the Secretary General in his Report of January 24, 1957,<sup>88</sup> and the resolution of the Security Council of September 1, 1951, which includes the following:

Considering that since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character; neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence.<sup>89</sup>

The contrary view was expounded by India. Its representative contended that the Armistice Agreement between Egypt and Israel of 1949 did not exclude belligerent or hostile action, and that the Secretary General's statement referred to above

is based on the false conception that the exercise of sovereign rights in a sovereign territory, in territorial waters, is an act of belligerency. Such an exercise of sovereign rights would be no more an act of belligerency than if it were an act on the highways of Cairo. It would be an act of belligerency if it were committed anywhere else. Therefore, in the submission of my Government, the statement is based on that false conception.<sup>90</sup>

With respect to India's Government, it may be said that rarely has a new state committed itself to so ancient a view of sovereignty. An act of belligerency may be committed on the "highways of Cairo" as well as on the highways leading through the territorial waters of a strait. If it is a belligerent act, it does not lose this character by reason of the place where it is committed.

The views expressed by Members on the international character of the waters in the Gulf, the right of innocent passage through the Straits of Tiran unimpeded by any claim to exercise belligerent rights, were not embodied in a draft resolution.<sup>91</sup> They remained, therefore, the views of these Members and did not become the position of the United Nations. They are nonetheless significant. The failure of the General Assembly to take a position on this vital aspect of the Middle East crisis is all the more remarkable if one considers that one of the purposes of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."<sup>92</sup>

##### 5. *The Juridical Status of the Gulf of Aqaba and the Straits of Tiran before the United Nations Conference on the Law of the Sea*

The Geneva Conference succeeded in unraveling the tangled question of innocent passage through waters corresponding closely to the Straits of

<sup>88</sup> Cf. p. 575 above.

<sup>89</sup> U.N. Doc. S/2298/Rev. 1, Official Records, 558th Meeting, Sept. 1, 1951, p. 2.

<sup>90</sup> 665th Meeting, March 1, 1957. General Assembly, 11th Sess., Official Records, Plenary, p. 1270, par. 55. See also p. 1269, pars. 46, 47.

<sup>91</sup> The representative of Canada appeared to advocate the opposite course at the 660th Meeting on Feb. 26, 1957. *Ibid.*, p. 1203, pars. 41 ff.

<sup>92</sup> Art. 1, par. 1, of the Charter.

Tiran and the Gulf of Aqaba. In addition, it made more precise the meaning of innocent passage, of the duties and rights of the coastal state or states and the duties of foreign ships during their innocent passage. As all these rules bear upon the particular case here under consideration, they will be briefly considered.

#### a. *Innocent passage*

Article 15, paragraph 3, of the International Law Commission's draft related the innocence of the passage to conduct of the ship.<sup>93</sup> Several amendments were proposed to clarify its meaning. A United States proposal<sup>94</sup> aimed at indicating "that the sole test of the innocence of a passage was whether or not it was prejudicial to the security of the coastal State."<sup>95</sup> It was recognized in the debate that a close link existed between the definition of innocent passage, the rights of the coastal state, and the duties of the foreign ship regulated in Articles 17 and 18 of the Commission's draft. The American proposal was opposed as "inconsistent with existing international law" on the ground that it "would enable a State to claim that the actual passage of a ship was prejudicial to its security," whereas the real test of innocence was "the manner in which passage was carried out."<sup>96</sup> The First Committee appeared to be anxious to eliminate as far as possible any subjective tests which might restrict the traditional scope of innocent passage. It was probably for this reason that an eight-Power amendment submitted by Mexico to insert the words "or the interests" after the word "security" in the American proposal was defeated.<sup>97</sup> On the other hand, amendments submitted by India<sup>98</sup> and Turkey<sup>99</sup> were adopted. The American proposal as amended by India and Turkey became Article 14, paragraph 4, of the Convention on the Territorial Sea after adoption at the Twentieth Plenary Meeting,<sup>100</sup> and reads as follows:

<sup>93</sup> "Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law." Report of the International Law Commission Covering the Work of Its Eighth Session, April 23-July 4, 1956. General Assembly, 11th Sess., Official Records, Supp. No. 9 (A/3159), p. 19 (hereinafter referred to as I.L.C. Report 1956).

<sup>94</sup> "Passage is innocent so long as it is not prejudicial to the security of the coastal State. Such passage shall take place in conformity with the present rules." Doc. A/Conf. 13/C.1/L. 28/Rev. 1. U.N. Conference on the Law of the Sea, Official Records, Vol. III, First Committee, p. 216.

<sup>95</sup> *Op. cit.*, p. 82, par. 22.

<sup>96</sup> Representative of Denmark, *ibid.*, p. 83, par. 27.

<sup>97</sup> Text of the eight-Power proposal in U.N. Conf., Official Records, Vol. III, p. 85, par. 4. For result of the vote see *ibid.*, p. 98, par. 37. The co-sponsors were: Chile, Ecuador, Haiti, Panama, Peru, Uruguay, Venezuela and Mexico. Speaking on this point, the representative of the United Kingdom "considered that any reference to the interests of the coastal State was also unacceptable, since it widened the whole concept to a degree which would make a farce of the right of innocent passage." *Ibid.*, p. 85, par. 7.

<sup>98</sup> The Indian representative proposed to insert after the word "prejudicial to" the words "the peace, good order or." *Ibid.*, p. 85, par. 3. For result of the vote see *ibid.*, p. 98, par. 39.

<sup>99</sup> The Turkish amendment proposed to add in the second sentence of the American proposal the words "and to the other rules of international law." *Ibid.*, p. 98, par. 40.

<sup>100</sup> *Ibid.*, par. 41, and Official Records, Vol. II, Plenary Meetings, p. 65, par. 3.

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.<sup>101</sup>

After the vote in committee the representative of Israel formulated a reservation on the definition of innocent passage.<sup>102</sup> A drafting change, proposed originally by Burma and later supported by Saudi Arabia, was accepted in the First Committee by the representative of the United States but does not appear in the final text. Burma proposed "a positive fact" for the "negative proof" called for by the American text by substituting the words "passage is innocent unless it is prejudicial . . ." for the words "passage is innocent so long as it is not prejudicial. . . ." <sup>103</sup> This wording would have given somewhat more emphasis to the original intent to make the passage itself rather than the ship the test of innocence. However, even without it, the text as adopted clearly puts the burden on the coastal state to show that the passage itself rather than the passage of a particular ship, its purpose or cargo, was prejudicial to the stated values of the coastal state. Thus the text rules out the concept of innocent passage propounded by India in connection with the question of passage through the Straits of Tiran and the Gulf of Aqaba.<sup>104</sup> It represents a stage in the struggle for a greater measure of objectivity and a corresponding reduction in the degree of subjectivity which generally characterizes the rules regarding innocent passage formulated by the International Law Commission.<sup>105</sup>

<sup>101</sup> U.N. Doc. A/Conf. 13/L.52, p. 6 (April 28, 1958). Official Records, Vol. II, Plenary Meetings, p. 133; also 52 A.J.I.L. 837 (1958).

<sup>102</sup> Official Records, Vol. III, p. 99, par. 43. He considered that in spite of certain improvements introduced by the American amendment, the text of the Commission's draft was more precise than the first sentence of the American amendment. The reservation was not repeated in the Plenary Meeting when the final text of Art. 14 was adopted. The final articles of the Convention do not provide for reservations.

<sup>103</sup> *Ibid.*, p. 83, par. 32, p. 85, par. 15; and Doc. A/Conf. 13/C.1/L.75, *ibid.*, p. 231. The acceptance of the Burmese drafting change by the representative of the United States is contained *ibid.*, p. 84, par. 46. There was no formal vote on the proposal.

<sup>104</sup> *Cf.* p. 578 above. But see Max Sørensen, "Law of the Sea," International Conciliation, No. 520, p. 234 (Nov. 1958). *Cf.* note 179, p. 593, below.

<sup>105</sup> That the Committee was concerned with this problem and was anxious to eliminate subjective judgment, although it was divided on the text best calculated to realize this objective, can be seen from the observation of the representative of the Soviet Union, who "shared the misgivings expressed by several representatives regarding the revised United States proposal, which, by referring to the passage itself as not being prejudicial to the security of the coastal State, makes a subjective interpretation of the rule possible. The text drafted by the International Law Commission was much more objective because it referred to a ship using the territorial sea for committing acts prejudicial to the security of the coastal State." Official Records, Vol. III, p. 84, par. 38. He finally voted in favor of the revised American proposal. *Ibid.*, p. 99, par. 42. In this context reference should also be made to the French amendment which introduced the concept of intent. Doc. A/Conf. 13/C.1/L.6, *ibid.*, p. 212. It was not voted upon. For observation on it by the Danish representative see *ibid.*, p. 86, par. 24; see also 3 Gidel, *Le Droit International Public de la Mer* 206 f.

### b. *Duties of Coastal State*

Draft Article 16, paragraph 1, of the International Law Commission included a negative and a positive duty.<sup>106</sup> The United States proposed to strike out the latter, stated in the second sentence, on the grounds that it went beyond existing principles of international law, that it might be construed as constituting absolute liability on the part of the coastal state, and that, contrary to the view of the Commission,<sup>107</sup> it was not supported by the Judgment of the International Court of Justice in the *Corfu Channel* Case.<sup>108</sup> This proposal was adopted in Committee I,<sup>109</sup> and also by the Conference.<sup>110</sup> The first sentence of Article 16, paragraph 1, in the Commission's draft became Article 15, paragraph 1, in the Convention on the Territorial Sea.

For the purpose of this paper it is unnecessary to determine whether the adoption of the United States amendment adds to or detracts from the traditional principles. Paragraph 1 of Article 15 categorically imposes upon the coastal state the duty not to hamper innocent passage as defined in Article 14, paragraph 4. Beyond this duty the First Committee did not desire to go.<sup>111</sup>

### c. *Rights of Protection of the Coastal State*

Article 17, particularly its paragraphs 1, 3 and 4 in the Commission's draft, was of greatest significance for the principle of innocent passage in general and the rights claimed by Israel in the Straits of Tiran and the Gulf of Aqaba in particular. Here, as in connection with the definition of innocent passage, several representatives were concerned to establish an objective standard and to eliminate subjective criteria as far as this is possible in a juridical text and in the present stage of the organization of the society of nations. As far as the first paragraph of Article 17 was concerned, the Committee's task was seen as establishing harmony and consistency with Article 14, paragraph 4, defining innocent passage. To this

<sup>106</sup> "The coastal State must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea, and must not allow the said sea to be used for acts contrary to the rights of other States." 1956 I.L.C. Report 19.

<sup>107</sup> Expressed in its commentary to Art. 16, par. 1. *Ibid.*

<sup>108</sup> U.N. Doc. A/Conf. 13/C.1/L.38, Official Records, Vol. III, p. 220. The United States referred particularly to the Court's *dicta* on p. 22 of the Judgment, [1949] I.C.J. Rep. 4.

<sup>109</sup> Official Records, Vol. III, p. 115, par. 10. The First Committee did not adopt the joint proposal of Bulgaria and the U.S.S.R., which elaborated the second sentence and excluded warships from its scope. Doc. A/Conf. 13/C.1/L.46, *ibid.*, p. 223, and p. 115, par. 9. The United Kingdom proposed to delete the second part of the second sentence beginning with "and." Doc. A/Conf. 13/C.1/L.37, *ibid.*, p. 218. In view of the adoption of the U. S. proposal, the British proposal was not put to the vote. *Ibid.*, p. 115, par. 11.

<sup>110</sup> Official Records, Vol. II, Plenary Meetings, p. 65, par. 3.

<sup>111</sup> And consequently it rejected the Yugoslav proposal, which required the coastal state "to take the steps which are necessary for the safety of navigation." U.N. Doc. A/Conf. 13/C.1/L.16, *ibid.*, p. 213, p. 114, par. 7, and p. 115, par. 12.



end the six-Power proposal to Article 17, paragraph 1,<sup>112</sup> was submitted, reading as follows:

The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.<sup>113</sup>

This text met with some opposition<sup>114</sup> but was adopted in committee,<sup>115</sup> and in the Plenary Meeting,<sup>116</sup> and incorporated in Article 16, paragraph 1, of the Convention.

Article 17, paragraph 2, of the Commission's Draft presented no difficulty and, as adopted, became Article 16, paragraph 2, of the Convention.<sup>117</sup>

Paragraph 3 of Article 17 as submitted by the Commission<sup>118</sup> met with substantial criticism. Here clearly the Commission proposed a subjective test, namely, the untrammelled opinion of the coastal state as sole condition for suspending the right of innocent passage. Amendments were introduced by several delegations "to make the condition in the first sentence more objective"<sup>119</sup> and to foreclose discrimination between different flags.<sup>120</sup> The Netherlands delegate, in introducing the four-Power amendment to Article 17, paragraph 3, emphasized also that the proposed text was intended to incorporate the tenor of the Commission's commentary to that paragraph<sup>121</sup> and thus to render it more objective.<sup>122</sup> In the opposing view,

<sup>112</sup> "The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules and other rules of international law." 1956 I.L.C. Report 19.

<sup>113</sup> U.N. Doc. A/Conf. 13/C.1/L.72; Official Records, Vol. III, p. 231. The sponsors were: Greece, Netherlands, Portugal, United Kingdom, United States, and Yugoslavia.

<sup>114</sup> Thus the Soviet and Mexican representatives favored the text formulated by the Commission. Official Records, Vol. III, p. 96, par. 8, and p. 99, pars. 6-9.

<sup>115</sup> *Ibid.*, p. 100, par. 16.

<sup>116</sup> *Ibid.*, Vol. II, Plenary Meetings, p. 65, par. 7.

<sup>117</sup> The text of Art. 16, par. 2, is as follows: "In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which the admission of those ships to those waters is subject." For the votes see Official Records, Vol. III, p. 100, par. 17, and *ibid.*, Plenary Meetings, p. 65, par. 7.

<sup>118</sup> "The coastal State may suspend temporarily in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. Should it take such action, it is bound to give due publicity to the suspension."

<sup>119</sup> Official Records, Vol. III, p. 79, par. 7, observations by the British delegate.

<sup>120</sup> *Ibid.*, par. 6, observation by the Greek delegate.

<sup>121</sup> The delegate probably had this comment in mind: "In exceptional cases a temporary suspension of the right of passage is permissible if compelling reasons connected with general security require it." I.L.C. Report, 1956, p. 20. The words "if compelling reasons . . . require it," imply a measure of accountability which is totally absent in the Commission's draft. See also the Netherlands delegate's observations in Official Records, Vol. III, p. 94, par. 17.

<sup>122</sup> *Ibid.*, p. 88, par. 15. The text of the proposal sponsored by the four Powers (Netherlands, Portugal, U.K., U.S.A.) is as follows: "Subject to the provisions of paragraph 4, the coastal State may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the

the Commission's text merely indicated who was to take the decision, and that

Given the absence of an independent organ which could arbitrate in the matter of the application of an objective rule, the only practical possibility was to maintain a subjective criterion as contained in the International Law Commission's draft. The coastal State should certainly substantiate any action it might take, but it undoubtedly had the right to initiate action at its own discretion.<sup>123</sup>

This view was shared by the delegates of the Soviet Union<sup>124</sup> and India. The latter delegate, arguing the unavoidability of subjective discretion, stated:

That did not, however, mean that the coastal State could act with impunity, for suspension of the right of passage would be *bona fide* only if ordered for the reasons given in paragraph 3, and the burden of proof would rest on the State alleging that such action was not *bona fide*.<sup>125</sup>

The Indian delegate clearly indicated the strength of the coastal state and the weakness of the state claiming innocent passage which was implied in the Commission's draft. The four-Power proposal was intended to restore a balance between the two interests involved. As the delegate of the United States pointed out, this proposal had been made "to ensure that a coastal State had the right to enforce its own regulations, but the doctrine of innocent passage must never be allowed to depend on the caprice of such a State."<sup>126</sup> The delegate of the United Kingdom "considered that it would be wrong to leave a coastal State to judge when and in what circumstances it should deem the suspension of innocent passage essential."<sup>127</sup> The four-Power proposal, as amended by Greece,<sup>128</sup> was adopted in the First Committee by a narrow margin,<sup>129</sup> and in the Plenary Meeting the whole Article 17 was adopted by a very large majority,<sup>130</sup> and became paragraph 3 of Article 16 of the Convention.

Paragraph 4 of the Commission's Article 17 was subjected to careful scrutiny and substantial changes.<sup>131</sup> It will be recalled that this provision was the subject of some debate in the Commission in connection with Israel's comment thereon and in the General Assembly in connection with Israel's

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protection of its security. Such suspension shall take effect only after having been duly published." U.N. Doc. A/Conf. 13/C.1/L.70; Official Records, Vol. III, p. 230.

<sup>123</sup> Observation by the Indonesian delegate, *ibid.*, p. 94, paras. 18 and 19.

<sup>124</sup> *Ibid.*, p. 94, par. 29.

<sup>125</sup> *Ibid.*, p. 96, par. 3.

<sup>126</sup> *Ibid.*, p. 95, par. 88.

<sup>127</sup> *Ibid.*, p. 95, par. 38.

<sup>128</sup> The Greek proposal was to insert after the word "may" and before the word "suspend" the words "without discrimination among foreign ships." U.N. Doc. A/Conf. 13/C.1/L.31; Official Records, Vol. III, p. 93, par. 4, and p. 100, par. 18.

<sup>129</sup> The vote was 31 for, 27 against, with 5 abstentions. *Ibid.*, p. 100, par. 20.

<sup>130</sup> *Ibid.*, Vol. II, Plenary Meetings, p. 65, par. 7. The vote was 62 for, 1 against, with 9 abstentions.

<sup>131</sup> Its text is as follows: "There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas."

claim that the passage through the Straits of Tiran and the Gulf of Aqaba was not subject to suspension by the coastal state or states concerned.<sup>182</sup> The decision of the Conference to adopt the four-Power amendment to paragraph 3 beginning with the words "subject to the provisions of paragraph 4 . . ." had already settled a point, namely, that the right of suspension was further limited by the rule to be laid down in paragraph 4. This would have been so in any event, but the inclusion of these words made the point even clearer. With reference to paragraph 4 the debate centered on two main aspects of the Commission's draft: its inclusion of the word "normally" and its omission of a rule governing access to a port through straits forming part of the territorial sea of one or more states.

The United States proposed to eliminate the word "normally" on the ground that the Judgment of the International Court of Justice in the *Corfu Channel* Case, the acknowledged basis of paragraph 4 of Article 17, did not use this qualifying term.<sup>183</sup> The retention of "normally" was urged by the delegate of Saudi Arabia on the ground that "the right of innocent passage could be exercised only in recognized international seaways."<sup>184</sup> The delegate of Portugal, while supporting its omission, would bow to the majority.<sup>185</sup> The delegate of the Soviet Union deemed the word "very important" and favored its retention.<sup>186</sup> Defending the American proposal, Mr. Dean recalled that "the Commission had not taken a vote on the insertion of the word 'normally,' which had been proposed by the USSR member at the Commission's seventh session and accepted without discussion. He therefore considered that the Committee was free to delete or retain the word in question."<sup>187</sup> The British delegate, supporting the deletion, pointed out that "it was vague, and might well become a future source of argument, friction and dispute between nations as to what was or was not the 'normal' use of a particular strait."<sup>188</sup> The decision of the Committee and the Conference was to drop the qualifying word "normally," as it was omitted from the three-Power proposal to paragraph 4 which was adopted by the Committee and the Conference. The suppression of "normally" was certainly justified in terms of the *Corfu Channel* Judgment. Whether it is likely to make much difference in practice only the future will show. For it can be contended with a degree of persuasiveness that some such qualifying concept is inherent in the phrase used by

<sup>182</sup> See p. 572 above.

<sup>183</sup> U.N. Doc. A/Conf. 13/C.1/L.39; Official Records, Vol. III, p. 220. It was also dropped in the Netherlands proposal, Doc. A/Conf. 13/C.1/L.51, *ibid.*, p. 224. See comment by the Netherlands representative, *ibid.*, p. 79, par. 15, and the three-Power (Netherlands, Portugal, United Kingdom) proposal, Doc. A/Conf. 13/C.1/L.71, *ibid.*, p. 231.

<sup>184</sup> *Ibid.*, p. 94, par. 23; see also his remarks, p. 93, par. 9.

<sup>185</sup> *Ibid.*, p. 94, par. 27.

<sup>186</sup> *Ibid.*, p. 94, par. 30.

<sup>187</sup> *Ibid.*, p. 95, par. 31.

<sup>188</sup> *Ibid.*, p. 95, par. 36. This argument was rejected by the delegate of Saudi Arabia, who recalled that the term "normally" had been used in several international instruments, and had been specifically included in the Convention and Statute on the International Régime of Maritime Ports, adopted at Geneva in 1923, to remove any doubts and ambiguity. *Ibid.*, p. 96, par. 5.

the Court, the Commission and the Conference: "straits which are *used* for international navigation. . . ." In other words, the prohibition of suspension applies only to straits which are "used . . ." When or which straits are used? Does the answer depend upon the density of the traffic,<sup>139</sup> the habitual choice of a strait by a particular flag, the location of a recognized route or some such criterion or a combination of several criteria? It may also be noted that the word "international" qualifies navigation and is itself not free of ambiguity.<sup>140</sup>

The question of securing access to a port appears to have been raised first by the Netherlands delegate saying:

His delegation was convinced that the only just solution of the regime of gulfs, bays and estuaries bordered by two or more States was to proclaim the principle of the free access of foreign ships to every port situated on their coasts, whether the water area in question included a central part which must be regarded as the high seas, or as being placed under the undivided co-sovereignty of the coastal States, or whether it was divided up into distinct territorial maritime zones.<sup>141</sup>

Amendments introduced by the British and Netherlands delegations to Article 17, paragraph 4, were intended to make this objective clear.<sup>142</sup> The British delegate, commenting upon the amendments, declared:

Their object was to ensure that passage was not impeded in waters which were essential to maritime communications. The main purpose of any maritime voyage was, after all, to arrive at the port of destination.<sup>143</sup>

The Netherlands amendment had a similar purpose, namely,

to stress that ships should always be authorized to traverse the territorial sea for the purpose of entering a port.<sup>144</sup>

<sup>139</sup> See Arthur H. Dean, "The Geneva Conference on the Law of the Sea: What Was Accomplished," 52 A.J.I.L. 607-629, at 623 (1958).

<sup>140</sup> The Saudi Arabian delegate's point is borne out by the fact that the Geneva Conference used the word "normally" in spite of its vagueness. Thus in the Convention on the Territorial Sea, Art. 3 speaks of "normal" baselines and Art. 9 of roadsteads which are "normally" used. The Convention on the Continental Shelf states in Art. 5, par. 8, that the coastal state shall not "normally" withhold its consent.

<sup>141</sup> 6th Meeting, March 6, 1958, Official Records, Vol. III, p. 11, par. 13. At the preceding meeting, March 5, 1958, the British delegate observed in connection with the right of innocent passage through international straits: "In his delegation's view, no established and customary right of passage or access could be done away with by the unilateral action of any of the neighboring coastal States." *Ibid.*, p. 9, par. 33.

<sup>142</sup> The British proposed to add the words "or waters constituting the sole means of access to a port." U.N. Doc. A/Conf. 13/C.1/L.37, March 25, 1958; Official Records, Vol. III, p. 218. The Netherlands proposed a new text for Art. 17, par. 3 of which read: "There shall be no suspension of the innocent passage of foreign ships through sealanes which are used for international navigation between a part of the high seas and another part of the high seas or the territorial waters of a foreign State." U.N. Doc. A/Conf. 13/C.1/L.51, March 25, 1958; Official Records, Vol. III, p. 224. It may be noted that Portugal suggested that Art. 17, par. 4, be modified to read: "through straits and sea lanes. . . ." U.N. Doc. A/Conf. 13/C.1/L.47, March 25, 1958; Official Records, Vol. III, p. 223.

<sup>143</sup> Official Records, Vol. III, p. 79, par. 12.

<sup>144</sup> *Ibid.*, p. 79, par. 15.

At the suggestion of the Chairman of the First Committee, proposals by different delegations relating to "the same questions of principle"<sup>146</sup> were consolidated into a single text. The resulting three-Power proposal included the words "straits or other sealanes" from the Portuguese, and the words "or the territorial waters of a foreign State" from the Netherlands, amendments.<sup>146</sup> The United States decided to support this text.<sup>147</sup> In presenting it to the Committee the Netherlands delegate declared that

it was insufficient to declare the high seas open to traffic without also guaranteeing the right of entry into seaports. If the right of access to ports was to be assured to landlocked States, *a fortiori*, should it be guaranteed to the maritime countries.<sup>148</sup>

The use of the term "sealanes" was supported by some delegations<sup>149</sup> and opposed by others.<sup>150</sup> Its use was defended by the Netherlands delegate on the ground that, although it had no special juridical significance,

it was a term that would be easily understood by all concerned with international navigation. The term "straits" was much too narrow, because there were sea-lanes used for international navigation elsewhere than in straits.<sup>151</sup>

However, the reference to sea lanes was deleted and, following a proposal by the Indonesian delegate, the words "territorial waters" were replaced by "territorial sea."<sup>152</sup>

The fundamental part of the three-Power proposal, with which the United States had associated itself, was strongly criticized by the delegate of Saudi Arabia. He opposed it on two grounds: first, on the ground that whereas international law provided for the right of innocent passage through straits linking two parts of the high seas, "it did not provide for such a right in the case of straits linking the open sea with an internal sea or with the territorial sea of a particular State."<sup>153</sup> He appeared to base this position on the Judgment of the International Court of Justice in the *Corfu Channel* Case,<sup>154</sup> which he accepted. According to that decision he urged

the right of innocent passage could be exercised in straits linking two areas of the high seas, but not in those linking a part of the high seas with the territorial waters of a State.<sup>155</sup>

<sup>145</sup> *Ibid.*, p. 80, par. 21.

<sup>146</sup> U.N. Doc. A/Conf. 13/C.1/L.71, March 28, 1958; Official Records, Vol. III, p. 231. This text was sponsored by The Netherlands, the United Kingdom and Portugal. The words in the British proposal were dropped. *Ibid.*, p. 93, par. 11.

<sup>147</sup> *Ibid.*, par. 5.

<sup>148</sup> *Ibid.*, p. 88, par. 16.

<sup>149</sup> See the Danish delegate's observation that he would support the text "on the understanding that it referred to straits only in so far as they constituted sealanes." *Ibid.*, p. 93, par. 7.

<sup>150</sup> Thus the delegate of Saudi Arabia declared that "so far as he knew, the word did not constitute a legal term, and was not defined by any writer on international law." *Ibid.*, p. 93, par. 9, and p. 94, par. 22. See also the remark by the Soviet delegate, *ibid.*, p. 94, par. 30.

<sup>151</sup> *Ibid.*, p. 94, par. 16.

<sup>152</sup> *Ibid.*, p. 93, par. 14, and p. 96, par. 7. It may be noted that the term "sea lanes" appears in Art. 5, par. 6, of the Convention on the Continental Shelf adopted by the Conference. U.N. Doc. A/Conf. 13/L.55.

<sup>153</sup> *Ibid.*, p. 93, par. 9.

<sup>154</sup> [1949] I.C.J. Rep. 4.

<sup>155</sup> Official Records, Vol. III, p. 96, par. 4.

It may be noted that this represents an attempt to use a judgment of the Court as authority for both what it decides, which is the usual case, and for what it does not decide, which is a most unusual case. Clearly the Court, in the Corfu Channel dispute, was not concerned with the situation envisioned in the three-Power proposal.

The second ground for the Saudi Arabian objection was that

in his opinion the amended text no longer dealt with general principles of international law, but had been carefully tailored to promote the claims of one State. His delegation would be unable to support a text that covered only one specific case.<sup>156</sup>

This contention does not appear to be borne out by the published record of the discussion in the Committee. On the contrary, in the view of the three Powers proposing the amendment, as stated by the Netherlands representative,

the addition of the words "or the territorial waters of a foreign State" reflected existing usage safeguarding the right to use straits linking the high seas with the territorial sea of a State.<sup>157</sup>

On the other hand, clearly the affirmation of this principle by the Conference gave strong support to one particular controversial case, namely, the right of passage through the Straits of Tiran and the Gulf of Aqaba to the Israeli port of Elath. The Committee adopted the three-Power proposal, with the amendments already indicated, by a roll-call vote of 31 votes to 30, with 10 abstentions.<sup>158</sup> In the Plenary Meeting, the delegate of the United Arab Republic asked for a separate vote on paragraph 4 of Article 17. This was opposed by the delegate of Denmark on the ground that

the principle of freedom of navigation was indivisible, and when vessels crossed a portion of the high seas on their way to a port, it was irrelevant whether or not they had to pass through the territorial sea of another State. The effect of a separate vote would be to discriminate between ships passing through the territorial sea of a State other than their flag State on their way from one part of the high seas to another, and ships passing through the same territorial seas on their way from a portion of the high seas to the territorial sea of a third State. The coastal State would be under an equal obligation to respect the right of innocent passage in both cases.<sup>159</sup>

<sup>156</sup> *Ibid.*, p. 96, par. 6. He also declared that "his government's participation in the final act of the Conference would be conditional, among other things, on the rejection of the amendments to Article 17 at present before the Committee." *Ibid.*, p. 94, p. 25.

<sup>157</sup> *Ibid.*, p. 94, par. 16.

<sup>158</sup> *Ibid.*, p. 100, par. 21.

<sup>159</sup> Official Records, Vol. II, Plenary Meetings, p. 65, par. 5. He went on to justify this position by reference to Denmark's practice: "Part of the Danish coast bordered an international strait joining two parts of the high seas, and for more than one hundred years his country had maintained freedom of navigation through that strait in the interests of international trade. Such an obligation as that which his country had assumed should be counterbalanced by corresponding rights in other parts of the world, and Denmark accordingly expected that there would be free passage for its ships through straits in the territorial seas of other States." *Ibid.*, par. 6.

The motion for a separate vote on the paragraph was defeated by 34 votes to 32, with 6 abstentions, and the whole Article 17 was then adopted by 62 votes to 1, with 9 abstentions.<sup>160</sup>

As adopted by the Conference, Article 17, paragraph 4, became Article 16, paragraph 4, and reads:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.<sup>161</sup>

Whatever may have been the motives which prompted the three-Power proposal,<sup>162</sup> it is clear that, rather than deal with the broad problem of bays or gulfs the coasts of which were under the sovereignty of several states, the Conference concentrated on the specific problem of the nature and extent of the right of innocent passage. In doing so it filled a gap left by the International Law Commission, and the solution which it adopted did not follow the direction indicated by the Commission in its comment to Article 17, paragraph 4, relating to the particular question raised by Israel. The Conference showed concern for ensuring the right of innocent passage in all conceivable situations and, while mindful of the interest of the coastal states, for protecting its character as an independent right not subordinate to any claim of sovereignty on the part of coastal states.<sup>163</sup> In proceeding along this line and also in insisting on objective criteria for both the right of innocent passage and the right of protection of the coastal states, the Conference corrected in some measure the overly exclusive concern of the Commission with the latter.

#### *d. Duties of Ships during Innocent Passage*

Article 18, the last clause in the International Law Commission's draft devoted to an aspect of innocent passage, reads as follows:

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.<sup>164</sup>

Here, as in the case of other provisions bearing on the right of innocent passage, the aim was to ensure the application of objective standards. The Commission's draft contained that standard in providing, in substance, that

<sup>160</sup> *Ibid.*, p. 65, par. 7. In explaining his abstention, the delegate of Saudi Arabia reiterated his argument that par. 4 "had been drafted with one particular case in view," and concluded: "Saudi Arabia would take the necessary steps to protect its national interests against the interpretation and application of paragraph 4." *Ibid.*, par. 8.

<sup>161</sup> U.N. Doc. A/Conf. 13/L.52; Official Records, Vol. II, Plenary Meetings, p. 134.

<sup>162</sup> It may be noted that the question of the Gulf of Aqaba was injected into the deliberations of the First Committee at their very outset by the delegate of Saudi Arabia, who claimed that this gulf "came under exclusive Arab jurisdiction." *Ibid.*, Vol. III, 3rd Meeting, March 4, 1958, p. 3, par. 30.

<sup>163</sup> Cf. the observations of the delegates of The Netherlands, the United States and the United Kingdom, *ibid.*, p. 9, par. 33; p. 94, par. 15; p. 95, pars. 33 and 37.

<sup>164</sup> 1956 I.L.C. Report 20.

the national laws and regulations shall be "in conformity with the present rules and other rules of international law." In the battle of amendments in the First Committee the lines were drawn between those who supported the international standard and the supporters of the national standard, that is, between those who favored the supremacy of international law and those advocating the primacy of municipal law. In short, the old contest respecting the treatment of foreigners was re-enacted with reference to innocent passage. The protagonist of national treatment was Mexico. It submitted a proposal in which the international standard was transposed from the laws enacted by the coastal state to the duty of foreign ships to observe them.<sup>165</sup> Explaining this proposal, the delegate of Mexico pointed out that

there was no doubt in his delegation's view that the words "in conformity with the present rules and other rules of international law" should apply to the exercise of the right of passage by foreign ships, and not to the enactment of laws and regulations by the coastal State.<sup>166</sup>

He also argued that

the obligation on coastal States to comply with rules of international law in enacting domestic laws and regulations was clearly expressed in Article 1, paragraph 2, and in Article 17, paragraph 1, of the Commission's draft.<sup>167</sup>

The principal argument against the Mexican proposal was the six-Power proposal, which consolidated various individual amendments and which differed only slightly from the Commission's text.<sup>168</sup> Commenting upon these two texts, the British delegate said that their essence

was that foreign ships must comply with laws and regulations enacted by the coastal State, subject to the one proviso that such legislation was in conformity with the present and other rules of international law. If that proviso were omitted, there would be no limitation whatsoever on the laws which the coastal State could enact. The Mexican amendment, far from making the enactment of laws and regulations by the coastal State subject to their conformity with the rules of international law, contained a quite different proposal: that the qualification should apply exclusively to ships exercising their right of passage.<sup>169</sup>

<sup>165</sup> The Mexican proposal for a new text of Art. 18 was worded as follows: "Foreign ships exercising the right of passage shall comply, in conformity with the present rules and other rules of international law, with the laws and regulations enacted by the coastal State, and, in particular, with those relating to transport and navigation." U.N. Doc. A/Conf. 13/C.1/L.45; Official Records, Vol. III, p. 222.

<sup>166</sup> *Ibid.*, p. 96, par. 15.

<sup>167</sup> *Ibid.*, p. 97, par. 16.

<sup>168</sup> U.N. Doc. A/Conf. 13/C.1/L.72; Official Records, Vol. III, p. 231. It ran as follows: "1. Foreign ships exercising the right of passage shall comply with the laws and regulations made and published by the coastal State in conformity with the present rules and other rules of international law. 2. The coastal State has the right to take in its territorial sea the necessary steps in order to prevent infringements of the laws and regulations mentioned in paragraph 1, and to ensure the enforcement of such laws and regulations." See also *ibid.*, p. 96, par. 13. The sponsoring Powers were: Greece, Netherlands, Portugal, United Kingdom, United States, and Yugoslavia.

<sup>169</sup> *Ibid.*, p. 97, par. 18.



In proceeding to vote on the different proposals the Committee maneuvered itself into a procedural *cul-de-sac*, the result of which was that there remained no text for Article 18 before the Committee. The Committee first adopted the Mexican amendment by 33 votes to 30, with 10 abstentions.<sup>170</sup> Thereupon five delegations withdrew their support from the six-Power proposal,<sup>171</sup> which the Chairman declared to have been rejected, in any event, as the result of the adoption of the Mexican amendment.<sup>172</sup> The Committee then adopted one part of a joint amendment submitted by Greece and The Netherlands and rejected another.<sup>173</sup> After a procedural discussion in which the incompatibility of the two adopted proposals was stressed, the Committee rejected both by 34 votes to 28, with 10 abstentions.<sup>174</sup> A graceful retreat by the Chairman enabled the Committee to adopt, by 59 votes to none, with 3 abstentions, the original text of the International Law Commission.<sup>175</sup> This text, with a consequential change ("in conformity with these articles" in place of "the present rules") and the insertion of the word "innocent" in the phrase "right of passage" suggested by the Drafting Committee,<sup>176</sup> was adopted by the Conference by 72 votes to none, with 2 abstentions, and became Article 17 of the Convention.<sup>177</sup> This completed the Conference's work on innocent passage. There can be little doubt that, in preferring the Commission's text rather than the Mexican proposal, the Conference scored a point in favor of the international standard as against the national-treatment principle. Whether the text of Article 17 will obviate disputes relating to the applicable national enactments and their conformity with the Convention and customary international law remains to be seen. In particular it remains to be seen whether the right to enforce these enactments, implicitly recognized in Article 17, includes the right to prevent a ship from passing through the territorial sea.<sup>178</sup> It would seem that the Conference's solution leaves room for supplementary regulation by bilateral or multilateral instruments.

## 6. Conclusions

There is obviously room for differing evaluations of the work of the Conference discussed above and in particular of its contribution to the solution

<sup>170</sup> *Ibid.*, p. 101, par. 27.

<sup>171</sup> *Ibid.*, p. 101, par. 28. Yugoslavia apparently remained the sole supporter.

<sup>172</sup> *Ibid.*, p. 101, par. 31.

<sup>173</sup> U.N. Doc. A/Conf. 13/C.1/L.32; Official Records, Vol. III, p. 217. The Committee adopted the words: "The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities," and rejected the words "nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels." *Ibid.*, p. 101, pars. 34, 35.

<sup>174</sup> *Ibid.*, p. 102, par. 16.

<sup>175</sup> *Ibid.*, p. 109, par. 57.

<sup>176</sup> *Ibid.*, p. 256.

<sup>177</sup> Official Records, Vol. II, Plenary Meetings, pp. 65 and 134.

<sup>178</sup> Cf. Max Sørensen, "Law of the Sea," International Conciliation, No. 520, p. 234 (Nov. 1958). He apparently assumes that "the coastal State is authorized to enforce its laws and regulations on foreign ships passing through its territorial sea, but is not allowed to prevent a ship from passing through merely on the ground of a violation of such laws or regulations."

of the question of passage through the Straits of Tiran and the Gulf of Aqaba. The intent of the Conference to reduce the element of subjectivism and to provide a better balance between the interests involved—security on the one side and freedom of navigation on the other—will probably meet with general approval. The large majorities in favor of the several articles are indicative of it. Whether the Conference actually succeeded in translating this intent into the articles dealing with vital aspects of innocent passage is debatable.<sup>179</sup>

Concerning the specific problem of passage through the Straits of Tiran and the Gulf of Aqaba, the contribution of the Conference is significant. The Conference, in Article 16, paragraph 4, decidedly gave its support to the point of view of all those governments which have taken their stand on the right of transit through the Straits and the Gulf. The reproach of the Arab states that the Conference was concerned with this specific problem, though approaching it through a general formula, seems to be well founded.<sup>180</sup> However, it is still a question whether the Conference adopted a rule the validity of which depends upon ratification of the Convention, or whether it merely confirmed an existing principle the validity of which is independent of acceptance of the Convention. The Conference received from the United Nations General Assembly the broad mandate to examine the law of the sea, "taking account not only of the legal, but also of the technical, biological, economic and political aspects of the problem."<sup>181</sup> The Conference does not seem to have come to any conclusion as to whether its work was primarily codificatory or in the nature of progressive development, although it debated this matter in connection with the number of ratifications to govern the entry into force of the conventions, and the inclusion of denunciatory clauses or reservations.<sup>182</sup> The Convention on the Territorial Sea does not state, as does the Convention on the High Seas, that it codifies the pertinent rules of international law and that its provisions are "generally declaratory of established principles of international law."<sup>183</sup> On the other hand, it contains no provision regarding reservations, as do the Conventions on Fishing and the Continental Shelf.<sup>184</sup>

With respect to the last part of Article 16, paragraph 4, however, it has been said that the Conference "adopted a new rule which clearly applied to the Israeli-Arab controversy," and that "the result reached was in accord with the general position of the United States" as laid down in the *Aide-Mémoire* of February 11, 1957.<sup>185</sup> This might be taken to mean that,

<sup>179</sup> Thus Sørensen argues that Art. 14, par. 4, far from restricting, "now extends the rights of the coastal State and allows it to interfere with passage on such grounds as the nature of the cargo and its ultimate destination—provided, of course, that such factors are genuinely of a character to prejudice the security of the coastal State in the specific case." *Ibid.* This view, if correct, would go a long way towards nullifying the right of innocent passage.

<sup>180</sup> See Sørensen, *loc. cit.*, p. 236.

<sup>181</sup> Res. 1105 (XI), Feb. 21, 1957; Official Records, Vol. II, Plenary Meetings, p. xi.

<sup>182</sup> *Ibid.*, Plenary Meetings, pp. 26, 27, 52, 56, 57, 58, 59, 60.

<sup>183</sup> *Ibid.*, p. 135.

<sup>184</sup> Cf. Art. 19 of the former and Art. 12 of the latter. *Ibid.*, pp. 141, 143.

<sup>185</sup> Arthur H. Dean, "The Geneva Conference on the Law of the Sea: What Was Accomplished," 52 A.J.I.L. 607-629, at 623 (1958). For the *Aide-Mémoire*, see p. 576 above.

unless ratified, that rule would not be binding. On the other hand, the debates at the Conference would seem to give substance to the view that the rule was part of international law. Their evidentiary value is significant.<sup>186</sup> The latter view would certainly correspond quite closely to the position taken by the Members of the United Nations in the General Assembly in favor of the right of passage through the Straits and the Gulf as a right based upon existing international law.

There is a difference between their position, however, and the rule of Article 16, paragraph 4. Whereas the Members urged freedom of passage on the basis that the Gulf "comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto,"<sup>187</sup> thus resting their claim essentially on the *Corfu Channel* Judgment, the Geneva Conference, while retaining this, added the further principle that there shall be "no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and . . . the territorial sea of a foreign State." This is a simpler way to the same port. It has the advantage which, particularly in the case of the Gulf of Aqaba, should not be overlooked, of rendering unnecessary proof of the affirmation or fact that the Gulf "comprehends international waters," about which there was some uncertainty in the International Law Commission.<sup>188</sup>

Should exception be taken to the validity of the principle formulated by the Geneva Conference, then the right of passage would rest, as it did before, solidly on the fact that the Straits of Tiran connect with a gulf or bay the coasts of which are under the sovereignty of several states. Such gulfs or bays have traditionally had the character of open seas, and under international law, if not under the holding in the *Corfu Channel* Case, there is a right of innocent passage through such straits to such bays or gulfs.<sup>189</sup>

<sup>186</sup> Philip C. Jessup, "The Geneva Conference on the Law of the Sea: A Study in International Law-Making," 52 A.J.I.L. 730-733, at 732 (1958): "The debates in the Conference would naturally contribute further evidence of what states consider to be 'a general practice accepted as law'."

<sup>187</sup> Cf. U. S. Aide-Mémoire, p. 576 above. <sup>188</sup> Cf. p. 572 above.

<sup>189</sup> Gidel, note 49 above, at p. 601, affirms the right of innocent passage to the different littoral states situated on a bay. Concerning passage through straits connecting with such a bay, he says: "À partir du moment où plusieurs riverains se partagent les côtes de cette mer, celui qui détient l'entrée a, en vertu du droit international, et à moins de limitation de régimes conventionnels spéciaux, l'obligation de laisser les Etats tiers passer par cette entrée. Il paraît devoir en être de même dans le cas d'une baie. . . . On ne doit pas facilement présumer pour des espaces maritimes la condition d'eaux 'intérieures,' puisque le passage inoffensif peut n'y être pas accordé par l'Etat riverain." *Ibid.* at 603. See also the statement by the delegate of The Netherlands, p. 587 above.

## DISCOVERY BY INTERVENTION: THE RIGHT OF A STATE TO SEIZE EVIDENCE LOCATED WITHIN THE TERRITORY OF THE RESPONDENT STATE

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Do states possess the right to seize evidence located within the territory of another, by forcible measures if necessary, if the object of this action is to procure the best evidence and thereby facilitate the task of an international tribunal in the decision of a dispute brought before it? In other words do states have the right to obtain discovery of evidence by intervention? This was one of the questions which the International Court of Justice was called upon to decide in the *Corfu Channel Case*.

Before examining the verdict of the Court let us recall what is generally understood by the term "discovery of evidence" and the usual methods for obtaining such discovery. The term "discovery" is used to describe certain processes by which a party to a civil cause or matter is enabled to obtain from the opposite party answers on oath to questions as to the facts in dispute between them and to obtain information regarding, and production of, the documents relevant to the dispute, for the purpose of preparing for the trial of the cause and of obtaining judgment.<sup>1</sup>

The usual modes of discovery are three in number; namely, disclosure of the existence of documents, inspection of documents and interrogatories.

The purpose underlying discovery of evidence is to assist a party in proving its case by requiring the opposite party to disclose documents in its possession or control, or answer questions relevant to the matter in issue and thus furnish evidence which is actually helpful to the other party. In many countries courts can, by utilizing special procedures, compel parties to produce documents and other relevant evidence which the courts must take into account to arrive at the correct decision of the case.

### SITUATION IN THE INTERNATIONAL FIELD

To appreciate the position of international tribunals with regard to obtaining discovery of evidence, it is interesting to recall that in the early disputes falling for decision by the mixed arbitral tribunals or mixed commissions, as they were called, constituted under the Jay Treaty of 1794, namely, the Spanish Spoliation Mixed Commission (constituted under Article 21 of the Treaty between Spain and the United States of October 27, 1795) and the Mixed Commission under the Ghent Treaty (1814) and

<sup>1</sup> 12 Halsbury's Laws of England, Pt. I, p. 2 (3rd ed.).

others, the Commissioners, as a rule, were only authorized to admit in evidence the documentary and oral evidence presented by the parties themselves. As regards powers to call upon parties to produce evidence by disclosure of documents or by interrogatories, unless such powers were provided for in the *compromis* itself, the Commissioners had no authority to require the parties to comply with their directions in this regard unless the agents of the parties themselves agreed to such a course.

An important advance with respect to the powers exercisable by international tribunals over the parties during the conduct of cases and in the matter of production of evidence and related questions was registered by the provisions of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. By Article 44 of the 1899 Convention, the Tribunal was authorized to call upon the agents of the parties for the production of all papers, and could demand all necessary explanations. In case of a refusal by a party to comply with these requirements, the Tribunal could take note of this fact. Another provision, of some importance, was added to this in the Convention of 1907, which, besides re-incorporating the above provision (as Article 69), further obliged the states to

undertake to supply the tribunal as fully as they considered possible, with all the information required for deciding the case. (Article 75.)

The aim of these provisions was to enable international tribunals to exercise powers in this regard similar to those possessed by ordinary municipal tribunals. It was realized that, in the nature of international society, it was impossible to enable an international tribunal to get information by a process like *subpoena* of documents resorted to by many municipal courts, although in individual cases there are instances of even this power being given to an international tribunal (*e.g.*, the Convention of May 22, 1902, between the United States of America and Mexico in the Pious Fund Arbitration).<sup>2</sup> But when, in the *Norwegian Ships* Case, referred to arbitration under a special agreement in 1921, the Norwegian Minister, in negotiating the *compromis*, inserted in the draft an article providing that "each party shall, at the request of the other furnish promptly all records, documents or facts in its possession or control bearing upon the subject of the arbitration as such other party may consider necessary in the presentation of its case," the draft article provided that in ordinary judicial proceedings the other party is subject to *subpoena*. If arbitration is to be a successful method of adjusting international disputes, some such provision as this seems to be required as a substitute for the *subpoena* in ordinary judicial proceedings.<sup>3</sup>

The absence of any comparable powers vesting in international tribunals was remedied by indirect means, the tribunals being entitled to draw inferences in certain circumstances. Thus, where evidence, which would probably influence the decision of the tribunal, was peculiarly within the

<sup>2</sup> Scott, *Hague Court Reports*, p. 1.

<sup>3</sup> Quoted in C. M. Bishop's *International Arbitral Procedure* 42-43.

knowledge of the claimant or of the respondent government, the failure to produce it, unexplained, could be taken into account in reaching a decision.<sup>4</sup> Practice showed that the obligation to supply the tribunal as far as possible with all information required for the decision of the case was generally complied with by the agents. Occasionally it was found necessary to resort to the sanction laid down by the rule in the above-mentioned case: the drawing of an inference from the non-production of evidence peculiarly within the knowledge of one of the governments. In several instances, evidence presented by the claimant was held sufficient to establish the claim in view of the failure of the respondent government to introduce rebutting evidence.<sup>5</sup> The use of forcible measures by a state for establishing its case was, however, never previously contemplated.

Some further powers for international tribunals were conferred in the Statute of the Permanent Court of International Justice. By Article 50 the Court was given powers enabling it to obtain relevant information by entrusting "any individual, body, bureau, commission or other organization . . . with the task of carrying out an enquiry or giving an expert opinion." The World Court is authorized to "make all arrangements concerned with the taking of evidence" (Article 48) and can, "even before the hearing begins, call upon the agents to produce any document or to supply any explanations" (Article 49). Formal note can be taken of any refusal. This last provision is couched in nearly the same words as the corresponding provisions of the Hague Conventions, but its scope is enlarged by the addition of the words, "even before the hearing begins."

Nonetheless, it is not correct to infer that the International Court is now in a position to obtain all relevant information and documents from the parties. The Court can only request the parties. Rule 54, framed in pursuance of Article 49 of the Statute, provides:

The Court may request the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.

In case the parties do not comply with such a request, the Court shall take formal note of the refusal. This may lead, as noted above, to the Court raising an inference against that party. But this is not an inflexible rule. In the *Corfu Channel* Case itself no adverse inference was raised, despite the fact that the Court formally requested the Agent of the United Kingdom, under the above provisions, to produce the documents referred to as XCU<sup>6</sup> for the use of the Court. These documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined

<sup>4</sup> U. S. A. (William A. Parker) v. United Mexican States, 4 U.N. Reports of Arbitral Awards; 21 A.J.I.L. 174 (1927).

<sup>5</sup> U. S. A. (Edgar A. Hatton) v. United Mexican States, 4 U.N. Rep. of Arb. Awards 239; U. S. A. (L. J. Kalklosch) v. United Mexican States, *ibid.* 412; U. S. A. (Lillie S. Kling) v. United Mexican States, *ibid.* 575, 25 A.J.I.L. 367 (1931); Rép. française (Georges Pinson) v. Etats-Unis Mexicains, Jurisprudence de la Commission Franco-Mexicaine des Réclamations (1922-32) (Paris, A. Pedone, 1933).

<sup>6</sup> These were documents regarding orders given to the fleet effecting the passage through the Corfu Straits on Oct. 22, 1946, in case they were fired upon from the coast.

to answer questions relating to them. In its opinion, announced on April 9, 1949, it declared:

The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise. . . .<sup>7</sup>

#### OPERATION RETAIL—MINE-SWEEPING OPERATION

It was in this state of the law regarding discovery of evidence in international jurisprudence for the states choosing to submit their disputes to the jurisdiction of an international tribunal or were signatories of the optional clause of the Court's compulsory jurisdiction when, to quote Sir Hartley Shawcross, "in the quiet daylight of an autumn afternoon" on October 22, 1946, two of His Majesty's Warships, *Saumarez* and *Volage*, were struck by submarine mines in Albanian territorial waters with the result that 44 British sailors were killed and a large number gravely injured. Besides this loss to human life, serious damage was caused to the ships. What was the cause of the explosions? Who was responsible for this grave incident? These were naturally the questions that arose in the minds of the United Kingdom authorities. On November 12/13, 1946, the Royal Navy assembled a large naval force consisting of an aircraft carrier, cruisers and other war vessels, which entered Albanian territorial waters at 9 a.m. on November 13 and swept the Corfu Channel. This operation was called "Operation Retail." It was considered by Albania to be a deliberate violation of her territory and sovereignty and an act contrary to international law.

According to the United Kingdom the operation was one of extreme urgency, and it considered itself entitled to carry it out. In the proceedings before the International Court of Justice, one of the principal arguments in justification of the operation was that it was carried out to secure, as quickly as possible, the *corpora delicti* for fear they should be taken away without leaving traces. An intervention, in the territory of another state, which had for its object the obtaining of evidence in order to submit it to an international tribunal and thus facilitate its task was permissible, as a measure of self-help.

#### SOME FACTS

The question was thus posed for the first time as to whether action taken by a state in the territory of another with the purpose of obtaining and preserving evidence is justifiable under international law. Unfortunately from the purely factual angle, it is doubtful if "Operation Retail" was undertaken for discovering and collecting evidence of Albania's delinquency. This plea was taken—and under the law the United Kingdom was fully competent to take such a plea—only after the conclusion of the Special Agreement on March 25, 1948, between the Agents of the United Kingdom and Albania, asking the Court to proceed to decide two questions

<sup>7</sup> Corfu Channel Case (Merits), [1949] I.C.J. Rep. 4, at 32; 43 A.J.I.L. 558, at 579 (1949).

regarding the incidents in the Corfu Channel. The second of these asked the Court to adjudicate on the legality of the United Kingdom operation of November 12/13, 1946, under international law.

The following facts appear to show that the plea taken by the United Kingdom before the International Court of Justice for its action of November 12/13 was an afterthought. The first communication regarding the subject is the note of the United Kingdom sent to the Albanian authorities on October 26, 1946. The note stated that "in view of the serious accidents which recently occurred to two of His Majesty's ships passing through the Corfu Channel . . . British mining authorities will shortly sweep the Channel." In the meeting of the International Board on the Post War Mine Clearance in European Waters held on October 31, 1946, the view expressed by the British representative was only to the effect that, inasmuch as the channel was an international waterway, it was desirable that it be swept. With this view the representatives of France, the United States, and the U.S.S.R. on the Board agreed, the last insisting that Albania's consent to the sweeping of the channel be obtained before it was swept and it was unanimously agreed that this should be done at a "favourable opportunity," which expression was intended to mean "that all conditions were generally acceptable, including no objection by Albania."<sup>8</sup> Finally, in the letter of November 10, 1946, sent by the United Kingdom Government to Albania communicating to her the decision to sweep the channel, the only reason mentioned was that this was necessary in order to remove a "serious menace to international navigation." On November 13, "Operation Retail" was carried out.

Even after the mine-sweeping operation, in the Security Council debates on this subject, the United Kingdom representative did not contend that "Operation Retail" was undertaken for the purpose of collecting and preserving evidence before it disappeared. On the other hand, the impression sought to be created was that "Operation Retail" had been carried out under the recommendation of the International Board. An author of a standard textbook, revising his work for a new edition during that period, commenting on the Corfu Channel incidents in the light of the Security Council debates, describes the British action of November 12/13 as having been undertaken in pursuance of the decision of the International Mine-sweeping Commission.<sup>9</sup>

It was in the Memorial submitted to the Court by the United Kingdom on September 30, 1947, that the matter was alluded to for the first time in another strain. In paragraph 19 of the Memorial it was stated:

The nature of the explosions and the extent of the damage were such as to indicate that they were caused by mines. It was urgently necessary to ascertain the cause of the explosions and, if caused by mines, what mines they were—whether they were moored or not and how they came to be in a channel which had for two years been clear. . . .<sup>10</sup>

<sup>8</sup> Annex 15 to United Kingdom Memorial, pp. 103, 104.

<sup>9</sup> Charles G. Fenwick, *International Law* (3rd ed., 1948).

<sup>10</sup> The Corfu Channel Case, Pleadings, Oral Arguments, Documents, Vol. I, p. 25.



Whether these words can be construed as laying the foundation for the argument ultimately presented that "Operation Retail" was carried out for the purpose of collection and preservation of evidence, is debatable, and it was only in the reply filed by the United Kingdom Government to Albania's counter-memorial on September 30, 1948, some four months after the Special Agreement with regard to the question to be determined by the Court, that this plea was clearly spelled out in all its amplitude for the first time.

From the above facts it would appear that this plea was taken as a legal defense to justify the infringement of Albanian territorial sovereignty—a defense which it was undoubtedly open to the United Kingdom Government to put forward; but from the purely factual angle it appears that "Operation Retail" was ordered, as the earliest letters indicated, "in view of the serious accidents" and the anxiety to clear the channel, whether Albania agreed to it or not, and not merely to obtain and preserve evidence of Albania's delinquency.

#### THE UNITED KINGDOM CASE

Coming to the United Kingdom plea itself, that under modern international law states possess the right to use forcible measures, by way of self-help, for remedying an antecedent wrong committed against them, if the measures taken by them are in the interest of the international community and calculated to advance the cause of international justice, there is no doubt that the plea presented by the United Kingdom posed for determination by the Court the very important question as to how far forcible measures can still be exercised by states in the face of the provisions of the United Nations Charter.

Down to the eve of World War I, international law continued to recognize as legal the practice of states of taking certain enforcement procedures by themselves for coercing other members of the society of nations to live up to their obligations. In the absence of a proper international organization, self-help by the state itself was recognized as a means of obtaining redress or reparation. If a state defied international law and committed a wrong, the state wronged resorted to self-help to secure fulfillment of the duties which the law-breaking state owed to it. Even after the establishment of the League of Nations, at least until the Pact of Paris (1928), the use of forcible measures by a state to redress what it itself considered to be a wrong was considered possible in certain circumstances.

In 1923, following the murder of certain Italian officers engaged in an official expedition on the Greek border, the Italian Government, not being satisfied with the reply of Greece to its ultimatum, bombarded and seized the Island of Corfu, evacuating it only after over a month's occupation. Despite the use of such extreme measures of force to obtain satisfaction for what Italy considered an international wrong, a legal committee of the League of Nations did not find it possible to hold such measures to be contrary to international law. It expressed the opinion that the legality of such measures depended on the particular circumstances of each case, and

left it to the Council of the League to determine in each case the issue after the fact.<sup>11</sup>

Question IV. Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?

Answer to Question IV: Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.<sup>12</sup>

In the *Nautilaa* Case, decided in 1928 by the German-Portuguese Arbitral Tribunal, the use of force as a measure of self-help was considered legal if certain conditions were fulfilled, namely, " . . . if its object was to impose on the offending State [which was responsible for the previous act contrary to international law] reparation for the offence, the return to legality or the avoidance of new offences." <sup>13</sup>

The Pact of Paris or the General Treaty for the Renunciation of War, 1928, for the first time made the use of force by states illegal. By Article 2 the "High Contracting Powers" agreed

that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means.

This prohibition is reaffirmed in the Charter of the United Nations, which declares that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. (Paragraph 4 of Article 2.)

It is in the light of these considerations that the United Kingdom plea of self-help in the *Corfu Channel* Case is to be viewed.

#### THE PLEA OF SELF-HELP IN OPERATION RETAIL

When the United Kingdom Government ordered its mine-sweepers to sweep the Albanian territorial waters on November 12/13, 1946, to redress the international wrong of Albania in not notifying to the world the existence of mines in its territorial waters, the traditional remedy of self-help was being utilized by the United Kingdom. The nature of the self-help, it was said, was merely the abatement of an international nuisance and the collection and preservation of evidence of the delinquency preparatory to the submission of the grievance to the appropriate international organ.

<sup>11</sup> Report of the Special Committee of Jurists.

<sup>12</sup> League of Nations Official Journal, 1924, p. 524; 18 A.J.I.L. 537 (1924). The report was adopted by the Council. League of Nations Official Journal, 1924, p. 527.

<sup>13</sup> 2 U.N. Reports of Arbitral Awards 1011, at 1025-1026.

Self-help for such a limited purpose, it was contended, was still valid under modern international law, and the Court was urged to sanction such a limited right.

The reasons advanced for the recognition of such a limited and narrow right of self-help were the classic reasons heretofore invoked by states to justify the right of self-help with due regard to the actual stage of the development and organization of the international community. International law, it was recalled, could not yet be regarded as a fully developed system of law either with respect to the certainty of its principles or more particularly with respect to the machinery for enforcing the law. International law, it was emphasized, still recognized and had to recognize a larger measure of self-help than municipal law needed to recognize, for in proportion as the machinery of justice and police was deficient, self-help had to be given a larger scope.

In the instant case, since Albania was not subject to the compulsory jurisdiction of the International Court of Justice, not having accepted the Optional Clause of the Court's jurisdiction, interim measures of protection could not have been sought from the Court, while a reference to the Security Council would have involved delay and probably produced nothing but a veto. Meanwhile, the newly-laid mines, the evidence of Albanian guilt, might have disappeared either because they had special sinking devices or had been swept up by those who laid them. In these circumstances the United Kingdom maintained that a state must be allowed a strictly limited right of self-help, and the legal principle which it requested the Court to approve was couched in the following words:

When State A has suffered damage and State A had good reason to suspect that State B has committed against it a serious offence—an illegality under international law—and State A wishes to bring that offence before the appropriate international organization, if the evidence justifies its suspicion, State A may take action—which in other circumstances would be an infringement of the rights of State B to investigate the cause of the loss and to preserve evidence if it is found—if State A has good reason to think that, if it does not do this, State B will cause evidence to disappear, always provided that the action is not disproportionate to the suspected offence.<sup>14</sup>

Dealing with the objection that such a principle would operate only for the benefit of the powerful states against weak ones, it was said that the position was very similar to that in domestic law, where the right of a householder to use reasonable force as a measure of self-help to expel a trespasser was recognized, even though such a right was of greater benefit to a strong young man than to a weak old woman.<sup>15</sup> It was also urged that for exercising such a right it would not be necessary to assemble big naval

<sup>14</sup> Sir Eric Beckett, *Corfu Channel Case*, Oral Arguments, p. 579.

<sup>15</sup> Under the *Code Civile Suisse* the following interesting provision exists: "Celui qui recourt à la force pour protéger ses droits ne doit aucune réparation, si d'après les circonstances, l'intervention de l'autorité ne pouvait être obtenue en temps utile et s'il n'existait pas d'autre moyen d'empêcher que ces droits ne fussent perdus ou que l'exercice n'en fût rendu beaucoup plus difficile." Art. 52, *Code des Obligations*.

forces in all the cases which might arise. The object might be achieved by simply detaining a single ship or aircraft in circumstances or in a place where it would otherwise be unlawful to detain them.

As for the contention that the right to exercise forcible measures had disappeared since the adoption of the United Nations Charter, which required all Members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations (paragraph 4 of Article 2), it was conceded that the right of self-help had been restricted and controlled by the provisions of the Charter, but it was argued that, in a case of this kind where neither the political independence nor the territorial integrity of Albania was threatened, the circumstances demonstrated that a properly limited right of self-help was indispensable even under modern international law, because a recourse to the appropriate organ of the United Nations might be rendered nugatory if the evidence were not available for it to judge the issue. It was therefore still necessary and appropriate for states, provided they acted within the spirit of the Charter, to take steps to collect and preserve evidence for submission before an international organ to facilitate its task.

#### THE COURT'S ANSWER

The Court unanimously rejected this thesis. It did not accept the United Kingdom Government argument that a state had the right of self-help, under modern international law, to intervene in the territory of another state, if the purpose of the intervention was to secure possession of evidence in the territory of that state, in order to submit it to an international tribunal and facilitate its task. The majority opinion did not expressly refer to the plea of self-help raised in this connection by the United Kingdom Government, which it merely described as a new and special application of the theory of intervention and declared:

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.<sup>16</sup>

The plea of "self-help" was discussed by the Court in the subsequent paragraph as if it had been invoked only in connection with the other argument utilized by the United Kingdom Government in justification for its "Operation Retail," namely, that a mine-field obstructing the right of passage in an international strait was an international "nuisance" which an interested state was entitled to remedy, even in territorial waters, if the coastal state declined to take any steps itself. The Court said:

<sup>16</sup> *Corfu Channel Case (Merits)*, [1949] I.C.J. Rep. 35.

The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.<sup>17</sup>

In actual fact, of course, the Agent for the United Kingdom Government, in his speech in reply, had pleaded the right of self-help in connection with the first argument as well as with the latter.

The other members of the Court, in their dissenting opinions, agreed with the conclusions of the majority opinion and made supplementary observations while dismissing the United Kingdom Government plea of such a right of self-help. Judge Krylov expressed his views in the following words:

It may be said that international law is unanimous in condemning the "right" of intervention in any forms in which this alleged right may be exercised.

. . . . .

In defending the unilateral action of the United Kingdom, its Counsel invoked the alleged right of self-help. He argued that Great Britain merely wished to collect evidence that mines had been laid; in other words, it was a judicial police operation. He tried to convince the Court that this was a unique and unprecedented case and that Great Britain had no choice but to exercise the right of self-protection, confined to what was strictly necessary.

The Court was unable to accept this argument. The claim to exercise judicial action in the territory of another State is inadmissible because it violates the sovereignty of the State in question. Memory recalls the Austro-Hungarian claim in 1914, before the outbreak of the first World War, to participate in a criminal prosecution which had been opened in Serbian territory. As is known, public opinion throughout the world declared its opposition to this exorbitant claim which violated the sovereignty of another State.

It should be observed that the British argument on this point, *i.e.*, their defence of the alleged right of self-help—which is nothing else but intervention—relies on assertions which have already been outstripped by the further development of international law, especially since the ratification of the Charter of the United Nations.<sup>18</sup>

Judge Azevedo, discussing the United Kingdom Government's arguments, made the following observations:

. . . the main object of the United Kingdom is clearly defined in the Reply: collection of evidence, to ascertain the cause of the explosions and to reveal the guilty parties.

On the other hand, it was feared that any measure asked for from

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* 76.

the United Nations and decided on by that body would be ineffective and slow.

But none of these reasons could justify such a unilateral action. . . .

If international justice does not yet possess satisfactory machinery, the responsibility rests on the Powers, the majority of whom do not consider the moment arrived to invest the Court with compulsory jurisdiction.

The Court cannot be blamed for the limited means at its disposal, nor for provisions such as that which allows a State to refuse to produce a document [he is referring to the United Kingdom refusal], as has happened in the present case.

. . . the collection of evidence can never justify an act of intervention . . . such an act is repugnant to the letter and spirit of the San Francisco Charter.<sup>19</sup>

According to Judge *Ad Hoc* Ečer:

. . . "Operation Retail" was an intervention . . . in the police or legal sense. In reality, the British Navy substituted itself for the Albanian police or judicial authorities in performing an act which was a quasi-judicial or police enquiry in Albanian territorial waters—i.e., an act strictly prohibited by international law.

I think further that the Judgment should mention, amongst the arguments for its decision, the provisions of the United Nations Charter, in particular, Article 2, paragraph 4, and Article 42.<sup>20</sup>

There is no doubt that the plea of the United Kingdom Government of a limited right of self-help was rightly rejected. Reading the United Nations Charter as a whole, as Professor Jessup has remarked,

it is impossible to escape the conclusion that the Organization is responsible for the substitution of collective measures of self-help which were legalized by international law before the world community was organized.<sup>21</sup>

The Charter of the United Nations has prohibited the use of force, and the use of force as an instrument of legal self-help has been restricted under that Charter to the special case of self-defense, to be exercised only against an "armed attack."<sup>22</sup>

Unless "Operation Retail" could be shown as having been undertaken in self-defense—a task which was never even attempted in view of the fact that the operation was not undertaken until three weeks after the mining of the ships—the exercise of forcible measures in Albanian territory without her consent, whatever the justification, was inconsistent with the provisions of the Charter. Given the question, in the Special Agreement, for the Court to answer, namely, whether the United Kingdom had "under inter-

<sup>19</sup> *Ibid.* 111, 112.

<sup>20</sup> *Ibid.* 130.

<sup>21</sup> Jessup, *A Modern Law of Nations* (1950).

<sup>22</sup> R. W. Tucker, "The Interpretation of War under Present International Law," 4 *Int. Law Q.* 32 (1951).

national law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian Waters . . . on the 12th and 13th November 1946 . . . ,” the answer of the Court had inevitably to be that Albanian sovereignty had been violated, and this even the United Kingdom Counsel admitted. Their argument that they had “acted outside their ordinary rights” presupposed that they admitted that this action was an infringement of the rights of Albania, but contended that a limited right of self-help, such as the action taken by them, was still available under international law. Apart from the fact that such a right of self-help would never be attempted where the parties were of nearly equal strength,<sup>23</sup> the notion that a coercing state should be the plaintiff, the investigator and the judge at one and the same time is a sheer defiance of principles of justice, and the recognition of such a right might result in the confusion of law with vengeance. It is true that no effective machinery for the redress of international wrongs by collective enforcement measures exists to back up the United Nations Charter, and in view of this weakness in the international system, some infringements on the sovereignty of other states may in certain special circumstances be regarded as normally excusable, but such measures cannot, in the face of the express terms of the Charter, be upheld as legal by a court of international justice. Self-help, involving use of force unilaterally by one state, cannot under modern international law be pleaded as a legal remedy.

#### THE RELIANCE BY THE COURT ON THE EVIDENCE SEIZED BY FORCE

Despite the fact that the Court declared that the United Kingdom “Operation Retail” was a violation of Albanian sovereignty, the facts discovered as a result of it were duly relied upon. In fact the evidence discovered by “Operation Retail” was of capital importance. As a result of this it was established: (1) that the mines striking the British warships on October 22 were moored contact mines of the GY type; (2) that these mines had been recently laid; (3) that they were laid in Albanian territorial waters and in the exact spot where the British ships were blown up on October 22 and were of the same type as those which struck the British ships on that day; (4) that it was thus clear that the explosions on October 22 were due to the mines belonging to the mine-field discovered by “Operation Retail.” In short, “Operation Retail” brought to light conclusive evidence both with regard to the place of the accident and the nature of the mines causing the same, establishing in consequence the fact that these were the same mines

<sup>23</sup> This is very well demonstrated by the Hungarian situation, where even a United Nations Special Committee, entrusted with the function of investigating the charges as to whether the intervention in Hungary of the U.S.S.R. was illegal and if the latter state had committed acts contrary to international law against the Hungarian people as the *prima facie* evidence suggested, did not enter Hungary to investigate the nature of the delinquency, but requested the permission of Hungarian authorities to enter that country for this purpose, and on being refused permission, submitted a report (General Assembly, 11th Sess., Official Records, Supp. No. 18 (A/3592)) with whatever evidence was available outside Hungary.

that struck the British ships on October 22. Both these facts and the conclusion to be drawn therefrom were fully accepted by the Court.<sup>24</sup>

In fact the eventual finding of the Court that Albania's responsibility was engaged under international law for the explosion of October 22, 1946, and the losses resulting therefrom, was to a very large degree determined by this evidence. After the Court had been satisfied about the exact spot where the mines had been laid it could thereafter, by relying on circumstantial evidence, such as the circumstance that mine-laying could be observed from the Albanian coast, coupled with the circumstance that the attitude of Albania both before and after the disaster indicated that she had knowledge of the mine-laying, hold Albania responsible under international law.

Nevertheless, as seen above, the "Operation Retail" conducted by the United Kingdom within Albanian territorial waters and against her will, was declared by the Court to be an act contrary to international law. It has, in consequence, been suggested in a recent work<sup>25</sup> that, if Albania had offered the plea that the Court should not have permitted the introduction of evidence seized by the United Kingdom Government by an act contrary to international law, it might have prevented the Court from relying on this evidence. This argument is based on analogy to some systems of municipal law, where evidence obtained by unlawful search and seizure is not permitted to be introduced to incriminate the wrongdoer. Actually this view is inspired by some decisions of the United States Supreme Court and other United States courts, which in turn are based on the interpretation of the Fourth and Fifth Amendments to the United States Constitution.

The reason for excluding evidence obtained by illegal searches and seizures is well summarized by Carroll, C. J., in *Youman v. Commonwealth*:

Will a High Court of the State say in effect to one of its officers that the Constitution of the State prohibits a search of the premises of a person without a search warrant, but if you can obtain evidence against the accused by doing so you may go to his premises, break open the doors of his house, and search it in his absence; or over his protest, if present, and this Court will permit the evidence so secured to go to the jury to secure his conviction?

It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that Courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished.<sup>26</sup>

This view, however, is actually not even accepted by the majority of the States in the United States of America. The Federal Constitution leaves the States free to adopt the rule that evidence is not inadmissible merely because it was obtained by an illegal search and seizure. In practice the position (until recently) was that 21 States followed the exclusionary rules,

<sup>24</sup> Corfu Channel Case (Merits), [1949] I.C.J. Rep. 14, 15.

<sup>25</sup> A. V. W. Thomas and A. J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas* 136 (1956).

<sup>26</sup> 189 Ky. 152, 224 S.W. 860 (1920).



namely, California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming. On the other hand the rule of admissibility of evidence obtained by illegal search and seizure is followed without qualifications in 25 States, i.e., Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont and Virginia. In Alabama and Maryland the question is regulated by statute.

One of the best expositions of the other view is to be found in the opinion in *People v. Mayen*:

The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of the iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged in the trial of criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possession of the goods wrongfully taken.<sup>27</sup>

The position of the Federal courts is also far from clear. In a recent decision the United States Supreme Court was of the opinion that the policy of the Federal Rules of Criminal Procedure governing searches and seizures is defeated if a Federal officer can use the fruits of an unlawful search either in a Federal or State proceeding.<sup>28</sup>

Wigmore, in his standard work on evidence,<sup>29</sup> is firmly of the view that admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence, and this was the rule universally followed in the United States until what Wigmore describes as the "ill starred" majority opinion of *Boyd v. United States* in 1885<sup>30</sup> which reversed this rule. However, this doctrine was virtually repudiated by the United States Supreme Court in *Adams v. New York*,<sup>31</sup> but in *Weeks v. United States*<sup>32</sup> the rule of *Boyd v. United States* was again

<sup>27</sup> Sloane, J., in *People v. Mayen*, 188 Cal. 237, 205 Pac. 435: The return of articles found under an invalid search warrant on a charge of larceny had been wrongfully refused and the articles were afterwards used in evidence.

<sup>28</sup> *Rea v. United States*, 359 U. S. 214 (1956); but see also *Stefanelli v. Minard*, 342 U. S. 117 (1951), and *Wolf v. Colorado*, 338 U. S. 257 (1949).

<sup>29</sup> A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 8, p. 5 (3rd ed.).

<sup>30</sup> 116 U. S. 616.

<sup>31</sup> 192 U. S. 585.

<sup>32</sup> 232 U. S. 383.

adopted with the condition that the illegality of the search and seizure should at first have been directly litigated and established by a motion, made before the trial, for the return of the things seized; so that, after such a motion, and then only, the illegality would be noticed in the main trial and the evidence thus obtained would be excluded. The position of the various State and Federal courts since then in this regard has already been noticed, from which survey it is evident that the courts in the United States are far from unanimous as to the question of exclusion of evidence as a result of illegal searches and seizures.

On the other hand, nearly all other systems of law admit such evidence. In the United Kingdom, the Privy Council, after surveying Anglo-American law on the subject, concluded:

the test to be applied, both in civil and criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained.<sup>33</sup>

The same view is held by the courts of the Commonwealth countries.<sup>34</sup>

The same rule is followed by civil law countries. The reason why illegal searches and seizures is condemned is that such a process is violative of a person's right to privacy and free enjoyment of his liberty in his home. But the reason for admitting relevant evidence discovered as a result of a trespass or illegal search is also quite clear. A person standing trial for an offense cannot be heard to say that, because the evidence establishing his guilt has been obtained without proper authorization and as a result of the violation of his privacy, it should be excluded. His remedy for violation of privacy is in a separate proceeding for damages or other appropriate recompense for the invasion of his private rights, and not the exclusion of the incriminating evidence in the trial that he is facing for his misconduct.

In consequence, if the International Court of Justice had been asked to exclude the evidence obtained through "Operation Retail," the analogy of municipal law systems would certainly have been on the side of admitting the evidence. The Court actually appears to have followed the rule of the overwhelming majority of private law courts in this regard. The evidence discovered as a result of "Operation Retail," being relevant to the matters in issue, was duly admitted. In view of Albania's counterclaim of violation of her sovereignty, which raised a different issue, she was awarded the satisfaction due to her, namely, a declaration by the Court that the action of the Royal Navy constituted a violation of Albania's sovereignty.

Apart from this, the Statute of the International Court of Justice gives extensive powers to the Court in matters regarding admissibility of evidence,

<sup>33</sup> *Kuruma v. R.*, [1955] A.C. 197.

<sup>34</sup> *Australia*: *Miller v. Noblet*, (1927) SASR 385; *Canada*: *Rex v. Durosel*, 41 Manitoba L. 15 (1933); *Regina v. Doyle*, 12 Ont. R. 347; *Rex v. Kostachut*, 24 Sask. L. 485; *England*: *Elias v. Pasmore*, [1934] 2 K.B. 164; *India*: *Ali Ahmed Khan v. Emperor*, 81 I.C. 615; *Baldeo v. Emperor*, 142 I.C. 639 (Cal.); *Bang. (Burma)*: *Ohwa Hum Htive v. Emperor*, 143 I.C. 834; *Scotland*: *Hodgson v. Macpherson*, 193 S.C. (g) 68; *Pakistan*: *The Crown v. Muhammad Siddique*, 1955 P.L.R. 695 (Lahore).

and in practice the World Court has assumed even wider discretionary powers in this regard.<sup>35</sup>

In view of the above, it does not seem at all likely that Albania could have successfully demanded the exclusion as inadmissible of the evidence discovered and seized by forcible measures from within its territory by "Operation Retail."

#### A POSSIBLE LEGAL WAY OF SECURING EVIDENCE?

We have already noted that the International Court of Justice has held that intervention by one state in the territory of another for the purpose of securing evidence for submission to an international tribunal is a violation of international law. Would the findings of the Court have been different if the United Kingdom, instead of ordering the forcible measures of sweeping the channel to discover the evidence of the delinquency, had attempted to discover it by merely sending some vessels equipped with mine-detecting apparatus and other scientific devices which could have detected such evidence, and had placed the information thus obtained before the Court? There is no doubt that the protests made by Albania against the show of force by the United Kingdom in carrying out "Operation Retail" in its territorial waters would not have been so vociferous if the clandestine method suggested above had been followed. But the question would still be whether under international law such an action could be considered legal.

There is little doubt that efforts to secure evidence by resorting to devices which amount to making an investigation or a police enquiry in the territorial waters of a foreign state, if done without the consent of the state concerned, are not included in the rights possessed by states to innocent passage within the territorial waters of another. From the legal point of view, therefore, even such an action would have constituted an infringement of Albania's sovereignty and would not have been regarded as permissible under international law. Besides, it is extremely doubtful if the evidence thus collected would have been sufficient to successfully establish Albania's international responsibility for the loss of British lives and the damage caused by the mining of her ships on October 22, 1946.

The measures undertaken by the United Kingdom Government to prevent the delinquency from going unpunished, as observed above, were adjudged as violative of Albania's sovereignty; without those measures the international wrong was likely to have gone unredressed. Nevertheless, unilateral measures by one state which involve the use of force, even if these are taken with a view to redressing an international delinquency were held not permissible under international law. What is a state expected to do in such circumstances?

Without trying to answer the question of what an aggrieved state should do in such circumstances, and confining our attention to the limited point under discussion, namely, whether the international responsibility of a state

<sup>35</sup> Oscar Chinn Case, P.C.I.J., Series A/B, No. 63, p. 46; Palmas Case, Rec., p. 20 (1928).

can be engaged without obtaining discovery of evidence by intervention, our answer is in the affirmative. As seen in the earlier part of this discussion, international tribunals have constantly been confronted with the situation of important evidence regarding a dispute being in the possession of one government but needed for establishing the case of the other, which evidence the government possessing it failed to produce. The tribunals in these circumstances enunciated generally satisfactory principles to do justice in the cases before them.

Moreover, a state is responsible to other states for what happens within the territory under its jurisdiction, and the Court cannot and does not expect the government of an injured state to produce direct evidence of the delinquency occurring in the respondent state. Even in the *Corfu Channel* Case this principle was recognized by the Court. It said that "by reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility," and the solution proposed was that

the State, in which the breach of international law occurred may be called upon to give an explanation which cannot be evaded by a mere denial and in fact it must up to a certain point supply particulars of the use made by it of the means of information and inquiry at its disposal and the injured State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.<sup>36</sup>

As already observed, the Statute of the International Court of Justice authorizes the Court to call upon agents to produce any document or to supply any explanation, which may be done even before the hearing begins.<sup>37</sup> Provisional measures to preserve the respective rights of either party can also be indicated by the Court.<sup>38</sup> The Court may also send commissions of inquiry or experts on the spot to ascertain facts in dispute between the parties. These powers are generally wide enough to enable the International Court of Justice to obtain the evidence necessary to decide a case. Considering all the aspects, if a case is to be settled by the Court, it is better to rely on indirect evidence rather than on direct evidence which can be obtained only through forcible violation of the sovereignty of a state.

Under Article 49 of the Statute of the Court, a party may refuse to comply with the Court's request for production of any document and the penalty provided is that the Court shall take formal note of such refusal. It is true that at the Hague Peace Conferences, states were not prepared to accept the Russian draft article to a corresponding provision of the Hague Convention of 1899 (Article 44), which had provided that the Court could require from the agents of the parties the production of any document and to obtain any explanation that it considered necessary. The draft article was considered unrealistic as it did not take into account the legitimate cases of refusal by states in the public interest. It is suggested that the article be amended so as to allow full explanation by the state of its refusal to produce a document which it is called upon to produce, and if,

<sup>36</sup> The *Corfu Channel* Case (Merits), [1949] I.C.J. Rep. 18.

<sup>37</sup> Art. 49.

<sup>38</sup> Art. 41.

after consideration of the reasons urged by that party, the Court considers that the documents should be produced, that party would then be obligated to produce it only for the perusal of the Court. Such an amendment may be more easily acceptable to states than the creation of an international investigating authority suggested by Mr. Pierre Cot.<sup>39</sup>

#### CONCLUSION

The Court unanimously—a rare phenomenon—rejected the right of self-help as a legal remedy in international law for collecting and preserving evidence. But did the judgment outlaw self-help as a legal remedy altogether? Certain eminent writers are of the view that, despite what they term the somewhat general language used by the Court, the observations of the Court could be confined merely to rejecting the right of self-help for the purpose of discovery of evidence, and self-help might still be regarded as legal in some circumstances.<sup>40</sup> It is submitted that the learned authors, in their anxiety to retain the right of self-help for states till such time as the systems of pacific settlement of international disputes and of collective security established by the Charter can be rendered effective, read into the declaration of the Court an interpretation that it cannot bear. The majority opinion was that the United Kingdom "Operation Retail" was a manifestation of a policy of force, and the other judges in their individual opinions expressly referred to the provisions of Article 2, paragraph 4, of the Charter, which forbids the use of force by one state in its relations with another state. The use of force as an instrument of legal self-help, we have seen earlier, is now restricted to the special case of self-defense as envisaged by Article 51 of the Charter and in no other circumstance. In any case discovery of evidence by intervention is not a method that is admissible in international law.

<sup>39</sup> The Corfu Channel Case, Oral Proceedings, Vol. IV, p. 679.

<sup>40</sup> Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law," 27 Brit. Yr. Bk. of Int. Law 5 (1950); Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); 1 Oppenheim-Lauterpacht, *International Law* 311 (8th ed., 1955); Thomas and Thomas, *op. cit.* 137.

## THE POSTWAR ALLIANCES OF POLAND AND THE UNITED NATIONS CHARTER

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After the second World War Poland concluded six bilateral treaties of alliance and became party to one multilateral treaty of alliance. The bilateral treaties are treaties of friendship and mutual assistance signed with the Soviet Union,<sup>1</sup> Yugoslavia,<sup>2</sup> Czechoslovakia,<sup>3</sup> Bulgaria,<sup>4</sup> Hungary<sup>5</sup> and Rumania.<sup>6</sup> The multilateral alliance is the Warsaw Treaty of Friendship, Co-operation and Mutual Assistance, signed by Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Rumania and the Soviet Union.<sup>7</sup>

In the following pages an effort has been made to analyze the provisions in these alliances which indicate the conditions under which the parties bind themselves to give each other military assistance. The stipulations concerning this assistance are viewed against the background of those articles in the United Nations Charter which describe the circumstances in which the Members may legally use physical force independently of the Organization. Though limited to the alliances to which Poland is a party, the explanations contained in this paper may be considered as being valid for the whole of the Eastern European security system, since the relevant provisions in the

<sup>1</sup> Signed in Moscow April 21, 1945, 12 U.N. Treaty Series 391 (cited hereafter as U.N.T.S.). For a short analysis of the legal aspects of Poland's bilateral alliances see Kłafkowski, Skubiszewski, Wiewióra, *Umowy międzynarodowe w świetle Konstytucji Polskiej Rzeczypospolitej Ludowej. Zagadnienia wybrane*, 2 *Zagadnienia prawne Konstytucji Polskiej Rzeczypospolitej Ludowej* 540 (1954).

<sup>2</sup> Signed in Warsaw March 18, 1946, 1 U.N.T.S. 53. In its note of Sept. 8, 1949, the Polish Government declared that the treaty with Yugoslavia "had been destroyed" as the result of certain facts the responsibility for which has been attributed in this note to Yugoslavia, *Zbiór Dokumentów* 769, 775 (1949). In the note of Sept. 30, 1949, the Polish Government stated that this treaty ceased to be binding, *ibid.* at 777, 778. At that time both parties considered their treaties as dissolved, although they disagreed as to who was responsible for the dissolution. At the time of writing, the parties had neither revived the old alliance nor concluded a new one. This paper deals with treaties which are in force and therefore we shall omit the treaty with Yugoslavia from our discussion.

<sup>3</sup> Signed in Warsaw March 10, 1947, 25 U.N.T.S. 231.

<sup>4</sup> Signed in Warsaw May 29, 1948, 26 U.N.T.S. 213.

<sup>5</sup> Signed in Warsaw June 18, 1948, 25 U.N.T.S. 319.

<sup>6</sup> Signed in Bucharest Jan. 26, 1949, 1 *Documents and State Papers* 684 (Dept. of State, 1948).

<sup>7</sup> Signed in Warsaw May 14, 1955; 49 A.J.I.L. Supp. 194 (1955). For a short discussion of this treaty see Lachs, "Le Traité de Varsovie du 14 Mai 1955," 1 *Annuaire Français de Droit International* 120 (1955); Gelberg, *Układ warszawski* (1957).

remaining alliances are to a large extent identical with those that are discussed below.

### 1. *Casus Foederis in the Bilateral Alliances of Poland*

All the bilateral treaties under examination brought into existence defensive alliances directed against Germany in case she should attack one of the parties, and against any other state associated with Germany in her possible aggressive action.

There are very small differences between the wording in some of the treaties as far as this *casus foederis* is concerned. In the treaty with the Soviet Union the parties are pledged to support each other by all the means at their disposal should either of them "be involved in hostilities with a Germany, which had renewed her policy of aggression, or with any other State which had joined Germany in such a war either directly or in any other way" (Article 4). The treaty with the Soviet Union was signed while hostilities against Germany were still in progress. That is why there are in this treaty provisions relating to the war alliance between Poland and the Soviet Union (Article 1) and the undertaking "not to conclude without each other's consent any armistice or peace treaty with the Hitlerite Government or any other authority in Germany violating or likely to violate the independence, territorial integrity or security of either High Contracting Party" (Article 5). It should be noted that these provisions were merely declaratory, as Poland and the Soviet Union were already parties to agreements imposing these obligations upon them (the two war agreements of 1941 between Poland and the Soviet Union<sup>8</sup> and the United Nations Declaration of 1942).

The formula used in the Polish-Czechoslovak treaty is slightly different. According to Article 3 of this treaty, assistance will be rendered "should either of the High Contracting Parties become involved in hostilities with Germany in consequence of her renewing her policy of aggression, or with any other State associated with Germany in such a policy." Article 2 of the treaty with Bulgaria speaks of "aggression by Germany or any other State which might be associated with Germany directly or in any other way." The treaty with Hungary employs a formula identical with that of the Czechoslovak instrument, but it refers to Germany "attempting to renew her policy of aggression" (Article 2). The Polish-Rumanian alliance provides for mutual help in the event of one of the parties "being involved in hostilities with Germany, should she seek to resume her aggressive policy, or with any other State that would directly or in any other form unite with Germany in a policy of aggression" (Article 2).

These are only differences in drafting, and it may be argued that they have no effect on the extent of the obligations of the parties. In spite of these differences the *casus foederis* remains the same in all the treaties discussed here. Although the term "policy of aggression" taken at its face value is more general than such terms as "aggression" or "attack," never-

<sup>8</sup> War and Peace Aims of the United Nations 854 and 361 (Holborn ed., 1948).

theless all these treaties are to be construed as requiring the parties to help one another only in case of an armed attack by Germany or her allies acting together with Germany. This, however, is not the only meaning which has been ascribed to the stipulations involved.<sup>9</sup>

The aim of the bilateral alliances concluded by Poland is to guarantee for herself support and help against any renewed aggression by Germany. The alliances might become the legal basis of a defensive action against another state only if that state were an ally of Germany, and then only on the condition that that state should join forces with Germany and participate in committing acts of aggression. In other words, the treaties under examination, their scope being limited, cannot be invoked against any aggression in which Germany does not take part. These treaties try to prevent Germany from repeating any wars of aggression in Eastern and Southeastern Europe. If any third state begins aggression, the defense against it on the basis of the treaties discussed here may be organized and enforced only in the case when it is an ally of Germany associated with her in an aggressive war. Hostilities on the part of those states which act independently of, and in no relation to, alliance with Germany, do not fall under the provisions of the bilateral treaties signed by Poland.<sup>10</sup>

The term "Germany" may now cause some difficulty as to its interpretation. It should be noted that all the treaties discussed here were concluded before the formation of two states on German territory—the Federal Republic of Germany and the German Democratic Republic. Neither of these is identical with the German state of 1945 (Deutsches Reich), which retained its international personality and statehood without interruption in spite of the far-reaching limitations that resulted from the fact that the four Occupying Powers assumed supreme authority with respect to Germany. But in 1949 two German states were created, neither of which may be considered as the sole successor of the German Reich. It seems that in

<sup>9</sup> Cf. Kulski, "The Soviet System of Collective Security Compared with the Western System," 44 A.J.I.L. 453, 460-461 (1950); Bowett, "Collective Self-Defense under the Charter of the United Nations," 32 Brit. Year Bk. of Int. Law 130, 143-144 (1955-1956).

<sup>10</sup> There are no grounds to see any "anti-Western meaning" in the formulas used by treaties of alliance concluded by Poland between 1945 and 1949. The opposite view is expressed by Kulski, note 9 above, at 456-459. In some of the agreements signed by the Balkan members of the system the *casus foederis* is worded more generally. Cf. Goure, "The Eastern European Bloc and the United Nations Charter," 3 Col. J. Int. Affairs 36, 37-38 (1949), and Howard, "The Soviet Alliance System and the Charter of the United Nations," 8 Commission to Study the Organization of Peace 65, 73, note 14. On the other hand a more limited formula has been used in the Soviet-Finnish alliance of April 6, 1948, 48 U.N.T.S. 149. Contrary to what Bowett writes, *loc. cit.* note 9 above, the *casus foederis* in this treaty is not typical in any sense, as it restricts Finland's duties to the case of military aggression (on the part of Germany or any state allied to the latter) committed "across the territory of Finland" (Art. 1, par. 1). Cf. Salvatorelli, "Formazione e caratteristiche del blocco orientale," 3 Comunità internazionale 397, 399-400 (1948), and Meissner, Das Ostpaktsystem Dokumentensammlung 19 (1955). As to the defensive character of the Eastern European alliances in general, see Berezowski, Umowy o pomocy wzajemnej i system bezpieczeństwa zbiorowego, Zagadnienie bezpieczeństwa zbiorowego 101, 129 (1955).



the political and legal circumstances before and after 1949 the term "Germany" used in the five postwar treaties of alliance concluded by Poland might have been construed as covering any German state, no matter what its name, geographical position or legal situation.

## 2. *Casus Foederis in the Warsaw Alliance*

The *casus foederis* in the Warsaw Treaty of 1955, to which Poland is a party, is formulated more broadly than in her postwar bilateral alliances. The parties to the Warsaw Treaty are obliged to come to each other's assistance "in the event of armed attack in Europe on one or more of the Parties to the Treaty by any State or group of States" (Article 4, paragraph 1). In this respect, but not necessarily in others, the Warsaw alliance follows the pattern of some other postwar collective defense agreements. Among the parties to the Warsaw Treaty are all the countries with which Poland, at the moment of signing, had binding bilateral alliances concluded in or after 1945, as well as two new allies, Albania and the German Democratic Republic. Faced with such a legal situation, one may ask whether the Warsaw Treaty did not replace the bilateral alliances. No provision in the Warsaw Treaty makes any reference to the bilateral alliances which the nations concerned might have concluded *inter se* before May 14, 1955. It seems that both systems of alliance, bilateral as well as multilateral, exist separately after that date, at least in law, if not in practice. The following two arguments substantiate this opinion.

As it has been pointed out above, the *casus foederis* in the Warsaw Treaty is formulated in a different way from that in the bilateral alliances discussed above. The event upon the occurrence of which the Warsaw Treaty creates the duty to render help is not identical with the *casus foederis* in Poland's bilateral treaties. The number of states against which action on the ground of the Warsaw Treaty might be undertaken is greater, at least theoretically, if not in fact. According to that treaty, these states are not limited to "Germany" and her allies, as is the case with Poland's bilateral treaties. The *casus foederis* in the Warsaw Treaty covers an unlimited number of states.

Besides the provisions concerning the *casus foederis*, there is another difference between the Warsaw Treaty and the bilateral texts which is also of importance as to their relationship.<sup>11</sup> The bilateral alliances were all concluded for the period of twenty years. After the expiration of this period, their binding force may be tacitly prolonged for further periods of five years. The Warsaw Treaty remains in force for twenty years, and after the lapse of this time it will for the next ten years regulate the reciprocal relations of those parties which do not give notice of denunciation (at least one year before the expiration of the twenty-year period, Article 11, paragraph 1). It should be noted that although the twenty-year period is repeated in each of the bilateral treaties, they were

<sup>11</sup> This paper is concerned only with those divergencies between the treaties under examination which are relevant to the question whether in Poland's international relations the multilateral alliance has replaced the bilateral alliances.

signed in different years, and thus this period will come to an end at different dates, *e.g.*, the Polish-Soviet Alliance was concluded more than ten years before the Warsaw Treaty was signed. But notwithstanding both the lapse of time and the dissolution by mutual consent, which may refer to the bilateral treaties as well, the Warsaw Treaty may also expire because of another reason. This treaty expressly stipulates that it shall cease to be operative from the day the General European Treaty of Collective Security enters into force (Article 11, paragraph 2). The occurrence of such a resolute condition will cause the expiration of the Warsaw Treaty, but it will not of itself automatically influence the binding force of Poland's bilateral alliances.

It is then evident that from the legal point of view the Warsaw Treaty has not replaced the bilateral agreements of friendship and co-operation which Poland concluded between 1945 and 1949. At the same time it is true that in practice her military collaboration with her allies since May, 1955, has been performed within the organizational framework created by the Warsaw Treaty.

This framework forms another difference between the two systems. The assistance stipulated under the provisions of all the alliances under consideration is automatic, *i.e.*, independent of any previous diplomatic consultations. According to the wording used in the treaties, the aid stipulated therein must be extended "immediately" or "without delay" upon the occurrence of the *casus foederis*. The bilateral treaties did not provide for any machinery to co-ordinate or organize the military efforts of the parties and their political co-operation. In this respect, the Warsaw Treaty takes a step forward. The parties set up a Political Consultative Committee in which each of them is represented (Article 6) with one vote. The Committee is not a permanent organ but only a conference of the representatives of the parties. During the first meeting of the Committee held in Prague on January 27 and 28, 1956, it was agreed that it would meet according to need, but at least twice a year. The Committee also decided to establish a permanent commission and a secretariat in Moscow.

At the time of signature of the Warsaw Treaty the signatories decided to create Joint Armed Forces (Article 5). They consist of contingents assigned by the parties. These contingents form a whole under a Joint Command assisted by a Staff of the Joint Armed Forces. Its headquarters are in Moscow. Commander-in-Chief of these Joint Forces is Marshal of the Soviet Union, Ivan S. Konev. The national contingents remain under the command of the ministers of defense or other military leaders of the countries involved. The commanders of national contingents serve at the same time as Deputy Commanders-in-Chief of the Joint Armed Forces. So far only Soviet troops are stationed on the territory of other parties to the Warsaw Treaty. The status of the troops thus stationed is regulated in bilateral conventions signed between the Soviet Union and the countries involved.<sup>12</sup>

<sup>12</sup> Resolution of May 14, 1955, on the establishment of a Joint Command, 49 A.J.I.L. Supp. 198 (1955). For a summary of the decisions of the first meeting of the Com-

### 3. *Article 51 of the Charter: The Alliances of Poland and Self-Defense*

The analysis of Poland's alliances from the standpoint of eventual preparation and application of self-defense raises two preliminary questions: (1) as to when international law empowers a state to have recourse to self-defense, and (2) whether Article 51 of the United Nations Charter introduces any changes concerning the exercise of the right of self-defense.

Without entering into a detailed discussion of the first question, one must distinguish two different approaches in defining the conditions under which self-defense is to be exercised. The first approach considers self-defense in terms of rights which can be protected by self-defense. A state may act in self-defense when certain of its legally protected interests have been menaced or violated. The form and method by which the breach of a right or the attempt to breach such right was carried out, especially whether there was any use of force or not on the part of the law-breaker, is not decisive. The important fact is the encroachment on a certain right. This method of defining the circumstances which lead to the application of the right of self-defense has at least one disadvantage. There are no precise rules of international law on what are the rights (legally protected interests) the violation of which permits the country to act in self-defense. The practice of states is not conclusive and the writers are far from being unanimous on the subject. This unsatisfactory state of the law and its interpretation opens the door to the abuse of the right of self-defense.

Therefore, a different approach to this problem is possible. The contemporary limitations imposed upon the free use of force by states influence our thinking on self-defense. One may instead say that self-defense is that kind of self-help which is directed "against the illegal use of force, not against other violations of the law."<sup>18</sup> Here we speak of the application of self-defense in terms of the form (or means) in which the state's rights have been infringed. There is a considerable difference between these two approaches. At the present time states have recourse to force on more rare occasions than formerly and it seems, therefore, that the second approach limits the number of cases in which self-defense may justify the use of forcible measures.

This second approach to the problem of self-defense dominates the post-war alliances<sup>14</sup> and this is also the case of the treaties concluded by Poland, referred to in the preceding sections. They do not define, even in the most general manner, the rights which are the object of protection by way of self-defense. They refer to hostilities which are the result of a

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mittee, see 10 Int. Organization 337 (1956). The first in the series of conventions on the status of Soviet troops in the Warsaw treaty countries was signed with Poland on Dec. 17, 1956, 52 A.J.I.L. 221 (1958).

<sup>18</sup> Kelsen, "Collective Security and Collective Self-Defense under the Charter of the United Nations," 42 A.J.I.L. 788, 784 (1948). There are still some difficulties of definition, but if by saying "force" we mean "physical force," then it is quite feasible to define this term in a precise way. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," 41 A.J.I.L. 872, 875-876 (1947), stresses the necessity of distinguishing self-defense from self-help and from the so-called "state of necessity."

<sup>14</sup> Bowett, note 9 above, at 147.

"policy of aggression" or simply to "aggression" (the treaty with Bulgaria), or to "armed attack" (the Warsaw alliance). Although the term "aggression" implies the violation of certain rights, the lack of a universally accepted definition of aggression makes it impossible to list these rights with a degree of accuracy. And again, one cannot exclude the possibility of defining aggression not in terms of rights but in terms of means used to encroach upon the rights.<sup>15</sup>

It is pointed out below that Article 51 of the United Nations Charter to some extent looks at self-defense also through the prism of the means by which substantive rights have been violated. In this article the parties state that

*nothing* in the present Charter shall impair the *inherent* right of individual or collective self-defense if an armed attack occurs against a member of the United Nations . . .

The italicized words seem to convey the idea that the Charter of the United Nations did not modify the right of self-defense as it existed prior to 1945. But it is submitted that this is not the right conclusion.

There is no need to enter into the considerations (which are of dubious value, both from the theoretical and practical standpoints) as to whether the Charter, by describing the right of self-defense as inherent (in the French version: *droit naturel*, in the Russian version: *neotemlivoye pravo*), presupposes the natural law doctrine.<sup>16</sup> This language of the Charter cannot and does not change the right of self-defense, heretofore a right under international law, into a right of natural law.<sup>17</sup> Nor does this language by itself maintain untouched the old scope and contents of this right. If the word "inherent" as used in Article 51 has any meaning at all,<sup>18</sup> it does not point to the substance of the right of self-defense but to its character as one of the "fundamental" rights which states enjoy, or are supposed to enjoy, as persons in international law. States are not prevented from changing the content of these rights by means of treaties which they conclude.

Now we must consider the question whether the wording of the opening sentence in Article 51 ("Nothing in the present Charter shall impair . . .") by itself preserves the right of self-defense in its pre-1945 meaning. Article 51 is not the only provision to use such an enabling formula. It can be seen that the opening phrase in Article 107 is couched in similar terms:

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been

<sup>15</sup> Quincy Wright, "The Concept of Aggression in International Law," 29 A.J.I.L. 373 (1935); "The Prevention of Aggression," 50 *ibid.* 514 (1956).

<sup>16</sup> Kelsen, *The Law of the United Nations* 791-792 (1950); *Recent Trends in the Law of the United Nations* 914 (1951); *of.* also Goodrich and Hambro, *Charter of the United Nations* 301 (rev. ed., 1949).

<sup>17</sup> It seems that Kunz, note 13 above, at 876, is mistaken when he says that Art. 51 puts the right of self-defense as a "right" of natural law.

<sup>18</sup> *Cf.* Stone, *Legal Controls of International Conflict* 243 (1954).

an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

A learned commentator of the Charter has pointed out that, since these two articles (51 and 107) use the same enabling formula, one is faced with two interpretations, each excluding the other. According to this view, each of these interpretations, taken separately, is possible.<sup>19</sup> An ex-enemy state, which is a Member of the United Nations and the object of military enforcement action based on Article 107, cannot invoke Article 51 because the former provision stipulates that nothing in the Charter shall invalidate or preclude this very action. However, the ex-enemy state may reply that it is just Article 51 which guarantees that nothing in the Charter shall impair the right of self-defense "if an armed attack occurs against a Member."

The dilemma would be really insoluble and therefore the value of the enabling formula questionable if the term "armed attack" as used in Article 51 could have been understood as covering also hostilities, war, enforcement action or whatever other expression can be employed in order to describe the action taken against an ex-enemy state in accordance with Article 107. The learned commentator cited, by formulating his dilemma of the two exclusive interpretations of Articles 51 and 107, has adopted the view that "an action under 107 may have the character of an armed attack against a former enemy state."<sup>20</sup> It is submitted that it is not so. No doubt, the action directed against that state may contain all the factual elements of an armed attack, whatever may be the definition of the term, but nevertheless such an action will not constitute an armed attack in the sense of Article 51. Neither Article 51 nor any other provision in the Charter defines the notion of armed attack. However, Article 51, by using the term "armed attack," means an *illegal* armed attack and not an action which is permitted by law, even if otherwise this action constitutes an armed attack. The action mentioned in Article 107 is legal because it is condoned both by the Charter and the inter-Allied agreements as well as by the agreements concluded with the ex-enemy states. Thus also an enforcement action by the United Nations itself can never be considered by the state against which this enforcement action is directed as constituting an armed attack. This meaning of Article 51 is made clear by the French and Russian versions of the Charter (*agression armée*; *vooruzhennoe napadenie*). Aggression is always an illegal action and therefore any activity which is permitted by law cannot constitute aggression. Armed attack in Article 51 means armed aggression,<sup>21</sup> while neither the action based on Article 107 nor the United Nations enforcement action is an armed aggression.

<sup>19</sup> Kelsen, *The Law of the United Nations* 918 (1950).

<sup>20</sup> *Ibid.* at 917.

<sup>21</sup> To prove this contention we may quote Kelsen himself: *cf.* his observations at pp. 795-796, 797 and 798. The Spanish version is in this respect identical with the English one: *ataque armado*.

Do the explanations as given above eliminate the supposed conflict between Articles 51 and 107 and thus restore the validity of the enabling formula ("Nothing in the present Charter . . .") as to the question whether the Charter limits the pre-1945 right of self-defense? It seems not. The recognition in Article 107 of legality of the action referred thereto does not deprive *third parties* of their privilege to have recourse to self-defense if and when that action comes into conflict with some of these third parties' rights.

The following situation may be helpful in ascertaining the irrelevancy, as far as our problem is concerned, of the enabling formulas used in Articles 51 and 107.

Let us assume that a military action by an authorized government (authorized by virtue of Article 107) against an ex-enemy state is at the same time an action which violates the territorial integrity and/or political independence of a third state which is a Member of the United Nations. And let us also assume, for the sake of argument, and without being involved in the above-mentioned problem of different approaches to the question when there is room for self-defense, that this third state is empowered, under the pre-Charter law, to invoke the right of self-defense and resist the action based on Article 107. Now here is the Kelsenian problem of what excludes what.<sup>22</sup> Is Article 107, in the case referred to above, restricted by Article 51 or *vice versa*? It may be argued that no contradiction between these two provisions can ever arise because the Members recognized in advance the legality of any action under Article 107. This is certainly so if one considers the relationship between the authorized government and the ex-enemy. But does this article mean that all the Members of the United Nations agreed in advance to all the detrimental effects (as to their rights) which may flow from action under Article 107, thus depriving themselves in this case even of the right of self-defense? <sup>23</sup> If so, then we have an important limitation of this right in spite of the formula "nothing in the present Charter," *et cetera*, as used in Article 51. If not, and this seems to be the right conclusion, then this very formula also used in Article 107 has not (in this article) the preserving and enabling character without any limitations whatsoever which it purports to have when

<sup>22</sup> Cf. Kelsen, *Recent Trends in the Law of the United Nations* 918 (1951).

<sup>23</sup> The problem of the renunciation or the exclusion of the right of self-defense presents itself in quite a different light as far as the enforcement action of an international organization is concerned. Here the Member State has recognized the responsibility of the Organization for the maintenance and restoration of peace on the world or regional plane. The Member State thus agrees to acquiesce in the Organization applying force with respect to it in circumstances defined in the Organization's statute or other instrument. The state makes concessions to the Organization in the important field of the use of force, but at the same time it expects that the Organization will help it as the need may be. This is not, however, the case in Art. 107. The governments authorized under Art. 107 do not act except in their own names. They do not exercise any function for a community of nations. There can be no doubt that Art. 107 recognizes the freedom of action and the validity of this action as applied to a former enemy state. But it does not have the same effect with regard to third parties. Cf. Goodrich and Hambro, *op. cit.* note 16 above, at 534.

taken at its face value. The same may apply to the formula as used in Article 51. The conclusion, then, is that this formula cannot by itself save the right of self-defense from being eventually cut down by the Charter.<sup>24</sup>

The limitations on the exercise of the right of self-defense are to be found in both Article 2, paragraph 4, and Article 51. These are limitations binding equally on all the Members of the United Nations. Article 2, paragraph 4, prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Article 51 stipulates that self-defense may be relied upon "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." The cumulative effect of the general ban on the use of force, together with permission to have recourse to self-defense only "if an armed attack occurs," is that the Charter introduces significant limitations with respect to the right of self-defense in its pre-Charter sense.<sup>25</sup> These limitations are, roughly speaking, twofold.

First, no preventive use of physical force is allowed. The state which acts in self-defense cannot strike before it is attacked.<sup>26</sup> This conclusion may seem unsatisfactory in view of the characteristics of modern warfare in which states have at their disposal weapons of mass destruction (atomic, hydrogen or other). The report submitted to the Security Council by the Atomic Energy Commission, in 1946 emphasized that a violation of the proposed convention on atomic energy matters "might be of so grave a character as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations."<sup>27</sup> However, this report is not law nor is it an authentic interpretation of Article 51. Further, the Members of the Organization can no longer base their action on self-defense in cases similar to the case of the Danish fleet in 1807 or to the *Caroline* case in 1837. In the *Corfu Channel* Case (Merits) the International Court of Justice seems to have lent its support to this restrictive interpretation of

<sup>24</sup> Bowett, note 9 above, at 181, ascribes some importance to this formula.

<sup>25</sup> Cf., among others, Weightman, "Self-Defense in International Law," 37 Va. Law Rev. 1095, 1109-1110 (1951); Goodrich and Hambro, *op. cit.* note 16 above, at 300, speak of Art. 51 as defining "the circumstances under which the right of self-defense may be exercised." These circumstances amount to limitations of the right of self-defense in its traditional meaning.

<sup>26</sup> This restriction is stated by many commentators on Art. 51; cf. Kunz, note 13 above, at 878, and Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* 13 (1950); Bramson, "Zagadnienie samoobrony w systemie bezpieczeństwa zbiorowego," 3 *Annales Universitatis Mariae Curie-Skłodowska, Sectio G*, 63, 81-82. Waldoek, "The Regulation of the Use of Force by Individual States in International Law," 81 *Académie de Droit International, Recueil des Cours* 451, 497-498 (1952), argues that there is still a right of self-defense in face of an imminent threat of attack. According to him, "to read Article 51 otherwise is to protect the aggressor's right to the first stroke," *ibid.* at 498. This is an overstatement, as there can be no question of any "rights" of an aggressor in this respect.

<sup>27</sup> United Nations, Atomic Energy Commission, Special Supplement at 19 (1946).

the right of self-defense under Article 51. According to the Judgment, the mine-sweeping operation carried out by the United Kingdom Naval Forces in Albanian territorial waters on November 13, 1946, was contrary to international law. In particular, the Court did not accept the British contention that the action was justified by "self-protection or self-help."<sup>28</sup>

Secondly, there is no room for self-defense even when the most fundamental and vital rights of a state are violated or endangered in a manner which does not constitute an armed attack, i.e., the actual use of physical force. The Security Council seems to uphold this opinion. The following two cases are relevant. During the first half of May, 1948, Pakistan used its troops to halt Indian troops in Kashmir, that is beyond the Pakistan borders. The reason for the Pakistan military action was the stopping of refugees who had started to enter Pakistan. It is not quite clear whether Pakistan based its action on the right of self-defense (such an attitude was ascribed to Pakistan by India). Be that as it may, the Security Council did not condone the Pakistan action.<sup>29</sup> The second case contains no ambiguities. When in 1951 the Security Council discussed the Egyptian interference with the passage through the Suez Canal of goods destined for Israel, Egypt contended that the right of self-preservation and self-defense transcended all other rights and, consequently, justified the Egyptian measures. The Council explicitly rejected this contention in paragraph 8 of its resolution of September 1, 1951.<sup>30</sup> On both occasions some Members of the Security Council emphasized the limitations on the right of self-defense contained in Article 51.<sup>31</sup>

<sup>28</sup> [1949] I.C.J. Rep. at 35. Cf. Waldock, *loc. cit.* note 26 above, at 502: "Here the Court seems to have given an emphatic warning that the right of self-defense is to be narrowly interpreted." The Court, however, did not recognize the right of states to use force against another state while there is an imminent threat of armed attack. In October, 1946, prior to the mine-sweeping operation which took place in November, the United Kingdom sent four warships through the Corfu Straits. The ships were kept at action stations during the passage. The Court did not dispute the legality of this measure. But contrary to what Professor Waldock says at another place in his lecture, *ibid.* at 498, the Court's decision does not condone resort to force in face of imminent threat of attack. The British action in October, 1946 (but not in November of that year) consisted only of readiness to act in self-defense if again attacked by Albania. Preparation of self-defense, whatever form it takes, is permitted by Article 51. Demonstration of force and actual use of force against another country are two different things. It is not quite clear what makes Professor Waldock, *ibid.* at 501, conclude that "the Court did not take a narrow view of the inherent right of self-defense." This statement is not consistent with the opinion of the same author quoted at the beginning of this footnote. Cf. the discussion of the Corfu Channel Case by Schwarzenberger, Report on Some Aspects of the Principle of Self-Defense in the Charter of the United Nations and the Topics covered by the Dubrovnik Resolution, International Law Association, New York University Conference (1958) at 22-24 and 36-40 (1958).

<sup>29</sup> Repertoire of the Practice of the Security Council 1946-1951 at 448 (1954).

<sup>30</sup> *Ibid.* at 449-450.

<sup>31</sup> The right of self-defense was also mentioned in 1948 in the Security Council when it debated the Palestine question, namely, in relation to the dispatch of Egyptian and Transjordan troops to Palestine after the proclamation of the State of Israel. This was not, however, the explanation offered by the countries involved, i.e., Egypt and Transjordan. Cf. *ibid.* at 493. Writing about the hostilities between the United Kingdom and



The above discussion of some problems of self-defense is necessary in order to make clear the standards which are relevant in ascertaining the compatibility of an alliance with the United Nations Charter. The treaties of alliance signed by Poland in or after 1945 provide for military action (the use of physical force) only after an attack on the part of a third state has taken place. This is the conclusion to be drawn from the analysis of the *casus foederis* made in sections 1 and 2 above. It has been pointed out there that, with the exception of the Warsaw Treaty, all other alliances signed by Poland do not refer to armed attack but speak of hostilities as the result of aggression or a policy of aggression. It has been pointed out above that armed attack means armed aggression, and, in spite of some efforts to widen the notion of aggression, the latter does not have any other meaning in contemporary universal international law than "armed aggression." Notions like "economic aggression" and the like are not part of international law. Commentators on the Rio Treaty of 1947 have rightly emphasized that this treaty distinguishes "aggression" from "armed attack." These distinctions, however, are binding only between the American Republics. We may repeat, then, that treaties of alliance signed by Poland do not permit the use of force in any circumstances except in repelling an aggressive military attack. No encroachment upon the rights of the parties, no matter how serious, authorizes the use of force unless an armed attack occurs and violates these rights.

Neither is preventive military action envisaged in the alliances under consideration. This point requires elucidation, as some provisions in Poland's alliances, when taken at their face value, might substantiate an opinion to the contrary. Thus in Article 3, paragraph 1, of the Polish-Soviet treaty, the parties

agree to take, on the conclusion also of the present war with Germany, all joint action within their power to obviate any further threat of aggression by Germany or any other Power which might be associated with Germany either directly or in any other way.

There are similar rules laid down in the remaining bilateral alliances. As to the Warsaw Treaty, Article 3, paragraph 2, envisages consultations for "joint defense and the maintenance of peace and security" wherever there arises a threat of armed attack (as distinguished from an accomplished armed attack) on one or more parties. It is this formula used in bilateral treaties which may cause some doubts.

It is submitted that a general declaration made in the bilateral treaties that the parties are not only bound to act in case of actual aggression, but also have some mutual duties when the menace of an armed attack arises,

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France on the one hand, and Egypt on the other, in 1956, Green, "The Double Standard of the United Nations," 11 Yearbook of World Affairs 104, 120 (1957), argues that the Western Powers "had grounds to exercise their right of self-defense in protection and vindication of their treaty rights to insulate, even by military measures, the Suez Canal after the rejection of their ultimatum by Egypt. . . ." The resolution adopted by the General Assembly on Nov. 2, 1956, leaves no doubt as to the fallacy of this view. See the debate in General Assembly, First Emergency Session, Official Records, Plenary Meetings 2-36 (1956).

does not mean that they are allowed to begin military operations against the would-be aggressor before he strikes first. With the exception of prerogatives concerning the ex-enemy states, the Charter of the United Nations gives the right to use armed force for preventive purposes only to the United Nations itself (or to regional organizations authorized by it), and strictly within the limits formulated in the Charter. Article 3, paragraph 1, of the Soviet-Polish treaty, cited above, provides for the use of all means to eliminate every possible menace of further aggression by Germany or her allies. It might seem that this language implies the use of force to prevent aggression. But this interpretation, which would lead to inconsistency between the treaty and the Charter, finds no support in the light of other stipulations arrived at by the parties. Article 3, paragraph 2, of the treaty with the Soviet Union adds that, for the purpose of liquidating in advance any threats on the part of Germany or her allies acting with her, the Contracting Parties will "participate in all international action for ensuring international peace and security." To dispel any doubts as to the character of any bilateral preventive action as distinguished from that organized on the higher international level, the treaty of April 21, 1945, declares that both countries will execute their agreement in compliance with the "international principles, in the adoption of which both Contracting Parties participated" (Article 3, paragraph 2). This paragraph clearly refers to the Charter of the United Nations, not yet drafted when the Polish-Soviet treaty was signed. The Polish-Czechoslovak treaty of 1947 pledges the two countries to participate in any international action aimed at the maintenance of international peace and security, while preventing the menace of aggression on the part of Germany and her allies. This duty of taking part in international efforts to establish peace and security is introduced into the treaties with Bulgaria, Hungary and Rumania independently of any prevention directed against possible aggression.

Thus we may conclude that any such action which is envisaged in the bilateral alliances of Poland and which may seem to be of a preventive character remains within the limitations of the United Nations Charter. If that action is not undertaken in the framework of the world organization, then it may only take the form of endeavors in the diplomatic field and never include the use of force, no matter how imminent the danger of aggression. The defensive character of the treaties discussed here precludes the use of any armed means on the initiative of the Contracting Parties. They may have recourse to these means only when one of them is attacked. So far the practice of the interested parties shows that this interpretation is correct. They have reacted only with diplomatic weapons when confronted with different stages in the development of the German question after the war, stages which they have thought disadvantageous or even dangerous to peace in Central Europe. As examples of the moves falling under the treaty stipulations examined here we may cite the Prague Declaration of February 18, 1948,<sup>32</sup> the Warsaw Declaration of June 24,

<sup>32</sup> Zbiór Dokumentów 97 (1948).

1948,<sup>33</sup> the Second Prague Declaration of October 21, 1950,<sup>34</sup> and the Moscow Declaration of December 2, 1954,<sup>35</sup> all dealing with the solution of the German problem. In other words, the aim of the parties, while binding themselves to some action to eliminate the threat of aggression, is not the application of force, but the employment of diplomatic persuasion and other pressure short of the threat or use of force.

#### 4. *Article 51 of the Charter: The Alliances of Poland and So-Called "Collective Self-Defense"*

In the preceding section the effort has been made to substantiate the view that the alliances to which Poland is a party do not provide for any preventive use of force nor empower the signatories to use force in defense of rights which have been violated otherwise than by an armed attack. This, of course, does not exhaust the answer to the question whether the alliances under consideration are compatible with the Charter of the United Nations. The crucial problem is that they lay upon the non-attacked party the duty to come to the assistance of the victim of aggression irrespective of whether the attack involves any breach of the rights of the former or whether this attack is also directed against that party, *e.g.*, the attacker wishing to reach the latter through the territory of another state.

No matter whether one defines the conditions for exercise of self-defense in terms of rights which are violated, or in terms of means used to violate any of the state's legally protected interests, the right of self-defense in international law belongs only to the state whose rights have been encroached upon or against which violence has been used. Nevertheless, as the result of a treaty of alliance, another state comes to the assistance of the former, although the conflict may be in every respect limited to the relationship of aggressor and victim without any repercussions whatsoever for a third state.

The problem of the legality of third states' intervening in defense of the attacked state (but not in self-defense) necessarily raises another problem, namely, the interpretation of the Charter provision on "collective self-defense." Article 51 mentions the existence of the right of collective self-defense as collateral to the right of individual self-defense. The restrictions imposed by the Charter on the Members of the United Nations when they have recourse to self-defense find application to the cases which it is possible to list under the heading "collective self-defense." We shall now try to explain the meaning of this term as used by Article 51.

The Charter applies in Article 51 the adjective "inherent" not only to the right of "individual self-defense" but also to that of "collective self-defense." The choice of this word in the latter context is even more dubious than in the former. Does it mean that the right of collective self-defense was part of pre-Charter international law? Some authors favor

<sup>33</sup> *Ibid.* at 445.

<sup>34</sup> Zbiór Dokumentów 185 (1951).

<sup>35</sup> Zbiór Dokumentów 3073 (1954).

the view that it is the Charter which establishes this right.<sup>86</sup> If so, then the description of the right in question as "inherent" is not accurate. If not, then another question arises: What was the content of this right in the pre-Charter international law?

We may distinguish two essentially divergent interpretations of the right of collective self-defense. One interpretation draws no basic distinction between individual and collective self-defense. It starts from the premise, which is correct from both the strictly grammatical and logical standpoints, that the core of the problem remains the same in the two cases of self-defense. Any state which invokes the right of self-defense, be it "individual" or "collective," must be attacked itself: "the right of self-defense is available only to a State which defends its own substantive rights"; "the difference between the individual and collective rights lies in whether States exercise their right of self-defense individually or in concert."<sup>87</sup> It is then necessary to make distinctions between self-defense and collective security action, the latter being an action "for the purpose of maintaining international peace and security within a defined region."<sup>88</sup>

The partisans of this interpretation may rightly say that the identification of collective self-defense and collective security action is a perversion of the concept of collective self-defense.<sup>89</sup> It is submitted, however, that the right of collective self-defense referred to in Article 51 is more extensive and goes further than the mere application, on a collective plane, of "individual" self-defense. One may even wonder what would be the aim of mentioning "collective self-defense" in addition to "individual self-defense" since, according to the restrictive interpretation explained above, the former means in its essence exactly the same as the latter. Article 51, by stipulating that the Members of the United Nations have the right of collective self-defense, authorizes them to come to each other's assistance when one of them is the object of an armed attack and the Organization has not yet taken measures "necessary in order to maintain or restore international peace and security." This broad authorization comprises, consequently, the right to conclude defensive alliances, bilateral or multilateral, and the right to set up international organizations, regional or other, for defensive purposes.

This second meaning ascribed to the words "collective self-defense," while contrary to the strictly grammatical and logical interpretation of Article 51, finds support in the preparatory work of the San Francisco Conference in 1945 and in the subsequent practice of almost every Member

<sup>86</sup> Dinh, "La Légitime Défense d'après la Charte des Nations Unies," 52 *Revue Générale de Droit International Public* 223, 244 (1948); Kelsen, *Recent Trends in the Law of the United Nations* 914 (1951); Stone, *op. cit.* note 18 above, at 245: "The very notion of collective self-defense seems contradictory."

<sup>87</sup> Bowett, note 9 above, at 150; *cf.* also *ibid.* at 138-140.

<sup>88</sup> *Ibid.* at 156. "This is not to suggest," Bowett writes further, "that such collective security action is illegal; but, not being self-defense, the legality depends on considerations different from those governing the legality of action in collective self-defense."

<sup>89</sup> *Ibid.* at 160.

of the Organization, the legality of this practice having never been questioned by any of the United Nations Organs.

Article 51 was inserted into the Charter in order to make it possible for the American Republics to consider an attack against one of them as an aggression against all of them and to enable them to help the victim of the attack.<sup>40</sup> The language used in Article 51 is general, and this provision of the Charter cannot be treated as the escape clause for the American system only. Since the American system is allowed, other states may also promise and/or render each other military assistance in case of defense, provided that the limitations enunciated in Article 2, paragraph 4, and Article 51 are fulfilled. Thus, strictly speaking, the Charter, instead of saying "collective self-defense," ought to have employed terms like "collective defense" or "defense of another State."<sup>41</sup>

None of the organs of the United Nations protested against such a broad interpretation of Article 51 contrary to its literal meaning. When attempts were made to adopt a resolution stating that participation in the North Atlantic Treaty Organization is incompatible with membership in the United Nations, the General Assembly rejected this view by a large majority.<sup>42</sup> At the present moment Members of the United Nations are bound by many bilateral and multilateral mutual defense treaties which provide for military assistance in favor of the attacked party so long as the United Nations does not take the necessary measures. We must consider these treaties as the expression of the Members' view on the meaning of collective self-defense in Article 51.

In fact, the two interpretations of Article 51, referred to above, are not as far apart as they seem. Those authors who say that collective self-defense means self-defense exercised in concert are ready to accept a very broad interpretation of what are the state's own rights the violation of which authorizes it to act in self-defense. Thus they introduce the notion of "the interdependence of the securities"<sup>43</sup> or the notion of "the threat

<sup>40</sup> 12 Documents of the United Nations Conference on International Organization at 680 *et seq.* (1945). *Cf.* also Vol. 11 at 58, 59, and 121. See comments by Goodrich and Hambro, *op. cit.* note 16 above, at 297; Kunz, note 13 above, at 873; Waldock, *loc. cit.* note 26 above, at 497.

<sup>41</sup> This interpretation of Art. 51 has been accepted by many authors. *Cf.* Goodrich and Hambro, *op. cit.* note 16 above, at 301; Kunz, note 13 above, at 875; Kulski, note 9 above, at 463; Kelsen, "Collective Security and Collective Self-Defense under the Charter of the United Nations," 42 A.J.I.L. 788, 789, 792 (1948); The Law of the United Nations 792 (1950); Recent Trends in the Law of the United Nations 915 (1951); Weightman, note 25 above, at 1111-1114; Waldock, *loc. cit.* note 26 above, at 504; Behr, "Regional Organizations: A United Nations Problem," 49 A.J.I.L. 166, 173 (1955). On the other hand, Dinh, note 36 above, at 244-248, restricts the right of collective self-defense, as understood above, to states which are parties to a regional arrangement. As to the terminology used in Art. 51, *cf.* Bowett, note 9 above, at 130-131, and the writers cited by him. Green, note 31 above, at 120, probably too much impressed by the language of Art. 51, employs the strange expression "to come to the collective self-defense" of a state.

<sup>42</sup> General Assembly, 6th Sess., Official Records, Plenary Meetings, 363rd Meeting, par. 140.

<sup>43</sup> Bowett, note 9 above, at 150.

to the security of the other State.”<sup>44</sup> If, under the restrictive interpretation of Article 51, states are free to determine when their own rights have been endangered by an attack on another state, and consequently (according to this theory) there is room for self-defense, then their freedom of action is practically as unlimited as in the case of the second interpretation of Article 51, which understands the right of collective self-defense as giving to Members the right to use physical force against any aggressor.

The explanations concerning the meaning of collective self-defense in the United Nations Charter make it possible to classify the Polish alliances under one of its provisions. The following articles may be taken into consideration: Article 51; Article 52; the escape clause formulated in Article 53, paragraph 1; and Article 107.

Contrary to the Warsaw Treaty, which invokes Article 51, all the bilateral alliances concluded by Poland contain only general references to the Charter of the United Nations. The provisions of the Soviet-Polish treaty are most general in this respect because this treaty was signed before the San Francisco Conference began. Nevertheless the possibility of creating a world organization of states was envisaged by the parties, and Article 3, paragraph 2, pledges them to take part “in all international action for ensuring international peace and security.” They further declare that they “will fully contribute to the realization of these lofty aims.” Paragraph 3 adds that

the High Contracting Parties will act conformably to the international principles, in the adoption of which both Contracting Parties participated.

Thus the two countries concerned undertake in advance to fulfill the future obligations assumed by them in accordance with the Charter. This is stated more explicitly in Article 2, paragraph 3, of the Polish-Czechoslovak treaty, where the parties declare that while carrying out their treaty they “will observe the obligations incumbent upon them as Members of the United Nations.” It seems that this affirmation of their loyalty towards the Charter was not necessary, as Article 103 of the latter provides that the Charter is the highest law for the Members of the United Nations and that consequently, in case of a conflict, the statute of the world organization always prevails over any other international agreement, bilateral or multilateral, concluded by the Member nations. The aforesaid provisions in the treaties with the Soviet Union and Czechoslovakia are only declaratory in their legal significance and create no new duties for the parties.

The situation was, however, different as far as the parties to the remaining bilateral treaties were concerned. At the time when the treaties with them were signed, Bulgaria, Hungary and Rumania were not Members of the United Nations. In spite of this fact, the parties decided to include in their treaties clauses which express their attitude towards the United Nations Charter. The formulas used in this connection are worded in a different way in the case of each treaty. The agreement with Bulgaria is

<sup>44</sup> *Ibid.* at 153.

to be executed "in accordance with the Charter" (Article 6). The treaty with Hungary stipulates that it will be fulfilled in the spirit (*w duchu*) of the Charter (Article 6), while the implementation of the treaty with Rumania "will conform to the principles of the United Nations Charter" (Article 2, paragraph 2). These obligations, incurred by states which were not then Members of the United Nations, were far from creating anything which might have been described as "passive membership"<sup>45</sup> in the Organization. To some extent these obligations merely repeated duties which already existed, as it should be borne in mind that certain basic principles enumerated in the Charter are declaratory of the existing law which binds all the members of the international community. However, some of these principles are new (for instance, the prohibition not only of recourse to war but of use of force in general), and their acceptance, even in such vague formulas as those used in the treaties with Bulgaria, Hungary and Rumania, have laid upon these countries some restrictions as regards the execution of the alliances. Besides this general conclusion, it is difficult to say anything more precise as to the exact extent of these restrictions. Only practice could provide an explanation. There were, however, no conflicts between the parties concerning a possible breach of the United Nations principles while executing the bilateral treaties of alliance. Today, since all the remaining countries in Southeastern Europe have entered the United Nations, the rules discussed here have lost their legal significance as rules which created additional obligations for the non-members of the United Nations.

It has been submitted above that the *casus foederis* in Poland's alliances cannot be read otherwise except as providing for military assistance in case of armed attack against the other parties. There is no doubt about it as far as the Warsaw Treaty is concerned, because Article 4 of that treaty refers to an armed attack. This interpretation, adopted above also with respect to bilateral treaties, must now be strengthened in relation to the latter in view of the references to the Charter contained in the bilateral instruments. If forcible measures of the parties are limited to the case when an armed attack occurs, then there is room to consider the alliances concluded by Poland as falling under Article 51 of the Charter.

Such a classification, applied also to the bilateral alliances, may seem to be inexact. It may again be argued that these alliances (contrary to the Warsaw Treaty) employ different language from that of Article 51. We disposed of this difficulty when we explained the *casus foederis* of the bilateral alliances (section 1) and the meaning of terms such as "policy of aggression" or "aggression" used in these alliances (section 3). One may argue further that the bilateral alliances, again in contradistinction to the Warsaw Treaty, do not repeat the reservation that any Member of the United Nations may exercise the right of self-defense "until the Security Council has taken the measures necessary to maintain international peace

<sup>45</sup> Term used in a different context by Kunz, "The Contractual Agreements with the Federal Republic of Germany," 47 A.J.I.L. 106, 110 (1953).

and security." We consider, however, that the absence of such a repetition does not automatically mean that the bilateral treaties under examination organize the defense in a way incompatible with the Charter. It is immaterial whether an alliance concluded by a Member of the United Nations expressly invokes Article 51 or incorporates parts of its provisions. It is also of no importance whether the allied states declare in their bilateral treaties that they shall immediately report to the Security Council on the measures taken by them in the exercise of the right of self-defense. Members of the United Nations do not need to repeat this obligation because it is binding on them from the very moment when they acquired membership in the Organization.<sup>46</sup> The important fact is that nothing in the provisions of the treaties under discussion is contrary to the Charter. Automatic and immediate help in the event of aggression does not exclude any future intervention on the part of the Security Council nor does it deprive that organ of the directing powers which it possesses under Article 51. It was pointed out above that the Warsaw Treaty is the only alliance in which Poland participates which invokes Article 51 and follows its language (Article 4). This, however, does not mean by itself that all the earlier treaties, which contain no references to the competence of the United Nations in case an armed attack occurs, provide for action that is free from the Organization's interference.<sup>47</sup>

But in order to fulfill its rights and duties the United Nations must have means. Shortly after the Organization began to function it was clear that it would not obtain these means either quickly or effectively. Articles 43 to 46 are still unexecuted, while attempts to fill this gap by other devices may evoke doubts as to their legality or desirability, at least from the point of view of some Members of the Organization. Even if there were no division of the postwar world into two opposite and powerful groups of nations (and this division contributes to the weakness of the United Nations), there would always be, at least at the start, some justified doubts as to how the Organization was to exercise its responsibilities.

With this in mind, it is not difficult to understand why the treaties of alliance concluded by Poland (as well as by other countries, both in the East and in the West) avoid any reference to Article 52 of the Charter (regional arrangements). Together with those of her allies who are her neighbors and these neighbors' neighbors, Poland forms a geographical unity. The far-reaching resemblances among the countries concerned as to their system of government and social and economic structure are important links which complete and strengthen the regional unity of the whole

<sup>46</sup> The opposite view is expressed by Bebr, note 41 above, at 183. Cf. Bowett, note 9 above, at 150: "... the mere omission to restate the duties imposed by the Charter is not in itself illegal."

<sup>47</sup> Goure, note 10 above, at 39, and Howard, note 10 above, at 79, classify the Eastern European alliances under Art. 51 with some hesitation. Bebr, note 41 above, at 183-184, writes that these alliances go beyond the standard of Art. 51, while Bowett, note 9 above, at 143, expresses the view that it was not intended to link these alliances to the terms of that article.



system.<sup>48</sup> In spite of these facts, the political grouping discussed here cannot be considered (as a whole) a regional arrangement in the technical sense used in Chapter VIII. This is so because the treaties involved do not provide for any special mechanism to settle local conflicts<sup>49</sup> and, what is more important, it is not the intention of the parties to submit their alliances to the preventive control of the United Nations provided for in Chapter VIII with respect to regional enforcement action. This intention is clearly shown in those provisions of the treaties discussed here which define the *casus foederis* and provide for automatic assistance in case of aggression. As has already been pointed out, the parties neither invoke nor cite Article 51, but their purpose is to organize self-defense within the framework of that article. This self-defense would be exercised in practice in complete independence of the United Nations "until the Security Council has taken the measures necessary to maintain international peace and security." The practical sequence of events is quite clear: as a rule, first the action of the victim of aggression and its allies, and later any action on the part of the Security Council. This is not so in case of regional arrangements. In Article 53, paragraph 1, Members of the United Nations stipulated, *inter alia*, that no enforcement action should be taken under regional arrangements or regional agencies without the authorization of the Security Council. The only exception to this rule is measures against states which were enemies of any signatory of the Charter during World War II. But the *casus foederis* in Poland's alliances is not limited to these nations. This excludes the possibility of considering the Polish alliances, including those which were not signed with ex-enemy states, as falling under the escape clause of Article 53, paragraph 1.<sup>50</sup>

Neither are the bilateral treaties of alliance signed by Poland based on Article 107. This is true because, first, Poland does not belong to those victorious Powers in the last world war who assumed the responsibility of dealing with the ex-enemies; and, secondly, treaties under Article 107 can be signed only by the members of the anti-Axis war alliance *inter se* and never with the participation of former Axis adherents.<sup>51</sup> Only the Polish-

<sup>48</sup> Cf. the Egyptian definition of regional arrangements submitted to the San Francisco Conference, 12 Documents of the United Nations Conference on International Organization 850 (1945).

<sup>49</sup> Kelsen, *The Law of the United Nations* 324, 433 (1950).

<sup>50</sup> A view to the contrary is expressed by Goodrich and Hambro, *op. cit.* note 16 above, at 316. They do not seem to take into account the fact that the *casus foederis* in the Eastern European bilateral alliances is formulated more broadly so as to comprise only ex-enemy states and that some of these alliances were signed with ex-enemy states. This must exclude them from the scope of the exceptional provisions of Art. 53, par. 1. On the other hand, the participation of ex-enemy states which are not Members of the United Nations does not deprive an alliance of the character of a "collective self-defense" measure under Art. 51. We do not discuss this problem. Cf. Kelsen, *The Law of the United Nations* 793 (1950), and *Recent Trends in the Law of the United Nations* 917, 918 and 925 (1951).

<sup>51</sup> Bebr, note 41 above, at 183 and 184 and Bowett, note 9 above, at 144, forget these two considerations when they treat all the Eastern alliances *en bloc* as falling under Art. 107.

Soviet treaty of 1945 could have been considered as one of the measures to which the Soviet Union was entitled under Article 107; but, as pointed out above, the *casus foederis* of this treaty is not restricted to the ex-enemy states and this circumstance also puts the treaty outside Article 107.

### 5. Conclusions

In this paper the attempt has been made to substantiate the view that the alliances signed by Poland are compatible with the Charter of the United Nations. Such a conclusion is not surprising in view of the fact that the Charter, especially, though not exclusively, in Article 51, leaves much room for defensive alliances.

In United Nations law as it stands at present, states have the right to conclude defensive alliances, provided that certain conditions are met. These conditions are easily fulfilled. This opens the way for not taking advantage of the United Nations security system and, indeed, most of the Members have availed themselves of this perfectly legal opportunity.

The difficulties encountered by the United Nations in creating effective guarantees for the security of states, and the impressive number of bilateral and multilateral alliances now in force, have the cumulative effect of leading some authors to regard the enforcement action based on these alliances as the "reaction of the international community against violations of law," and to regard the state which has recourse to self-help under international law as an organ of this community.<sup>52</sup> This view, however, confounds an action allowed by law with an action performed in the name of the international community. What is legal in the law of nations is not necessarily done on behalf of the international community.

The "primary responsibility for the maintenance of international peace and security" which rests with the Security Council does not mean that a "secondary" responsibility may be exercised by individual Members or their groups in the name of the world organization.<sup>53</sup> In discussing and analyzing the functioning of any system of alliances that fits within the Charter provisions one may consider it as a *de facto* substitute, regional or other, for the action which was to be performed by the United Nations itself.<sup>54</sup> But the exercise of the right of collective self-defense, allowed by the Charter, is not by this very fact an activity for and on behalf of the United Nations. The collective security system as foreseen by the Charter must be distinguished from alliances concluded under Article 51. The latter, in contradistinction to regional arrangements within the meaning of Article 52, are not instruments that supplement the former. The collective self-defense treaties are not means for the achievement of the purposes of the United Nations. They play such an important rôle in contemporary international relations because "the Charter remains unfulfilled."<sup>55</sup>

<sup>52</sup> Kelsen, *The Law of the United Nations* 782 (1950).

<sup>53</sup> Cf. Bowett, note 9 above, at 156 and 157.

<sup>54</sup> *Ibid.* at 155.

<sup>55</sup> Stone, *op. cit.* note 18 above, at 265. Compare his justified criticism concerning Beckett's view, *ibid.* at 264-265.

The United Nations itself is far from considering defensive alliances as part of its own system. In one of the resolutions adopted during its Fifth Session, the General Assembly commended the Secretary General on his memorandum concerning the development of a twenty-year program for achieving peace through the United Nations. The memorandum states that

measures for collective self-defense and regional remedies of other kinds are at best interim measures and cannot alone bring any reliable security from the prospect of war.<sup>56</sup>

This, it is submitted, is the right perspective from which to look at any treaty of alliance concluded by a Member of the United Nations.

<sup>56</sup> The opening sentence in par. 13 of the memorandum, 2 *Repertory of Practice of United Nations Organs* 431 (1955). The resolution referred to is Resolution 494 (V).

## EDITORIAL COMMENT

### THE ACT OF STATE DOCTRINE AND THE RULE OF LAW

That courts in the United States administer international law because it is the law of the land was a main point of the United States argument to the International Court of Justice in the *Interhandel* Case. This point was argued in support of one United States preliminary objection, that Switzerland was supporting a claimant which had not exhausted its remedies in United States courts.<sup>1</sup>

There are, however, a number of fact situations (not including the *Interhandel* Case) in which American courts have felt that they are not free to test by principles of international law, acts of a foreign state operating on a person or property within its territory, even when the American court has jurisdiction over private parties in commercial litigation and perhaps jurisdiction over a *res*. For reasons of domestic policy, the courts have not felt able to apply principles of international law unless the State Department previously has given its consent.

A recent report by the Committee on International Law of the Association of the Bar of the City of New York, under the chairmanship of John R. Stevenson,<sup>2</sup> pointed out that the Act of State doctrine is not of itself a rule of public international law, and in the United States it is "largely a consequence of judicial deference to the executive branch imposed by the separation of powers in our constitutional system."

Upon the unanimous recommendation of its Committee on International Law, the Association of the Bar of the City of New York at its annual meeting on May 12, 1959, adopted, after some discussion, the following resolution:

WHEREAS it is important both for the redress of individual wrongs and for the realization of the rule of law in international affairs, that United States courts be encouraged to exercise the judicial function of inquiry into the validity under international law of the acts of foreign States when such inquiry is necessary to determine the rights of litigants and will not prejudice the conduct of the foreign relations of the United States;

NOW THEREFORE, BE IT RESOLVED, that The Association of the Bar of the City of New York is of the view that the United States Department of State should make a public declaration to the effect that (1) it is the policy of the United States Government that United States courts (both Federal and State) consider themselves free from any restraint based on deference to the executive branch of the Government in the conduct of this country's foreign relations which prevents judicial in-

<sup>1</sup> *Interhandel* Case (Switzerland v. United States of America), Oral Proceedings (Nov. 5 to 17, 1958), pp. 140-141 (I.O.J. Distr. 58/185).

<sup>2</sup> "A Reconsideration of the Act of State Doctrine in the United States Courts," Report of Committee on International Law, presented to the Annual Meeting, Association of the Bar of the City of New York.

quiry into the validity under international law of the acts of foreign States whenever such inquiry is necessary for the determination of controversies within the jurisdiction of such a court and will neither violate recognized principles of sovereign immunity, to the extent such principles may be applicable, nor prejudice the conduct of the foreign relations of the United States; and (2) if the Department of State, after such notice as the court deems reasonable, does not indicate otherwise in a particular case, the absence of such prejudice shall be presumed.

This resolution, containing the view that the State Department should by the device of another general statement, such as the Tate letter,<sup>3</sup> attempt to remove a restraint on American courts, is an important practical proposal for the extension of the rule of law at home, and also by precept hopefully to affect the conduct of other states.

This may be regarded as a companion to the movement which has gained momentum in recent months to broaden and add certainty to the United States adherence to the compulsory jurisdiction of the International Court of Justice.<sup>4</sup>

In the discussion at the Bar Association's annual meeting, several members questioned the effect of the proposed resolution. It would open the door for American courts to try title based on the acts of another government. This, one member felt, would exacerbate intergovernmental relations, create uncertainty, and result in unfavorable treatment of American property abroad.

The effect of the proposal, if acted on by the Department of State, would be to increase the fact situations in which private commercial litigants could, by the device of trying title, test by legal principles the acts of another government. The goods involved might be a Picasso painting, oil, tobacco or a ship. The American court might sustain the validity, by international standards, of the foreign government's act, or the court might refuse to recognize the act's validity. The foreign government might then step in and object that the decision of the American court reflected either a policy of the forum or an interpretation of international law at variance with its own. At that point, the case could be lifted to the intergovernmental level. It could, with the consent of both governments, be litigated in the International Court of Justice. Thus the private commercial litigants would have a remedy, and the possibility of government claims would be preserved.

Under the present doctrine in the United States, a case has from the beginning the flavor of an intergovernmental dispute which does not lend itself to commercial litigation, except with the advance consent of the State Department. This is of itself injurious to good international relations.<sup>5</sup>

<sup>3</sup> 26 Dept. of State Bulletin 984 (1952).

<sup>4</sup> Speech of Vice President Nixon to Academy of Political Science, New York Times, April 14, 1959, p. 20; see also Briggs, "The United States and the International Court of Justice: A Re-examination," 53 A.J.I.L. 301 (1959).

<sup>5</sup> Jessup, "Power, Facts and Law," Presidential Address, 49 A.S.I.L. Proceedings 1, 6 (1955).

The potential private litigant may thus be denied a forum, otherwise competent, which will weigh what might be the material fact in his case, the act of a foreign government. The litigant may be able to find a forum elsewhere, perhaps in a trading country of Western Europe. But beyond his personal interests, the present doctrine may put the American court in the position of maintaining what it would find, on examination, to be an international tort.<sup>6</sup> Certainly this might be a private party's approach in urging the State Department to act, or in urging an American court to weigh the act of the foreign government even under the existing doctrine.

The Report of the International Law Committee infers correctly, as the writer believes, that the Act of State doctrine is more broadly applied in the United States and the United Kingdom than in other states. Subject to what a comparative law study would verify, it therefore seems unlikely that the modest circumscription suggested would result in harassment or discrimination for American interests abroad. The State Department and its law officers have themselves frequently discussed with other governments their conduct, as measured by principles of international law. In one diplomatic note, the Department observed that where the sovereign act of a government affects foreign states or their nationals, its validity under international law is always open to discussion.<sup>7</sup>

Another objection to the proposal was that it would be impractical, and put an undue burden on the State Department to have to decide, within the usual time limits of private litigation, whether to object that judicial inquiry into the validity of acts of a foreign state would prejudice the conduct of the foreign relations of the United States. It would be simple, by a one-sentence letter to the Attorney General, for the State Department to formulate that very conclusion. There might be pressure from one litigant or a foreign government to do so. However, the proposal could save the Department the harder decision on affirmative action to permit judicial consideration, as under the present practice.

<sup>6</sup> See Report of Committee on International Law, p. 8 (note 2 above): "... A refusal of courts to consider foreign acts of State in the light of the law of nations is not, it should be remembered, merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the full protection of the United States courts, police and governmental agencies to commercial property transactions which are contrary to the minimum standard of civilized conduct on the general acceptance of which security in such transactions ultimately rests ..."

See also, Report of the Committee on Nationalization of Property, American Branch, International Law Association, Proceedings and Committee Reports 1957-8, p. 62: "... It is, in our submission, unsound to maintain that the State is responsible under international law for the violation of alien property and contractual interests but that, under its rules of private international law which are alleged to be municipal rules alone, its courts may subvert that international law by which the State as a whole is bound. Whatever doctrinal validity the dichotomy between private international law and public international law may have, it is insufficient to overcome the needs of the international community. Public international law is not only to be described but applied. A principal forum of its application, especially in the field of alien property and contractual interests, is and should increasingly be the municipal courts of States."

<sup>7</sup> 29 Dept. of State Bulletin 358, 360 (1953).

The resolution of the Association of the Bar suggests a practical method of widening the area in which international commercial transactions can be governed by principles of law. The resolution, together with its valuable supporting Report, show the Act of State doctrine as essentially a political approach to the acts of foreign governments. At a time when there is in progress a broad examination of ways and means of extending the rule of law, it is appropriate to place some emphasis on a forum right here in the United States for private commercial litigation, with limited freedom to look to and apply principles of international law. If the hard cases lead eventually to intergovernmental litigation, the International Court of Justice can then provide governments, which have the will to use it, with the necessary forum.

JAMES N. HYDE

NON-BELLIGERENT'S RIGHT TO COMPENSATION FOR INTERNMENT OF  
FOREIGN MILITARY PERSONNEL

Within the past year there have been several incidents involving the internment of military personnel of the United States who had crossed over the border into East Germany from the West German Republic. In one of these an American helicopter, which had allegedly invaded East German airspace by inadvertence, was forced down on June 7, 1958, and nine members of its crew taken into custody.<sup>1</sup> A more recent instance was the arrest and confinement of a Lieutenant Richard Macklin, who parachuted into East Germany on December 3, 1958, when his plane ran out of fuel on a flight along the East German border.<sup>2</sup> In the first case the men were detained for a period of forty-two days. Lieutenant Macklin's detention lasted for two months.

During these prolonged periods, the United States Government consistently maintained that release of its military personnel was a responsibility of the Soviet Government under postwar agreements establishing procedures for the reciprocal return of military personnel of the other government when arrested or detained. It refused to address its request to the East German government, which it had not recognized, but demanded that appropriate instructions be issued by the U.S.S.R. to its military representatives in Germany for release of the crew of the helicopter, and later, of Lieutenant Macklin. In the American view, the episodes had been contrived to blackmail the United States into negotiating with the East German regime, with all the implications such negotiation might entail. The Soviet Government, on the other hand, took the position that all requests

<sup>1</sup> *Cf.* New York Times, June 27, 1958, for the text of the U. S. Aide-Mémoire to the Soviet Government in this case.

<sup>2</sup> *Ibid.*, Dec. 6, 1958, p. 1. An earlier example is furnished by the detention in Czechoslovakia in June-July, 1951, of two U. S. airmen who, after landing, were arrested and held incommunicado for four weeks. *Cf.* 24 Dept. of State Bulletin 1019 (1951); 25 *ibid.* 93 (1951); and 30 *ibid.* 319-320 (1954). An American civilian, Mr. Emory Vaughan, who had been arrested under similar circumstances, was released on May 9, 1959, after a detention of 47 days. New York Times, May 10, 1959.

should be addressed to the East German government as the sovereign entity directly concerned.<sup>3</sup>

It is not the objective of the present comment to examine the political undertones of the diplomatic shadow-boxing which preceded the eventual return of the airmen in question. Suffice it to observe, for this purpose, that United States efforts to persuade Soviet authorities to compel release of the airmen by the East German government were unsuccessful, as was the East German quest for United States recognition. In both cases, release of the personnel was eventually arranged in agreements between the American and the East German Red Cross.<sup>4</sup> There is, however, a subsidiary aspect of these incidents which raises a delicate and generally ignored point of international law.

In both cases, the East German authorities insisted upon, and received from the Red Cross, reimbursement for the living expenses of the confined military personnel during the period of their detention. In the case of the helicopter crew, this sum amounted to 7,334 East German marks (\$1,748); in the case of Lieutenant Macklin and the four enlisted men who were released with him, the Department of the Army paid 4500 West German Deutsche marks (\$1,070) claimed by the East German government for the men's board.

A claim of this character necessarily enmeshes its proponent in the rather curious proposition that the forcible and prolonged detention of an alien—whether a civilian or a military person—without justification, gives rise to a right of reimbursement for the expenses occasioned to the detaining government by virtue of a detention (a) which it is at liberty to terminate at will; and (b) which may or may not have been initiated as a valid exercise of the detaining government's power to punish for infractions of its penal code. We may pass aside the further hurdle of whether an unrecognized government in these circumstances possesses a *locus standi* to espouse such claims in the international forum.

Examination of the available authorities on the internment of foreign military personnel fails to disclose precedents in which liability for reimbursement was held to exist on the precise factual conditions presented by the Macklin case. The closest parallel—if, indeed, germane at all—is that occasionally found in claims arising from the wartime internment of belligerent military personnel by a neutral. There have been sufficient instances of this in postwar settlements to attest the general principles

<sup>3</sup> New York Herald Tribune, Dec. 6, 1958, p. 1; *cf.* also New York Times, July 12, 1958, p. 1.

<sup>4</sup> The crew of the helicopter was released on July 19, 1959. *Cf.* New York Times, July 20, 1958, p. 1. Lt. Macklin and four enlisted men were returned on Feb. 5, 1959. *Ibid.*, Feb. 6, 1959, p. 1.

In a statement issued at the time of the signing of the first agreement in East Berlin, Premier Otto Grotewohl's office declared the arrangement "took into account the existence of the German Democratic Republic as a sovereign State," and "emphasized that agreements reached under the occupation regime are no longer effective for the German Democratic Republic. These privileges can no longer be claimed in the territory of the German Democratic Republic." (As cited.) Was the helicopter incident the initial phase of the latest Berlin crisis?



which are applicable to the problem. An examination of these principles may provide useful perspective in disposing of such claims for compensation as were advanced in the Macklin and helicopter cases.

It is well settled in international law that a neutral state which grants refuge or asylum to soldiers of a belligerent Power is obliged to relieve them of their arms and to intern them.<sup>5</sup> There is no obligation to receive such soldiers when they present themselves for admission; but once received, the neutral falls under an obligation to take such measures as are necessary to prevent them from rejoining their forces. Classical doctrine regards the obligation as inherent in the status of neutrality and as an aspect of the recognized principle of international law that complete impartiality must be maintained by a neutral in its relations with states at war.<sup>6</sup>

Now this duty of internment would arise whether asylum is granted to single fugitive soldiers who are seeking refuge<sup>7</sup> or whether large bodies of troops attempt to cross the border to escape captivity or annihilation. An historic example of the mass-type of reception is furnished by the military convention of February 1, 1871, between the Swiss General Herzog and the French General Clinchant during the Franco-Prussian War, pursuant to which the French First Army (87,000 men) entered Switzerland. Oppenheim has stated the rule applicable to situations of this kind as follows:

On occasions during war large bodies of troops or even a whole army are obliged to cross the neutral frontier for the purpose of escaping captivity. A neutral need not permit this, and may repulse them on the spot; but he may also grant asylum. It is, however, obvious that the presence of such troops on neutral territory is a danger to the other party. The duty of impartiality incumbent upon a neutral obliges him, therefore to disarm them at once, and to guard them so as to ensure that they do not again perform military acts against the enemy during the war.<sup>8</sup>

As early as the Brussels Conference of 1874, the principle was given sanction in Article 53 of the Declaration Concerning the Laws and Customs of War. It was subsequently incorporated in Article 11 of Hague Convention V of 1907, concerning the Rights and Duties of Neutral Powers and Persons in War on Land, in these terms:

A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

<sup>5</sup> 2 Oppenheim, *International Law* 582 (6th ed.); 3 Rolin, *Le droit moderne de la guerre* 123 ff.; 2 Halleck, *International Law* 152 (3rd ed.); Holland, *The Law of War on Land* 65; Despagnet, *Cours de droit international public* 821 (3rd ed.); Pillet, *Les lois actuelles de la guerre* 162 (2nd ed.); 2 Fauchille, *Droit international public* 677; 4 Calvo, *Le droit international* § 2632; 3 Accioly, *Tratado de Direito Internacional Público* § 2054 (2<sup>o</sup> ed., 1957); 4 Bustamante y Sirvén, *Derecho Internacional Público* § 1.124; Hague Convention No. V of 1907, Art. XI; The War Department Field Manual, *Rules of Land Warfare*, 1940, FM 27-10 § 383.

<sup>6</sup> Oppenheim, *op. cit.* 583.

<sup>7</sup> *Idem*, 582; Rolin, *op. cit.* 134; Sauser-Hall, *Des belligérants internés chez les neutres* 102 ff.

<sup>8</sup> *Op. cit.* 583.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.<sup>9</sup>

These principles, which were given application in the second World War,<sup>10</sup> had also been confirmed by practice reported in World War I.<sup>11</sup>

It is an important corollary of the duty of internment that the belligerent whose armed forces have been interned must reimburse the neutral for the "expenses caused by the internment." This proposition, which is equally well established in general international law,<sup>12</sup> was reaffirmed at the Hague Conference of 1907 in Article 12 of Convention V:

In the absence of a special convention to the contrary, the neutral power shall supply the interned with the food, clothing and relief required by humanity.

At the conclusion of peace the *expenses caused by internment* shall be made good.<sup>13</sup>

A similar statement was approved by the Inter-American Neutrality Committee in its "Recommendation relative to Internment" adopted at Rio de Janeiro on January 26, 1940. The second paragraph of Article 8 of the resolutions adopted was thus worded:

During the time that the interned persons are unable to gain their own livelihood, they shall receive from the neutral State the lodging, food, clothing and assistance required by reasons of humanity. The neutral State shall have the right to receive from the belligerent State to which the interned persons belong, periodic reimbursements for the expenditures *occasioned by the internment*, which reimbursements cannot in any case cease or be affected by delay or failure of payment.<sup>14</sup>

<sup>9</sup> 2 Malloy's Treaties, etc. . . . of the United States 2298; War Department Training Manual, TM 27-251, p. 41; 2 A.J.I.L. Supp. 120 (1908).

<sup>10</sup> The international character of the duty to intern was recognized early in World War II by domestic legislation enacted in several states. Thus the Brazilian Decree-Law 2983 of Jan. 25, 1941, declared: "Internment is a rule of international law, being founded upon the obligation of every neutral State to forestall or prevent hostile acts within its territory by any belligerent, but . . . it is at the same time a rule of municipal law with respect to the means, form and organs for making it effective. . . ." The Brazilian decree expressly regards internment as constituting "a measure of international security taken by the neutral" for the purpose of maintaining its own rights and obligations. 7 Hackworth, Digest of International Law 564. To the same effect: Cuban Presidential Decree 859, of March 29, 1940, as cited; Ecuadorean Decree 15 of March 31, 1940, *ibid.* 565. And see also the Argentine Decree of Dec. 19, 1939, interning officers and crew of the German battleship *Graf Spee*; Hackworth, *op. cit.* 561.

<sup>11</sup> Harvard Law School, Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, 33 A.J.I.L. Supp. 484 ff. (1939); Oppenheim, *op. cit.* 584; Foreign Relations of the United States, 1915 Supp., pp. 821 ff.

<sup>12</sup> Fauchille, *op. cit.* 678; Despagnet, *Cours*, p. 821; Sauser-Hall, *op. cit.* 90 ff.

<sup>13</sup> Italics supplied. Cf. also par. 537 of the U. S. Army Field Manual on the Law of Land Warfare, FM 27-10, July, 1956, which merely reproduces Art. 12 of Hague Convention V.

<sup>14</sup> 34 A.J.I.L. Supp. 78 (1940). Italics supplied.

While, upon occasion, neutral states have not pressed claims for reimbursement,<sup>15</sup> the practice of states has long confirmed the right to do so. Thus the convention between Generals Herzog and Clinchant, referred to above, granted the French Army entry into Switzerland upon condition that it lay down its arms, equipment, and ammunition, which were to be restored to France after peace and "after the definitive settlement of the expenses occasioned to Switzerland by the sojourn of the French troops."<sup>16</sup> But even in the absence of a comparable agreement, it is recognized that the right to reimbursement exists, and that it is accompanied by a *jus retentionis* over the belligerent's war material, as a pledge against the expenses of the internment.<sup>17</sup>

Is the operation of these principles affected by the circumstance that internees may have entered the neutral territory from the airspace? In World War II, there were numerous instances of that kind involving American airmen in Switzerland. Would it have been sound for the Swiss Government, for example, to urge as an added ground for reimbursement, that, since it had no opportunity to refuse asylum to these airmen, as in the case of land combatants, it should not, therefore, be liable for any expenses caused by the internment of the aviators? It has already been noted<sup>18</sup> that the duty of internment applies just as fully to individual fugitive soldiers seeking refuge, as to large bodies of troops. In principle, there is no more reason for denying application of the rule in the case of an aviator who either intentionally or involuntarily seeks refuge over the neutral airspace, than there is in the case of an individual soldier who surreptitiously slips across the border undetected. Both are subject to internment, with its consequences. Such was the practice followed during the first World War in respect to aviators.<sup>19</sup> Of that practice, Spaight says:

The rule of internment was universal, and no exception was made for error, distress or *force majeure*. . . . The land war rule that belligerent troops who cross a neutral frontier in proved error are exempt from internment if they leave again at once, was not extended to air warfare. This is the more remarkable when one remembers how much easier it is for air forces than for land forces to lose their way.<sup>20</sup>

World War II practice, however, followed a rather erratic pattern. In some neutral countries the rule with respect to detention of belligerent

<sup>15</sup> Cf. the action of Belgium during the Franco-Prussian War, mentioned in 4 Calvo, *Le droit international* § 2635; 2 Kleen, *Lois et usages de la neutralité* 34, and authorities cited.

<sup>16</sup> Arts. 1 and 2. The text of this military convention is found in Rules of Land Warfare, 1914, Ch. XI, App. A, p. 146.

<sup>17</sup> Calvo, *op. cit.* § 2634; Rolin, *op. cit.* 125, 142; Sauser-Hall, *op. cit.* 187-188.

<sup>18</sup> See above, p. 640.

<sup>19</sup> 7 Hackworth, *Digest* 559; Rolin, *op. cit.* 131; Oppenheim, *op. cit.* 586; Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, Art. 95, 33 A.J.I.L. Supp. 766-767 (1939) and authorities cited.

<sup>20</sup> Air Power and War Rights 424-425 (1st ed.). The obligation to intern the personnel of belligerent military aircraft entering neutral jurisdiction was recognized in Art. 42 of the Rules of Aerial Warfare prepared by the Commission of Jurists in 1923. Cf. 32 A.J.I.L. Supp. 36 (1938); and see 3 Hyde, *International Law* 2287-2288, § 864.

aircraft and crews—which was rigorously adhered to by the Swiss—was regarded as applying only to those entering neutral jurisdiction on operational flights.<sup>21</sup> In some instances neutral governments were disposed to allow the departure, without discrimination, of belligerent airmen who had been interned for a considerable period.<sup>22</sup> Of course, a belligerent airman who lands in enemy territory and escapes into a neutral country is in precisely the same position as a ground soldier, and is governed by the same rule of internment. The Swiss Official Manual expressly provides for internment in such cases.<sup>23</sup> On the other hand, it appears that individual fugitive soldiers were not generally interned in practice.<sup>24</sup>

Inasmuch as neutral Switzerland had the undoubted right to compel belligerent aircraft to alight by whatever means might prove necessary,<sup>25</sup> any distinction between ground troops and airmen on the basis of the neutral's right to refuse or to permit asylum would be a most artificial one.

On all these points, the law—that is, the law of neutrality as applied prior to the United Nations Charter—is reasonably certain. However, a more controversial question is whether the expense incurred by the neutral state in *guarding* internees and in providing adequate means for their surveillance, is embraced within those expenses for which reimbursement may properly be claimed by a neutral. What, in other words, is the meaning of the phrase “expenses caused by internment” in Article 12 of Hague Convention V of 1907, in the light of pertinent sources of interpretation?

Unfortunately, substantial clues as to the intended scope of the phrase, which merely reproduced that of Article 58 of Convention II of 1899, are not furnished either by the minutes of the conferences which approved it, or by the proceedings on the corresponding article of the Brussels Declaration. Nor do the minutes of the Inter-American Neutrality Committee clarify the recommendations which it voted on this matter. Theoretical support for the position that surveillance costs are not reimbursable may be derived from the essential nature of the neutral's duty to intern. That duty necessarily comports the obligation of providing such means of surveillance, of taking whatever measures are incumbent upon a neutral, in order to comply with its international obligation to intern, as the circumstances may require. In other words, the duty to subject internees to surveillance and to provide guards for that purpose is as much an international obligation as the primary duty to intern. Leading authorities on the subject have expressly recognized this consequence. Sauser-Hall, for example, in his careful study, *Des Belligérants internés chez les neutres*, declares:

<sup>21</sup> Cf. Spaight, *Air Power and War Rights* 429-431 (3rd ed., 1947), for comments on the policy followed in Eire.

<sup>22</sup> Thus the Turkish announcement of April 30, 1943. *Op. cit.* 430.

<sup>23</sup> Conventions internationales concernant la Guerre sur terre 53, note 26 (1910).

<sup>24</sup> This situation should not be confused with the rule applicable to a prisoner of war who escapes into neutral territory. Such an escapee is free to repatriate himself. See, on this point, the discussion of the Bennett case in Spaight, *op. cit.* 451-452.

<sup>25</sup> Harvard Research in International Law, as cited.

Refugee forces, disarmed, under foreign sovereignty, are no longer belligerent forces; the neutral has the duty to prevent them from resuming that character by returning to the battlefield. He will accomplish this result by internment . . . at a certain distance from the frontier. In order to increase the difficulties of attempting to escape, *the refugees will therefore be confined in the interior of the country, in camps, barracks, etc., if need be in fortresses, and they will be the object of a strict surveillance; they may not recover their liberty as long as the war lasts.*<sup>26</sup>

Since the duty to provide guard and surveillance for internees is a duty imposed by international law, it would seem to follow that such expenses as are incurred by the neutral in performing that duty are expenses which it is bound to meet itself, in the absence of a treaty provision to the contrary. Exclusively as a question of legal theory these expenses would not appear to be properly chargeable to the belligerent Power whose subjects have been interned, but should be assumed by the neutral. On such reasoning Sauser-Hall and Kleen deny that the expenses of protection, disarming, and placing in internment under guard are reimbursable items; whereas, in Sauser-Hall's view, providing for the care and maintenance of the internees constitutes a service to the belligerent whose troops it has welcomed. From that care a quasi-contractual right to compensation arises against the nation whose troops have benefited thereby.<sup>27</sup>

Still, in the situation here confronted, to cleave to what seems a solid juridical principle may very well work to the disadvantage of the nation which invokes such an argument to resist payment of the neutral's claims. There is a degree of persuasion in the equitable contention that an uninvited guest who puts his reluctant host to much inconvenience and who benefits incalculably by hospitality and security against enemy seizure, ought to pay all expenses caused by his visit—not just those which directly benefit him. The possible rejoinder that these expenses are a small enough price to pay for the neutral's privilege of remaining aloof from the conflict has not influenced those who deny that surveillance costs are to be charged to the belligerent whose troops are interned.<sup>28</sup>

<sup>26</sup> P. 84. Translation and italics supplied. *Accord*, 3 Rolin, *Le droit moderne de la guerre* 123-248, *passim*; Oppenheim, *op. cit.* 583; Fauchille, as cited; Pillet, *Les lois actuelles de la guerre* 162-163. And compare the comments of M. Renault at the Hague Conference of 1899, Proceedings 469 (Carnegie Endowment ed.).

<sup>27</sup> As he puts it, "the neutral's obligations of protection, disarming and internment . . . possess the character of a condition *sine qua non* for the maintenance of neutrality; the neutral, in a word *must* accomplish them to remain neutral. The expenses which their execution provokes fall then into the general expenses which every war entails for peaceful States desirous of protecting their situation, occupying border positions, stationing guards, etc. The care of the refugees, on the other hand, does not have this character of a condition *sine qua non* of the observance of neutrality. . . ." *Op. cit.* 93.

Art. 1, par. 2, of the Havana Convention of 1928 on Rights and Duties of States in the Event of Civil Strife provided for the "expenses of internment to be borne by the state whose public order may have been disturbed." 46 Stat. 2749; 4 Treaties . . . etc. of the United States 4725 (Trenwith, 1938); 22 A.J.I.L. Supp. 160 (1928).

<sup>28</sup> In the words of Kleen: "It is already a great deal, that a peaceful State whose borders are threatened by disturbances taking place in other countries . . . should be exposed to considerable sacrifices in order to guard its borders against invasions. And

Rolin, whose otherwise exhaustive study does not analyze this question, seems to take the view that expenses of surveillance should be paid. Discussing the Franco-Swiss convention above referred to, he declares that the French Army's treasure chest and post wagons (which, under Article 7, were to be accounted for by the Swiss Confederation when the settlement of expenses took place), constituted a guaranty for the payment of expenses occasioned "by the *care* and *guarding* of the *prisoners*." No authority is cited for this casual allusion to guarding as a reimbursable expense, and no further mention is made of the subject in his scholarly discussion of internment.<sup>29</sup> But Rolin's position is supported by what actually took place between the French and Swiss Governments under the internment agreement of 1871. From the statement of accounts approved by the Swiss National Council, it appears that the list of expenses submitted to France included an item for the subsistence and pay of *troupes de surveillance*, of whom some 16,861 were required, at a total expense of Fr. 1,615,159.16. No objection to this item appears to have been raised by the French delegates who examined the accounts, so far as can be ascertained from available documents; and the total bill of Fr. 12,154,396, was paid by the French Government.<sup>30</sup> This appears to be the first important precedent for the view that reimbursement for guarding should be made, whatever may have been the special circumstances surrounding the admission of the French Army.

In the second World War, this precise question was presented to the Office of the Judge Advocate General of the United States Army, which, after reviewing the authorities, recommended that the Swiss Government be reimbursed for such expenses as it had incurred in providing surveil-

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once the entry of fugitives has occurred, it must bear the burdens and expenses which their surveillance occasions. It will hardly have any chance to be indemnified for the losses and damages so caused." 2 *Lois et usages de la neutralité* 33-34 (translation supplied). As indicated in the text, both Sauser-Hall and Kleen view the "expenses of internment" as signifying the cost to the neutral of furnishing the necessities of life, *e.g.*, subsistence, clothing and lodging. This construction finds some support in the circumstance that the phrase "expenses caused by internment" in the second paragraph of Article 12 immediately follows a description of those things which the neutral is obligated to supply to internees under that article, that is, the "food, clothing and relief required by humanity." Compare 2 Hyde, *International Law* 746 (2nd ed.).

The celebrated German General Staff book, *Kriegsbrauch im Landkriege*, after positing the neutral's duty to intern, recognizes its right to compensation only for the "maintenance and care" of the troops which have crossed the border. Morgan ed., 1915, p. 145. Fauchille apparently places a similar interpretation upon Art. 12 in upholding the neutral's right to reimbursement for "food and clothing, etc.," and to retention of belligerent material as a pledge against the settlement of "expenses incurred for the benefit of the refugees." *Op. cit.* 678. Calvo (as cited) and Despagnet (as cited) allow reimbursement for the expenses of *entretien*.

<sup>29</sup> Rolin cites Kleen to support his contention that a neutral may dispose of belligerent military equipment held as a guaranty, to obtain reimbursement of "the expenses of maintenance," without recognizing the distinction Kleen erects between the expenses of care and those of *guarding* (*op. cit.* 142). His careless use of the term *prisoners* to describe internees reveals some confusion of thought in view of his attempt to differentiate between them in a later passage.

<sup>30</sup> *Feuille fédérale suisse*, Vol. I, pp. 207-211 (1873).

lance troops. That recommendation was based less upon the cogency of legal argument than upon such extra-judicial considerations as the desirability of encouraging the Swiss to provide future asylum to American airmen, the effect of non-payment upon favorable Swiss treatment of internees, and the like.<sup>31</sup> The position of the Judge Advocate General was later adopted by the United States in settling the Swiss claims. During the period from September, 1943, through April, 1945, payments were made to Switzerland on a billing of 5 million Swiss francs covering food, quarters, property damage claims, transportation, salvage of American aircraft, clothing and similar expenses. Included in this sum was an item of 140,800 Swiss francs for the "cost of guards." Agreement was eventually reached on a final adjusted balance of 4,520,000 francs on November 4, 1947, which was paid by the United States on February 12, 1948.<sup>32</sup>

One other, little noticed, World War II case likewise deserves attention. This was a dispute between the French and Swiss Governments which grew out of the internment by Swiss authorities of troops of the Second Polish Division. Those troops had fought on the side of France as an integral part of the 45th Army Corps of General Daible. At the latter's request, Switzerland interned both units, and subsequently billed the French for all costs of the internment, including the care of the Polish troops. France, like the United States, paid the expenses for internment of French soldiers, but denied its liability for internment of the Polish Division from February, 1941, on the ground that at that time the French Corps had been liberated pursuant to an agreement between Vichy and the German authorities. The prolonged detention of the Polish troops from 1941 to 1945 was therefore not, in its view, a French responsibility. No solution of the dispute having been found through diplomatic channels, the Swiss unilaterally invoked the jurisdiction of the Permanent Conciliation Commission under the Franco-Swiss Treaty of Conciliation and Compulsory Arbitration of April 6, 1925. This Commission,<sup>33</sup> after hearing the parties, proposed that France pay to Switzerland a sum corresponding to the real costs of the internment of the Second Polish Division from June, 1940, to February, 1941 (the date of the release of French elements of the 45th Army Corps). For the period from February, 1941, to November, 1945, the Commission suggested that France pay "substantial compensation" as a matter of equity, for the costs sustained by the Swiss in their internment of the Polish troops.

During the four weeks' interval allowed the parties to consider the Commission's proposals, the entire dispute was settled, France agreeing, on the basis of those proposals, to pay Switzerland the sum of 19 million francs. While this was considerably less than the 90 million francs which the Swiss claimed, Switzerland derived from the conciliation procedure

<sup>31</sup> Memorandum for the Judge Advocate General, SPJGW 1944/8317, June 26, 1944.

<sup>32</sup> Letter to the writer from Colonel Howard S. Levie, Office of the Judge Advocate General of the Army, JAGW 1956/8570, Nov. 23, 1956.

<sup>33</sup> The Commission was composed of Baron van Asbeck, as president, Messrs. de Zulueta, Corbin and Panchaud, and Lord McNair. The Swiss thesis was presented by Professor Sausser-Hall, and the French thesis by Professor André Gros.

the satisfaction of having its rights in this matter acknowledged by the Commission.<sup>34</sup>

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It is clear that the principles and precedents which have been outlined above afford little support for the type of claim discussed at the beginning of this comment. The elements of treaty obligation, neutral status, quasi-contractual right, and benefit to the detained personnel—all present in the wartime illustrations—are lacking. What we have instead is a peacetime detention, effected without the constraint of an obligation to detain, and continued without justification. In such circumstances, the orthodox principles of international responsibility would seem to govern, namely, that the territorial state is responsible to the state of the injured national for the damages resulting from the detention. In other words, far from creating a right to reimbursement, the protracted detention of these airmen under the circumstances reported could be deemed to constitute an infraction of the law of nations. Accordingly, in the absence of a showing that the penetration of foreign territory was willful and for the purpose of violating the laws of the territorial state,<sup>35</sup> the proper party claimant in such cases would appear to be the government of the detained personnel, not that of the detaining country.

To recognize the validity of a claim by the latter would be tantamount to conceding that governmental authorities may indefinitely incarcerate the subjects of another nation and then require that nation to pay all the expenses incurred by the former in consequence of its own impropriety. No principle of law, domestic or international, sustains so weird a postulate.

ALWYN V. FREEMAN

#### OBSTACLES AND ALTERNATIVES TO INTERNATIONAL LAW

(Efforts have been made during the past decade or more to revive, revise and reaffirm the principles and rules of international law, following upon the unhappy experiences of World War I and World War II and the inconclusive period lying between. The activity of the International Law Commission of the United Nations constitutes but one, although perhaps

<sup>34</sup> Cf. a communiqué of the Swiss Federal Political Department of Nov. 24, 1955, and for background and agreement of settlement, the *Journal de Genève* of Nov. 25, 1955.

The Swiss claim was computed on the basis of some 2,000 Swiss francs per man per year, for the 8,000 Polish troops. These rates were considerably less than charges billed to the United States Government, which insisted that American internees be kept in hotels instead of in barracks.

For an exhaustive review of modern Swiss practice in the treatment of refugees and internees in general, see the report to the Swiss Federal Council by Professor Carl Ludwig on "La politique pratiquée par la Suisse à l'égard des réfugiés . . . 1933 à 1955" (Bâle, 1957).

<sup>35</sup> Compare the action of the Czechoslovak authorities in the case of John P. Kennedy and Cole Youngert, American soldiers who were convicted and sentenced to prison for 14 and 10 months, respectively, after a secret trial on charges of "Frontier Violation." *New York Times*, Nov. 2, 1958, p. 9.



the most outstanding, example of such efforts. To this should be added the Conferences on Maritime Law.) The American Society of International Law has, in its annual meetings and through its JOURNAL, attempted to contribute to this movement. Today these efforts continue, and the American Bar Association, through its Special Committee on World Peace Through Law, is joining in the good work. The American Peace Society, from the angle of its own objectives and activities, is contributing to the same end, though with little reference to international law.

It does, however, appear desirable and logically necessary at this point to pause and ask ourselves what are the obstacles to the development and utilization of law in the conduct and control of international relations and what, indeed, are the alternatives thereto. For many decades "international law" grew in volume and in a certain degree of precision, and also in a certain degree of respect and authority. There have followed forty-four years of turmoil, not to say chaos, leaving us still with the problems of the current status of international law, its content, and its future. What are the obstacles or countervailing influences which have checked the rule of law among nations, and what are the alternatives, failing this, in the conduct of international affairs?

It should be remembered that the objectives of the American Society of International Law are not only "to foster the study of international law" but also to promote "the establishment and maintenance of international relations on the basis of law and justice."

There appear to exist three major obstacles to the operation of international law in world affairs or three alternatives to the conduct of world affairs under law. These may be indicated briefly as (1) international politics, (2) international legislation, and (3) the power struggle. The first constitutes chiefly a substitute and alternative for law, although somewhat of an obstacle thereto; the second, an alternative and only mildly an obstacle; and the third, distinctly both an alternative and an obstacle. Let us examine each of these striking current phenomena in this light.

## I

By "international politics" must be understood, of course, the interplay among the policies and activities of nations. Perhaps an illustration would be useful at this point. In a recent issue of a Genevese newspaper there appeared the following passage:

All this, besides, has only a secondary importance. The lesson to be drawn from the speech of M. Khrushchev is that, no more than the massive compliments of Mr. Macmillan, the concession made by the Western powers in accepting the presence of advisers of the two Germans at a possible four-power conference has not brought the Kremlin to make on its part any conciliatory gesture. Quite the contrary. It is once more obvious that the least weakness is immediately exploited, that each breach draws a new assault seeking to enlarge that breach, and that the offensive halts only before a wall without fissures. Mr. Dulles, on his hospital bed, has the bitter satisfaction of having been right.<sup>1</sup>

<sup>1</sup> Tribune de Genève, Feb. 26, 1959, p. 20. Writer's translation.

Where is international law in all this? Nowhere. Nor can it be hoped that any conceivable development of international law could deal adequately with the problems involved in such a situation as that reflected in the passage quoted—and there are, alas, all too many such situations—or supplant the interplay of politics there reflected. Such a vain attempt would meet with complete frustration. (Even in a mature society many aspects of human relations remain outside of the scope of law and must be dealt with by negotiation and mutual adjustment.)

Two inferences must be drawn by the advocates of a broader and stronger international law. (That law will never be able to cover all of the manifold issues of international relations.) Nor will it ever be strong enough—although this involves another, almost entirely distinct, problem—to impose control upon this interplay of diplomatic policies and activities. It would be salutary for the international lawyer (so to speak) to bear this in mind both for his own good and for the good of the good cause which he seeks to serve.

There is involved here—as in the concepts of “consent” and “agreement” at the base of international law—the problem of good faith. May and can states trust one another? Obviously, no simple answer can be given to this vital question, or rather, an over-simplified answer is the only possible solution. (States can and must trust one another to a reasonable extent.) States openly professing deceptive practices, even if not always living up to this profession, for fear of the consequences, fall in one vague category; states professing to act in good faith fall—subject to the same qualifications—in another. There is no escape from this situation.

## II

On a slightly higher level, however, it is possible, and, indeed, imperative, to note that (what is needed for the regulation—pertinent rule-making—of international relations is not “international law” in the conventional sense, but legislation and administration. It is not enough to talk about treaties and agreements. It is true that international conventions either of a constitutional character (United Nations Charter) or regulating so-called “non-political” matters such as communications, health, and so on, remain in form and in law “treaties,” and subject to all of the legal requirements applying thereto.) It is also true, however, that in substance, and, to some extent, in form, these conventions depart greatly from the simple treaty. Judge Hudson and others have long since pointed out this difference and the significance of this development. The orthodox international law advocate loses immeasurably in his effort to improve matters international by adhering to the older type of law and neglecting the newer. The incorrigible legalism of the lawyer! Close observation of international processes in Geneva in recent days might seem to confirm the impression that new international legislation is everything, the old international law next to nothing; of course, this is not quite true.

Connected with this phenomenon is the growth of international administration—the actual application of common international law, but also of

the newer international legislation. (It might almost be said that an ounce of international administration is worth a pound of "international law.") But there is no necessary antagonism in theory or in principle between the two—though much personal and practical friction—and we hardly need to regard this branch of the matter as an additional difficulty.)

### III

(Finally the revival of international law is blocked by the power struggle, the struggle for material advantage or merely general supremacy of choice in all matters. This struggle is presently embodied in the conflict between the U. S. and the U.S.S.R., but is far more fundamental than this. A few hundred years from now—and we are dealing here with an issue of at least that duration—two other units may be involved. For the moment, however, the point is that two parties engaged in such a struggle are not very likely to admit the control of law, either law imposed from outside or based upon "agreement" between themselves.) There is much talk of "discussion" or "consultation" as well as "agreement" among the parties, just as there is much talk of "security" and "aggression," "peace" and "threat(s) to peace," but this is almost verbal jousting. (The United States may assert that it is willing to abide by international law, but some doubts may be felt in this connection also.) Even Soviet Russia may at times express a similar attitude (Mr. Khrushchev actually referred to "international law" the other day!), but the secular Russian attitude toward law in the conduct and control of social affairs, a very skeptical attitude, plus recent current Russian behavior, counts doubly against this. (At the present moment this struggle of and for power between Moscow and Washington constitutes the most formidable, and possibly a fatal, obstacle to the application of law in major international relations—such as those noted in the first section above. It should be noted that this conflict has little or nothing to do with the alleged conflict between Communism and capitalism.) It is true that orthodox Communist theory contains all of the basic ingredients for such a struggle, namely, refusal to admit the possibility of co-existence, complete mistrust as to motives and good faith, determination upon struggle by all means *à toute outrance*. But the power struggle might develop between two great movements embodying Mohammedanism and Christianity or indeed racial purity and cosmopolitanism or technocracy and humanism. Today it is Russia *versus* the United States, and application of international law in the premises is virtually excluded.)

✓ Under these circumstances, what is to be done? Give up the struggle for regulation of international relations by law—the law, be it repeated, of consent and agreement? By no means. Even revival and reaffirmation of the older type of common international law and its "gradual codification" (shades of yesteryear!) may and indeed must be sought, but without undue valuation of its worth and without undue optimism. All due effort must be made for development of international legislation and administration—one is tempted to say here "period" or "full stop," but there is no period

or full stop to this process. Finally one may, and indeed must, hope for cessation or subsidence of the power struggle between Russia and the rest of the world, and this—apart from any disintegration of Soviet Russia—may be barely possible, though it is quite unpredictable. In its absence, the future of international law, on the level of major international political problems, appears indeed desperate, if not hopeless.

Reference was made to the question of enforcement of international law. All that has been said concerning the law itself applies thereto, although curious velleities in this direction have crept into current great-Power discussions. Happily here also in the field of legislation and administration the problem, for reasons which lack of space forbids examining here, is less acute.

The moral is obvious. Let us do the best we can where the possibilities are greatest. International law can be revived and amplified, if not only good will, but also adequate intelligence, is employed in the process.

PITMAN B. POTTER

#### SPECIAL NOTICE

The Fifty-Fourth Annual Meeting of the American Society of International Law will be held April 28-30, 1960, at the Mayflower Hotel, Washington, D. C.

E. H. F.

## NOTES AND COMMENTS

### A NEW REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON REVISION OF THE BUSTAMANTE CODE

The Inter-American Juridical Committee, a permanent committee of the Inter-American Council of Jurists, the legal organ of the Organization of American States, has produced the fourth report<sup>1</sup> on possible revision of the Bustamante Code or Code on Private International Law which the Sixth International Conference of American States adopted in 1928 at Havana.<sup>2</sup> This report calls for even more attention than the earlier ones.

The "story" started with a decision taken by the Inter-American Council of Jurists at its first session held in Rio de Janeiro in 1950 that the permanent committee investigate the

possibility of revision, in so far as advisable, of the Bustamante Code and the Montevideo Treaties of 1889 and 1939/1940 and of the Restatement of the Law of Conflict of Laws, *in order to make these three codifications uniform.*<sup>3</sup>

The first "Opinion" of the permanent committee,<sup>4</sup> rendered in 1951 and commented upon in this JOURNAL,<sup>5</sup> stressing the different character of the three bodies of law involved, concluded that unification was an impossible task and that what was probably desired was a study to see whether the Bustamante Code could be revised in the light of the Montevideo treaties and the Restatement in such a way that the result would be a single code to govern in all American states. In a communication addressed to the permanent committee in February, 1952,<sup>6</sup> the United States Government declared itself in

substantial agreement with the conclusion drawn in the Opinion that the work of "amalgamation," "recasting" and "synthesis" of the three dissimilar codes would probably progress "on a theoretical, ethereal, and unsubstantial basis."

<sup>1</sup> Inter-American Juridical Committee, Report on the Possibility of Revision of the Bustamante Code or the Code of Private International Law (CIJ-38) (Department of Legal Affairs, Pan American Union, Washington, D. C., December, 1958).

<sup>2</sup> The International Conferences of American States 1889-1928 (Scott ed., 1931) 367; 4 Hudson, International Legislation 2279 (1931).

<sup>3</sup> 1950-1951 Inter-American Juridical Yearbook 289, 302 (emphasis supplied). Cf. 1949 *ibid.* 301, 305-307, 319 (F. A. Ursua, of Mexico, dissenting); A. V. Freeman, "The First Meeting of the Inter-American Council of Jurists," 44 A.J.I.L. 374, 377 (1950).

<sup>4</sup> 1950-1951 Inter-American Juridical Yearbook 360.

<sup>5</sup> A. K. Kuhn, "Opinion of the Inter-American Juridical Committee on Revision of the Bustamante Code," 46 A.J.I.L. 317 (1952).

<sup>6</sup> We quote from the unpublished Memorandum of Feb. 13, 1952, obtained from the Secretariat of the Inter-American Council of Jurists.

The permanent committee subsequently produced a "Second Opinion"<sup>7</sup> with a series of suggestions for changes in the Bustamante Code. The "Opinion" was not unanimous.<sup>8</sup> The United States member, in a separate opinion, raised the important point, among other matters, whether limiting application of the contents of the Code to ratifying countries and thus creating for each country two separate sets of conflicts rules was sound.<sup>9</sup>

The two Opinions came up for action at the Second Meeting of the Inter-American Council of Jurists, held in Buenos Aires in 1953. Without clarifying its first decision, the Council asked the permanent committee to produce a comparative study of the Bustamante Code, the Montevideo treaties and the Restatement of Conflict of Laws in consultation with the national codification commissions and groups dedicated to the study of private international law, as well as the foremost writers on the subject, and to submit the study to the governments for their comments.<sup>10</sup> The permanent committee did not produce the comparative study requested, but one of its members, the delegate from Colombia, prepared a comparative study of the three instruments,<sup>11</sup> and this study was sent by the committee to the governments for their comments.<sup>12</sup> We now have a new committee report dealing with the comments received and reaching certain conclusions, prepared for submission to the Inter-American Council of Jurists at the next session in Santiago de Chile.

It appears from the report that, of the twenty-one member states, only two governments have commented upon the comparative study, those of Ecuador and the United States. The comments are on a "preliminary question" raised in the comparative study by its author, whether the Restatement should be included in the revision work, or whether, on the contrary, the task should be limited to a revision of the Bustamante Code in the light of the Montevideo treaties,<sup>13</sup> the author favoring the latter.

<sup>7</sup> 1952-1954 Inter-American Juridical Yearbook 286.

<sup>8</sup> See *ibid.* at 295-297, for reservations made by delegates of Argentina and Chile.

<sup>9</sup> *Ibid.* at 297, 300 (George H. Owen). This is indeed contrary to modern trends. References in Nadelmann, "Uniform Legislation vs. International Conventions," in *International Trade Arbitration* 167, 175 (Domke ed., New York, 1958).

<sup>10</sup> 1952-1954 Inter-American Juridical Yearbook at 192, 208 (Resolution XII).

<sup>11</sup> Inter-American Juridical Committee, Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws (CIJ-21) (Department of International Law, Pan American Union, Washington, D. C., September, 1954, mimeo.). Not printed in the Yearbook. The author is Prof. José Joaquín Caicedo Castilla of Colombia.

<sup>12</sup> The delegate of the United States (George H. Owen) made the following statement: "The Delegate of the U. S. A. approves this Resolution because he agrees that the study prepared by the delegate of Colombia amply serves the primary purpose of enabling the jurists of the hemisphere and the Governments to envisage the problems that have confronted those who have worked in this field. In the meantime, he reserves his opinion on various points with regard to the manner in which the task of preparing a comparative study in this field should be executed. He believes that after the observations of the jurists and the Governments are received, the Inter-American Juridical Committee should start the detailed examination and discussion of each article of the three texts under study." *Ibid.* at 2.

<sup>13</sup> "[I]nasmuch as that country [the United States] has shown a persistent desire to continue to isolate itself with regard to juridical matters, this fact should be considered

Relying principally on the reasons advanced by Ecuador and the contents of the Memorandum of the United States Government, in a unanimous opinion of its nine members<sup>14</sup> the permanent committee reached the conclusion, which it now recommends to the Council, that the work of unification should be limited to the Bustamante Code and the treaties of Montevideo.<sup>15</sup> Efforts should be made to obtain withdrawal of the reservations made by various states in ratifying the convention which approved the Code, uniformity should be sought between the rules of the Code and those binding the parties to the Montevideo treaties, and attempts should be made to obtain adherence of those Latin American states which have not adhered to either instrument.

The fact that some Latin American states have ratified the Code without reservations,<sup>16</sup> some with a general reservation practically amounting to non-ratification,<sup>17</sup> and some have not ratified at all,<sup>18</sup> that, on the other hand, a number of South American states are bound by the Montevideo treaties of 1889,<sup>19</sup> that some, but not all, have ratified the new treaties of 1940,<sup>20</sup> and that a few states have adhered to both the Code and the treaties<sup>21</sup>—does not make unification an easy task. We shall not discuss the difficulties here,<sup>22</sup> but limit our observations to the proposed elimination of the Restatement, that is, of American conflicts law, from consideration in the work of revision of the Bustamante Code.

The Government of Ecuador, in its reply as quoted in the report, recalls that the Restatement is no codification, and suggests that, in all likelihood, because of Constitutional problems in the United States, a revised Code would have no better chance of being ratified by the United States than the Bustamante Code in its present form. The Memorandum of the United States Government,<sup>23</sup> which is merely summarized in the report, first recalls the comment made in February, 1952, on the "First Opinion" and then proceeds:

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by the American governments so as to decide whether the study of the codification of Private International Law should be limited to the orbit of the Montevideo Treaties and the Bustamante Code. If this were done it would have the drawbacks that are evident from the above discussion, but it would offer the advantage of facilitating the desired harmonization by doing away with the obstacles that are the result of the differences in the Anglo-Saxon and Latin American juridical systems." *Ibid.* at 11.

<sup>14</sup> Raul Fernandes (Brazil), Luis D. Cruz Ocampo (Chile), Carlos Echeopar Herce (Peru), José Joaquín Caicedo Castilla (Colombia), Hugo J. Gobbi (Argentina), A. Gómez Robledo (Mexico), E. Schacht Aristeguieta (Venezuela), A. Alvarez Aybar (Dominican Republic), Benedict M. English (U. S. A.).

<sup>15</sup> Sec. 18 of the Report cited in note 1 above.

<sup>16</sup> Brazil, Cuba, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic, Venezuela.

<sup>17</sup> Bolivia, Costa Rica, Chile, Ecuador, El Salvador.

<sup>18</sup> Mexico, Argentina, Uruguay, Paraguay, Colombia.

<sup>19</sup> Argentina, Uruguay, Paraguay, Peru, Bolivia, Colombia.

<sup>20</sup> Argentina, Uruguay, Paraguay.

<sup>21</sup> Bolivia, Peru.

<sup>22</sup> See discussion in the Second Opinion, note 7 above, and the Comparative Study, note 11 above.

<sup>23</sup> We quote from a copy procured from the Secretariat of the Inter-American Council of Jurists.

The Department of State continues to hold the view that bringing the Bustamante Code into harmony with the Montevideo Treaties and the Restatement of the Law of Conflict of Laws would probably constitute an impractical exercise. The subsequent study of the Juridical Committee points up basic differences between the Bustamante Code, the Montevideo Treaties and the Restatement and serious problems involved in any amalgamation of these texts into a single Code.

Even should a practical and workable harmonization of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws be achieved, the Federal structure in the United States raises for this Government both Constitutional and practical problems which would render ratification of such a Code extremely difficult, if not impossible. In general, the Bustamante Code treats of matter which in the United States is the internal concern of the several States. In these fields, the States have devised laws [*sic*] relating to the Conflict of Laws which are not always identical or reconcilable.

Apart from Constitutional problems, there would exist the practical problem of procuring uniformity in the legislation of the States and territories of the United States on the multiplicity of subjects covered by the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws.

Accordingly, it is believed that it would constitute a disservice to the cause of codification in this Hemisphere, not to state at this time that it appears highly improbable that the United States would become a party to such a revised Code as is envisaged, particularly in view of the Constitution and the Federal structure of the Government of the United States. The Department of State believes that the Inter-American Juridical Committee and the Inter-American Council of Jurists can better achieve their goal by attempting to resolve the problems raised by the countries which are party to the present Code or which may ratify such a revised Code.

In view of the confusion created by the original—obviously faulty—decision of the Council to attempt unification of the rules of the Bustamante Code, the Montevideo treaties, and the Restatement, it was well to recall what was clearly stated at the moment of the signing of the convention on the Bustamante Code and has become well known abroad, that, for a variety of reasons, including those stemming from the federal structure of the Government of the United States, this country is not likely to become a party to a Code codifying the whole field of conflict of laws, as does the Bustamante Code. On the other hand, the Memorandum might as well have repeated what was also said at the signing, that the United States might be interested in adhering to parts of the Code.<sup>24</sup> For, leaving aside the question whether the treaty-making power could be used for matters reserved to the States, the Code also covers topics in the Federal area. But we are not concerned with the statement of 1955 except for its possible influence on the committee's decision. We address ourselves to the conclusion reached by the committee in August, 1958, and incorporated in the report, that American conflicts law should not be taken into account in the

<sup>24</sup> The International Conferences of American States 1889-1928 (Scott ed., 1931) 371; 4 Hudson, *International Legislation* 2347 (1931); Lorenzen, "The Pan-American Code of Private International Law," 4 *Tulane Law Rev.* 499, 519 (1930).



work of revision of the Bustamante Code. If this suggestion is to be taken literally, we think that an error has been made—an error no less fundamental than the one in the original decision of the Council. And we fear that long-range consequences of a most regrettable character will ensue if the recommendation is ratified by the Council.

Under the Charter of the Organization of American States, the Inter-American Council of Jurists has the task to work on uniformity in the legislation of the member nations.<sup>25</sup> Whether unification solely of the law of the Latin American states, especially if only for internal application, as in the case of a rule applicable only to parties to the convention, is within the attributes of the Council, is questionable. But the jurisdictional question may well be left aside. Satisfactory revision work on the Bustamante Code is inconceivable without due regard being given to conflicts law elsewhere and, in the first place, to the law in the United States. Conflicts law does not develop in quarantine, in Latin America, or in the United States, or in Western Europe, or the British Commonwealth, or Scandinavia. While considered a branch of domestic law by many, conflicts law has always, and for obvious reasons, been one of the least insulated fields of the law. Civil law and common law have not produced distinct sets of principles. The conflicts law has remained largely uncoded in both systems. Many are the sources of the rules in the Montevideo treaties and the Bustamante Code. Rules of the treaties and the Code being in conflict, how could unification work be approached without giving consideration to the law in general?

One of the foremost experts on problems of unification of law recently recalled the dangers of "mechanical" unification, or unification without regard to the quality of the laws to be unified.<sup>26</sup> An illustration in point may be taken from the current work in the United States on revision of the Restatement of the Law of Conflict of Laws. The work would be unsatisfactory, indeed, if the decisions in the fifty-odd American jurisdictions were the only material considered; if, in searching for the best rule, developments elsewhere were not taken into account. The project for Rabel's great work, *The Conflict of Laws: A Comparative Study*, it may be recalled, originated with the American Law Institute, producer of the Restatements of the Law.<sup>27</sup> Similarly, notwithstanding the suggestions in the report, experts put in charge of revision of the Bustamante Code, to make the Code and the Montevideo treaties uniform, necessarily would turn to outside sources as well. Modern textbooks, when consulted, will be found

<sup>25</sup> Charter of Bogotá, Art. 67: "The purpose of the Inter-American Council of Jurists is to serve as an advisory body on juridical matters; to promote the development and codification of public and private international law; and to study the possibility of attaining uniformity in the legislation of the various American countries, insofar as it may be desirable." 1948 Inter-American Juridical Yearbook 296, 305.

<sup>26</sup> Mario Matteucci, "Introduction à l'étude systématique du droit uniforme," 91 Hague Academy Recueil des Cours 383, 393 (1957).

<sup>27</sup> See 1 Rabel, *Conflict of Laws: A Comparative Study* x (William Draper Lewis), xvii (Hessel E. Yntema) (1945).

full of references to foreign conflicts law, including American.<sup>28</sup> Comparative study of conflicts law, characteristic of our time, is a necessity if unification is to be achieved. The United States can pride itself on having made significant contributions to the comparative study.<sup>29</sup>

While we do not think that the recommendation to disregard American conflicts law in the revision work reflects ideas promoted by the extremists in the Hispano-Luso-American movement, warnings in speeches and articles that unification of Latin American law will be jeopardized by giving attention to alien law cannot be ignored. Suggestions of this sort, not unknown in other parts of the world, have a certain appeal, although they do not often come from persons familiar with the alien law. The difficulties of unifying Latin American private international law are of long standing. Doctrines in the Montevideo treaties have been found not acceptable to the Bustamante group. The Montevideo countries have disagreed with certain doctrines in the Bustamante Code. Splits have developed within the original Montevideo group.<sup>30</sup> The law of the United States has not been involved. Suggestions that difficulties come, or will come, from the United States are ill advised. They should be distinguished from the warnings given that the attainment of uniformity may be jeopardized through endeavors to broaden the range of acceptance of the Code.<sup>31</sup> This indeed is a danger which must be kept in mind, a danger always arising when revision of multipartite conventions or, as a matter of fact, of uniform laws, is attempted.

Inasmuch as elimination of American conflicts law from consideration in the revision work has been recommended, it may not be out of place to recall a few pertinent facts. The United States has become a—if not “the”—favorite place in the world for study of conflict of laws. This is not because American courts have found better rules, which they have not, but because the difficulties resulting from the Federal system have produced an amount of material for study not available elsewhere and be-

<sup>28</sup> There is a dearth of materials in Spanish on American conflicts law. Existence of a Spanish edition of Story's Commentaries on the Conflict of Laws (Buenos Aires, 1891) seems to be ignored outside Argentina. Occasionally the French translation of the Restatement has been used to discuss “Vested Rights” on the basis of the introduction to the translation. References to American law are in Julian G. Verplaetse, *Derecho Internacional Privado* (Madrid, 1954), and these references have been used by some more recent textbooks. Holdings in American law books in faculty libraries in Latin America are deplorable, except for a very few places, like Mexico and Buenos Aires. This applies similarly to holdings in Latin American law other than the domestic law. There are, of course, some first-rate experts on American conflicts law in Latin America.

<sup>29</sup> In addition to the Rabel work, cited note 27 above, the “bilateral studies” produced by the Parker School of Comparative Law of Columbia University deserve special mention. They include: *American-Colombian Law* (Phanor J. Eder), *American-Brazilian Law* (P. Griffith Garland); *American-Argentine*, *American-Chilean*, *American-Mexican laws* being in preparation. Likewise entitled to special credit are the Institutes giving instruction in American law to foreign graduate students.

<sup>30</sup> See note 22 above.

<sup>31</sup> See, on this point, Quintin Alfonsín, “Cooperación Judicial Internacional,” 9 *Revista de la Facultad de Derecho y Ciencias Sociales* 165, 167 (Uruguay, 1958).

cause these difficulties have necessitated unparalleled efforts to understand, and try to overcome, these difficulties. The ever-growing number of foreigners familiar with American conflicts law is not the result of forced labor. Exclusion of American conflicts experience from consideration in the revision work would remove a principal source of enlightenment. It is true that mere consultation of the Restatement cannot produce insight into the American conflicts system. It is as if an American lawyer thought he could master the Bustamante Code system by merely reading the Code—an instrument prepared by, and for the purposes of, Latin American lawyers.

A satisfactory uniform conflicts law is an objective worth laboring for, on a wide basis, or regionally. Latin America has pioneered in regional codification. It has earned high respect for the results reached. Endeavors to increase the results are entitled to full support, but the difficulties involved must be faced realistically. They include the fact that conventions age, that understanding of the problems to be dealt with has increased. The fate of the old Hague conventions may be recalled. Work on revision can succeed only if modern developments are taken into account with an open mind. This alone can lead to wider agreement.

If, in its endeavor to remove false expectations, the United States Memorandum of March, 1955, has created the impression that the United States has no direct interest in the results of the revision of the Bustamante Code, this is unfortunate, for the contrary is true. With growing economic and other ties with Latin America, the United States cannot be indifferent to the status and evolution of the conflicts law in Latin American countries; nor can, as a matter of fact, Latin America be indifferent to our own conflicts rules. The Memorandum follows the series of similar pronouncements of the past where the Federal Government disowned interest in unification efforts when the topic involved was in the "State" area, irrespective of whether the States themselves had an interest in unification.<sup>32</sup> This policy has now been abandoned, it would seem. In the fall of 1956, an Observer Delegation of the United States Government, comprising experts from the "State law" area, attended the Eighth Session of the Hague Conference on Private International Law.<sup>33</sup> In the spring of 1958, notwithstanding earlier pronouncements to the contrary,<sup>34</sup> the United States Government sent a delegation to the United Nations Conference on International Commercial Arbitration, expressing active interest in endeavors to unify arbitration law through such means as uniform legislation.<sup>35</sup> At the Hague Conference, the United States observers had raised the question whether advantage may be had from use of uniform legislation instead of, or in addition to, international conventions. Federal systems like those

<sup>32</sup> See Nademann, "Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law," 102 U. of Pa. Law Rev. 323 (1954).

<sup>33</sup> See Nademann, "The United States at the Hague Conference on Private International Law," 51 A.J.I.L. 618 (1957).

<sup>34</sup> 1955 United Nations Yearbook 245, 246; 1956 *ibid.* 387, 388.

<sup>35</sup> See Domke, "The United Nations Conference on International Commercial Arbitration," 53 A.J.I.L. 414, 419 (1959).

of the United States and Canada might find participation easier in this way.<sup>36</sup> The question is under consideration by the chancelleries of the Hague group at this moment; it deserves similar attention by the members of the Organization of American States and its organs.<sup>37</sup>

Signs multiply that, as far as the United States is concerned, more than a mere theoretical question is involved. As a result of Congressional action at the last session, the President has set up a "Commission on International Rules of Judicial Procedure" to study existing practices of judicial assistance and co-operation between the United States and foreign countries with a view to achieving improvements.<sup>38</sup> In this field, the work of the Commission will parallel work on revision of the Bustamante Code by the permanent committee. More recently, the National Conference of Commissioners on Uniform State Laws decided to draft a Uniform Recognition of Foreign Judgments Act for submission to the States,<sup>39</sup> also a subject covered by the Code and of great practical importance. These, and other steps to come,<sup>40</sup> are tangible proof of United States interest in unification work and of the existence of avenues for co-operation on a restricted but expandable scale.<sup>41</sup>

Instead of removing American conflicts law from consideration, as suggested in the report, it is hoped that the Inter-American Council of Jurists will ask the permanent committee, first, in connection with production of a comparative study, to comply with the earlier instructions relating to consultation of national codification commissions and groups dedicated to the study of private international law, as well as of the foremost writers; second, to prepare a revision of the Bustamante Code with due regard to the rules of the Montevideo treaties, American conflict rules, and any

<sup>36</sup> See Nadelmann and Reese, "The American Proposal at the Hague Conference to Use the Method of Uniform Laws," 7 *Am. J. Comp. Law* 239 (1958).

<sup>37</sup> At the 10th Conference of the Inter-American Bar Association, Buenos Aires, 1957, the following resolution was adopted: "The Conference, Considering the difficulties encountered in work on unification of rules of conflict of laws through adoption of multi-lateral conventions, Resolves to recommend the use of uniform or model legislation and/or multilateral conventions in work on unification of rules of conflict of laws, and Requests the secretary general of the Association to bring this Resolution to the attention of the Inter-American Council of Jurists and the Inter-American Juridical Committee."

<sup>38</sup> See E. H. Finch, "International Rules of Judicial Procedure," 53 *A.J.I.L.* 432 (1959).

<sup>39</sup> 1958 Handbook of the National Conference of Commissioners on Uniform State Laws 77, 151. Cf. Nadelmann, "Non-Recognition of American Judgments Abroad and What to Do About It," 42 *Iowa Law Rev.* 236, 257 (1957).

<sup>40</sup> A special Committee of the American Bar Association is investigating what ought to be done from the U. S. side respecting international unification of private law. 1957 Handbook of the National Conference of Commissioners on Uniform State Laws 152, 233; 82 *A.B.A. Reports* 176 (1957).

<sup>41</sup> Cf. Nadelmann, "Legislación uniforme frente a las convenciones internacionales, como método para la unificación del Derecho Internacional Privado," Cuadernos de los Institutos, Boletín III (1958), Instituto de Derecho Comparado "Prof. Dr. Enrique Martínez Paz," page 19 (Córdoba, Argentina); 47 *Revue Critique de Droit International Privé* 37 (1958); 54 *Friedens-Warte* 321 (1958); English text in *International Trade Arbitration* 167 (Domke ed., New York, 1958).

other materials which may be helpful in achieving to the greatest degree possible unification of the rules of conflict of laws.

Inasmuch as the permanent committee only meets for three months each year, that it has to attend to problems of public and private international law and unification of law, that not all members specialize in private international law, and that research facilities at the seat of the committee are inadequate, recourse should be had by the committee to outside assistance from expert bodies on the conflict of laws. There would have been no Bustamante Code except for the recourse to this method. Under the revised statutes of the Inter-American Council of Jurists, the use of experts has become possible.<sup>42</sup> Thought should be given to setting up an inter-American group of conflicts law experts and assistants for the revision work at an institution equipped with the facilities needed for comparative research in conflict of laws.

KURT H. NADELMANN

#### 53RD ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law held its 53rd Annual Meeting from April 30 to May 2, 1959, at the Mayflower Hotel. Under the general subject of "Diverse Systems of World Public Order Today," a series of simultaneous panel discussions on Thursday, April 30, and Friday, May 1, considered universality in perspective, the Russian, the Islamic, and the Latin American systems, security problems among diverse systems, principles of jurisdiction, the allocation of resources and contending systems, human rights among diverse world orders, economic growth and trade among competitive systems and the law of treaties among diverse systems. The prepared papers and comments were followed by general discussion from the floor.

The meeting opened on Thursday afternoon, April 30, at 2:30 p.m. On Panel I, under the chairmanship of Professor Hardy C. Dillard of the University of Virginia Law School, Professor Harold D. Lasswell, of the Yale Law School, discussed "Universality in Perspective." Professor Oliver J. Lissitzyn, of the Columbia University Law School, spoke on "Western and Soviet Perspectives on International Law," and Professor John N. Hazard, of the Russian Institute of Columbia University, discussed "Soviet Socialism as a Public Order System." The papers were followed by informal comments by Mrs. Adda B. Bozeman, of Sarah Lawrence College, and Professor Leon Lipson of Yale Law School.

Panel II, under the chairmanship of Professor Josef L. Kunz of the College of Law of the University of Toledo, considered the Islamic and Latin

<sup>42</sup> "When the Inter-American Juridical Committee considers it useful, it may request the Department of International Law of the Pan American Union, and also other organizations and experts in international law, to furnish background material or preliminary studies on any topic submitted to the Committee for study." Art. 42, Statutes of the Inter-American Council of Jurists as amended. 1955-1957 Inter-American Juridical Yearbook 248, 251. For background see 1952-1954 *ibid.* 75.

American systems of world public order. Dr. Majid Khadduri, of the School of Advanced International Studies, Johns Hopkins University, delivered a paper entitled "The Islamic System: Its Competition and Co-Existence with Western Systems," and Dr. R. K. Ramazani, of the Woodrow Wilson Department of Foreign Affairs, University of Virginia, spoke on "The Shī'ī System: Its Conflict and Interaction with Other Systems." Comments were made by Dr. Saba Habachy of the Egyptian Bar. "The Latin American System" was the subject of an address by His Excellency Señor Don Julio A. Lacarte, Ambassador of Uruguay to the United States. Professor Martin B. Travis, Jr., of Stanford University, discussed "Political and Social Bases for the Latin American Non-Intervention Doctrine," and Professor A. J. Thomas, Jr., of the School of Law of Southern Methodist University, spoke on "Non-Intervention and Public Order in the Americas."

On Thursday evening, April 30, at 8:30 p.m., Mr. C. Wilfred Jenks, Assistant Director General of the International Labor Organization, spoke on "The Challenge of Universality." He was followed by Professor Maxwell Cohen, of McGill University, who took as his theme "From Diversity to Unity: International Law in a Bipolar World." Professor Myres S. McDougal, President of the Society, concluded the session with an address on "Perspectives for an International Law of Human Dignity." At the opening of this session the Manley O. Hudson Medal was conferred on Lord McNair, former Judge of the International Court of Justice, writer, and professor of international law, for his outstanding achievements and contributions in the field. In the absence of Lord McNair, Mr. Jenks received the medal in his behalf, and President McDougal read a message from Lord McNair accepting the medal.

On Friday morning, May 1, at 9:30 a.m., Panel I discussed "Security Problems among Diverse Systems of World Public Order." Mr. Edgar Turlington, of the D. C. Bar, and a Vice President of the Society, presided. Professor W. T. R. Fox, of Columbia University, delivered a paper on "The Politics of Survival and the Bases of World Public Order." Professor Quincy Wright, of the Woodrow Wilson Department of Foreign Affairs, University of Virginia, spoke on "International Law and Civil Strife," and Dr. Florentino P. Feliciano, of the Department of Justice, Republic of the Philippines, discussed "Conflicting Orders and the Appraisal of Resort to Coercion." The commentators were Professor Richard R. Baxter of Harvard Law School and Professor Ruth C. Lawson of Mount Holyoke College.

Panel II considered "Diverse Systems and Principles of Jurisdiction," under the chairmanship of Professor Herbert W. Briggs of Cornell University, a Vice President of the Society. The speakers were Professor Joseph M. Sweeney, of New York University School of Law, Professor Kenneth S. Carlston, of the University of Illinois School of Law, who spoke on "The Grasp of Jurisdiction," and Professor Richard A. Falk, of Ohio State University College of Law, whose paper treated "The Relevance of Contending Systems of Public Order for the Delimitation of Legal Competence." The commentators were Mr. Breck P. McAllister of the

New York Bar, and Professor Louis Henkin, of the University of Pennsylvania Law School.

On Friday, May 1, at 2:30 p.m., Panel I, under the chairmanship of Professor William W. Bishop, Jr., of the University of Michigan Law School, dealt with "The Allocation of Resources and Contending Systems." Mr. Arthur H. Dean, of the New York Bar, discussed "Recent Developments in the Law of the Sea," and Dr. William T. Burke, of Yale Law School, commented upon the 1958 Geneva Conventions. The subject of "Sharable and Strategic Resources—Outer Space, Polar Areas, and the Oceans" was discussed by Professor Nicholas deB. Katzenbach, of the University of Chicago Law School. Professor Brunson MacChesney of Northwestern University Law School, Professor Joseph W. Bingham, of Stanford University Law School, and Rear Admiral Chester A. Ward, Judge Advocate General of the U. S. Navy, commented upon the preceding papers.

At the same time, Panel II, under the chairmanship of Professor Louis B. Sohn, of Harvard Law School, discussed "Human Rights among Diverse World Orders." Dr. Egon Schwelb, Deputy Director, Division of Human Rights, United Nations Secretariat, delivered an address on "The Influence of the Universal Declaration of Human Rights on International and National Law." Mr. Moses Moskowitz, Secretary General of the Consultative Council of Jewish Organizations, spoke on "The Covenants on Human Rights: Basic Issues of Substance," and Mr. Stanley Hoffman, of Harvard University, discussed "Implementation of International Instruments on Human Rights." Comments were offered by Mr. James Simsarian, Officer in Charge, U. N. Cultural and Human Rights Affairs, Department of State, and Dr. Marek St. Korowicz, of the Fletcher School of Law and Diplomacy.

On Friday evening, May 1, at 8:30 p.m., Panel I discussed "Economic Growth and Trade among Competitive Systems," under the chairmanship of Mr. G. Winthrop Haight, of the Asiatic Petroleum Corporation. Professor Richard N. Gardner of Columbia University spoke on "International Measures for the Promotion and Protection of Foreign Investments." Mr. Stephen M. Schwelb of the New York Bar discussed "International Protection of Contractual Arrangements," and Professor Harold J. Berman of Harvard University discussed "The Legal Framework of Trade between Planned and Market Economies: The Soviet-American Example." Comments on the papers were made by Mr. Arthur H. Dean, of the New York Bar; Mr. William L. Griffin of the Department of State, Mr. James N. Hyde of the New York Bar, Dr. Martin Domke of New York University and Mr. Leo M. Drachler of the New York Bar.

On the same evening Panel II considered "Diverse Systems and the Law of Treaties." Professor Philip C. Jessup of Columbia University presided. The speakers were Professor David R. Deener of Tulane University, who discussed "Treaty Powers in a Federal-Parliamentary System: Case of Canada"; Dr. Jan F. Triska of Cornell University, who spoke on "The Soviet Law of Treaties"; and Professor Alona E. Evans of Wellesley College, who had as her subject "Treaty Practice in Chile, Argentina, and

Mexico." Commentators were Professor Covey T. Oliver, of the University of Pennsylvania Law School, Professor Gertrude C. K. Leighton of Bryn Mawr College, and Professor Wesley L. Gould of Purdue University.

The sessions concluded with a dinner at 7:00 p.m. in the East Room of the Mayflower. After-dinner addresses were delivered by the Honorable Loftus Becker, Legal Adviser, Department of State, who discussed "Just Compensation in Expropriation Cases: Decline and Partial Recovery"; the Honorable Oscar Schachter, Director, General Legal Division, Office of Legal Affairs, United Nations, who spoke on "The International Official in a Divided World"; and Senator Henry M. Jackson, of Washington State, who delivered an address on "National Policy-Making in a Divided World."

At the business meeting of the Society on Saturday morning, May 2, the Committee on Study of Legal Problems of the United Nations presented a report dealing with the acceptance of the compulsory jurisdiction of the International Court of Justice by the United States Government, and expressing the view that the United States reservations to its acceptance of such jurisdiction operate as a serious limitation upon the use of the International Court for the settlement of disputes between nations. At the conclusion of Professor Sohn's report, a motion was offered that it was the sense of the meeting that the recommendation in the report that the United States should withdraw its reservations to the compulsory jurisdiction of the International Court was an admirable expression of the sentiments of the Society. The motion was seconded and, after a considerable discussion as to the wording of the motion, a number of amendments having been proposed, the meeting voted that the motion be adopted with certain amendments, subject to drafting changes by the Executive Council. As framed by the Council at its meeting immediately following the business session of the Society, the following action was recorded in the minutes of the annual meeting:

After hearing the Report of the Committee and having given special consideration to the resolution of 1946 incorporated in that Report, it was voted to record as the sense of the meeting that the members warmly associated themselves with the Committee's recommendation that the United States withdraw its reservations to the acceptance of the Optional Clause of the Statute of the International Court of Justice.

The resolution of 1946 referred to is the resolution adopted by the American Society of International Law at its meeting on April 27, 1946, which reads:

RESOLVED, That the American Society of International Law strongly favors a declaration by the United States Government of its acceptance of the jurisdiction of the International Court of Justice in the types of legal disputes enumerated in Article 36 of the statute of the Court.

Following the adoption of the motion expressing the sense of the meeting, a motion was made, seconded and carried that the President of the Society, if invited to do so, be authorized to appear and testify in the sense of the Society's action, at a hearing before the Senate Committee on Foreign Rela-



tions on a pending bill to withdraw the so-called Connally Amendment to the United States acceptance of the compulsory jurisdiction of the International Court.

The report of the Committee on Department of State and United Nations Publications was presented by Chairman Denys P. Myers, and upon his motion, duly seconded and carried, the following resolution was adopted:

RESOLVED, That the Society hails the assignment of a competent officer of the Department of State to proceed with the preparation of a digest of International Law as applied by the United States since 1938 and urges the acceleration of the project by providing adequate personnel for its prompt completion and the allocation of funds for its publication;

The Society commends the project for issuing an English edition of United States treaties from 1778 to 1949, for which publication funds should be allocated in the earliest possible fiscal year;

Resumption of publication of United States Treaty Developments in cumulative form is deemed by this Society as an essential service both to the Foreign Service of the United States and to the legal profession; funds should be provided for publication of the material at present compiled;

The Historical Division of the Bureau of Public Affairs, whose responsibility for selection of documents for *Foreign Relations* is primary, should in submitting material for domestic clearance specify those documents which in its judgment require the attention of clearance officers. Objectively, clearance officers are bound to observe the five criteria of permissible omissions listed in Regulation 0.45.2, a-e. Temporary policy positions should not in principle weigh unduly against publishing the full factual record of past events. Provision should be made for prompt or periodic review of questions of clearance not resolved at the working level;

The Secretariat of the United Nations is commended for speeding up the publication of the *Treaty Series* with the aim of issuing volumes one year after registration of the instruments contained therein. The *Treaty Series* is of necessity very bulky and it is suggested that much more material could be put in the same space if more compact typography were adopted;

The Society believes that a necessary service should be rendered in publishing the records of United Nations conferences that produce agreements, of which the Conference on International Commercial Arbitration is an example.

The Society views with interest the proposal for a United Nations Juridical Yearbook which would usefully assemble world-wide judicial citations and the scattered legal aspects of subjects dealt with in the whole system of United Nations organizations, but the Society deems that any plan to include papers by individual contributors would hardly be practicable.

Upon the recommendation of the Committee on Annual Awards presented by Chairman Herbert W. Briggs, the Society voted to award its Certificate of Merit to Mr. C. Wilfred Jenks for his recent book entitled *The Common Law of Mankind*. Dr. Charles G. Fenwick reported for the Committee on Selection of Honorary Members and, upon the recommendation of the committee, the Society elected as an Honorary Member Dr. Luis Podestá

Costa of Argentina for his distinguished contributions and service in the field of international law.

The Society also adopted, upon the recommendation of the Executive Council, an amendment to Article V, third paragraph, of the Society's Constitution, changing the beginning of its fiscal year from January 1 to April 1.

Mr. Henry F. Butler, Chairman of the Finance Committee, and also Chairman of the special committee concerned with the acquisition of the building on Massachusetts Avenue made possible by the gift of Mrs. Benjamin Tillar, reported that steps were being taken to obtain an exception to the zoning regulations of the District of Columbia to allow the Society to occupy the building. He stated that following the rejection of the Society's application by the D. C. Zoning Board, legislation was being introduced in both Houses of Congress to permit the exception.<sup>1</sup> In reporting on the status of the Society's building, Mr. Butler stated that the Society would need around \$30,000.00 to renovate the premises and make certain structural changes to comply with the building regulations and to provide a working library and office rooms. He appealed for contributions in money, furniture and books.

Mr. Edgar Turlington, Chairman of the Committee to Study the Policies and Procedures of the Society and to make recommendations on these matters with a view to making the Society more effective, reported that the main proposals of his Committee had been adopted, among them the proposal to appoint an Executive Director and necessary assistants for carrying out an enlarged plan of activity of the Society. Mr. Turlington stated that the plan to appoint an Executive Director had not materialized, since it had not been possible to find someone with the necessary qualifications and ability to work without compensation.

Professor Kenneth S. Carlston, Chairman of the Committee on Nominations, presented the report of the Committee, and upon motion duly made, seconded and carried, the list of nominees was declared unanimously elected as follows:

Honorary President: The Honorable Christian A. Herter, Secretary of State.

President: Herbert W. Briggs.

Vice Presidents: Charles E. Martin, Herman Phleger and Edgar Turlington.

The present Honorary Vice Presidents were re-elected, except for the substitution of the Honorable John Foster Dulles \* for the Honorable Harold H. Burton, and the addition of the retiring President of the Society.

Professor Robert R. Wilson was elected a member of the Executive Council to serve until 1960, filling the vacancy caused by the death of Mr. Louis B. Wehle.

<sup>1</sup> H. R. 6378 authorizing the Society to occupy the premises as its national headquarters was passed by the House of Representatives on June 8, 1959, and is pending in the Senate.

\* Deceased May 24, 1959.

The following were elected to serve on the Executive Council until 1962: John G. Laylin of the D. C. Bar; J. Chrys Dougherty of the Texas Bar; Philip W. Amram of the D. C. Bar; Wesley L. Gould of Purdue University; James N. Hyde of the New York Bar; Rosalind Branning of the University of Pittsburgh; Joseph Dainow of Louisiana State University; Ferdinand F. Stone of Tulane University.

The Committee on Nominations for the year 1960 was elected as follows: Arnold W. Knauth, Chairman; Harry L. Jones, Oscar Schachter, Herbert S. Little, Leo Gross.

Following the election of officers, the Society adopted a motion that the Executive Council consider the advisability of establishing the office of President-elect, and, if it be of the opinion that such is desirable, that it take appropriate measures to that end.

The Executive Council of the Society at its meeting on May 2 re-elected the Honorable Edward Dumbauld, Secretary, and Mr. Edward L. Merigan, Treasurer, of the Society. It also reappointed Miss Eleanor H. Finch, Executive Secretary, and Denys P. Myers, Assistant Treasurer, for the following year.

The present Board of Editors was re-elected for the coming year, with the addition of Mr. Oscar Schachter as a new member.

The Council established a committee, to be appointed by the President, to examine the desirability of providing for a President-elect and for a special honorary position for ex-Presidents of the Society, and to study Article VIII of the Constitution regarding resolutions, with special reference to its interpretation.

The 53rd annual meeting was one of the most successful meetings the Society has had, with a large attendance at the sessions as well as at the concluding dinner. The speeches and addresses, which will appear in the printed *Proceedings* later this year, will testify to the interest and success of the meeting.

ELEANOR H. FINCH

#### REGIONAL AND LOCAL MEETINGS OF THE SOCIETY

During the past year six regional meetings of the Society have been held as a result of the efforts of its Committee on Regional and Local Meetings under the chairmanship of Professor Richard A. Falk, of Ohio State University. According to the report of the Chairman, each member of the Committee was asked to organize a regional meeting on behalf of the Society. Although it was suggested that the regional meeting might anticipate some portion of the 1959 Annual Meeting, discretion was left to the individual Committee member to organize the kind of meeting that he considered to be responsive to regional interests. The results this year on both a qualitative and a quantitative basis exceeded what has been done by the Committee in recent years. This was a consequence, it was felt, of the appeal of the subject matter of the Annual Meeting, the earlier circulation of letters to Committee members asking them to proceed, and, most of all,

the very enthusiastic support and assistance given to the Committee by the President of the Society, Professor McDougal. This support was most importantly expressed by Professor McDougal's willingness to participate as a major speaker in two of the regional meetings.

*Chicago.* On October 25, 1958, Northwestern University School of Law joined the Society in sponsoring a Conference on the International Law of Territorial Waters and International Rivers. The meeting consisted of two sessions. In a luncheon session presided over by Professor MacChesney, who had also been responsible for the excellent organization of the entire meeting, Professor William W. Bishop delivered a paper entitled "Can Communist China and Iceland Extend Unilaterally Their Territorial Waters to Twelve Miles?" In an afternoon session Sydney Craig, Esq., of the Chicago Bar, presided over Professor Maxwell Cohen's presentation of the subject "Uses of the Waters of International Rivers: Controlled by International Law?" This paper was commented upon by a panel composed of William L. Griffin of the Legal Adviser's Office of the State Department, John G. Laylin, Esq., of the District of Columbia Bar, and Professor Ignaz Seidl-Hohenveldern of the University of Saarbruecken, Germany. The conference attracted about 100 people.

*Madison, Wisconsin.* A meeting arranged under the title "Diverse Systems of World Public Order: International Security" was held February 3-4, 1959, at the University of Wisconsin Law School under the joint auspices of the Society, the Law School, the Wisconsin State Bar Committee on World Peace through Law, and the National Security Studies Group. This meeting was organized by Professor William G. Rice with the special assistance of Professor Gordon B. Baldwin and Professor William Bradford Smith. It was a most impressive meeting, consisting of six complete sessions, with the following principal speakers and topics: Professor Richard R. Baxter gave a paper entitled "Diverse Attitudes Toward Collective Security"; Professor Quincy Wright spoke on the subject "India's Program for Achieving Security Between Nations"; Professor Gordon B. Baldwin presided over a panel that considered the subject "Soviet Attitudes Toward World Public Order"; Professor Wright presided over a panel devoted to "South Asian Views of International Security." Bruno V. Bitker, Esq., gave an address entitled "Is a Compulsory International Court Foreseeable," and, finally, Professor Norman Gibbs of All Souls College, Oxford, gave a paper on "The North Atlantic Treaty Organization" which was followed by a panel consideration of the subject.

*New York City.* On the night of March 4, 1959, at the United Nations, there was held a meeting that has received wide acclaim for its great success from every point of view. There was an audience of nearly 400, made up of a great deal of the leading legal talent in the area. Credit for this outstanding organizational achievement should be given to G. Winthrop Haight, Esq. The meeting itself was devoted to the general subject "Economic Growth and Trade among Competitive Systems." Some opening remarks were made by Charles Malik of Lebanon, the current President

of the General Assembly. The main presentations were made by Professor Wolfgang Friedmann on the subject of commercial relations with state trading corporations, Professor Richard N. Gardner on "International Measures for the Promotion and Protection of Foreign Investments," and Stephen M. Schwebel on "International Protection of Contractual Arrangements."

*Columbus, Ohio.* On April 11, 1959, a Conference on the Meaning of Aggression in Current International Law was held at Ohio State University under the joint sponsorship of the College of Law, the Department of Political Science, the Committee on Defense Studies, and the American Society of International Law. This represents the fourth consecutive year in which a regional meeting has been held at Ohio State. The meeting was organized by Bruce Marshall of the Department of Political Science. Professor McDougal delivered the first main address on "Aggression and Self-Defense in Contemporary International Law." This was followed by a major presentation of Arnold Wolfers, Professor Emeritus of International Relations at Yale University, and now at the Washington Center of Foreign Policy Research, under the title, "The Aggressor Theory of War: No End of Fallacies." These papers were then commented upon by Professor Wojciech Morawiecki of the University of Warsaw. The meeting was well attended by over 100 people.

*New Orleans.* On April 16-17, 1959, a regional meeting of the Society devoted to "International Law Developments and Latin America" was held under joint auspices at Tulane University in New Orleans. The meeting was organized by a local committee under the chairmanship of Professor David Deener. On the first day three main presentations were made: Professor McDougal on "International Law and Contending Systems of World Public Order," Professor Brendan F. Brown of Loyola University School of Law on "Application of the International War Crimes Concept," and Professor Alan Karabus on "Modalities of Economic Aggression." The second day of the conference consisted of a morning seminar conducted by Professor McDougal and an afternoon presentation of three papers by leading New Orleans lawyers: Thomas M. Rodgers, Jr., Esq., on "Changing International Attitudes toward Oil Production Problems," Bernard K. Oppenheim, Esq., on "Some Legal Aspects of Doing Business in Latin America," and Brunswick G. Deutsch, on "Developments in the Law of the Sea."

*Coral Gables, Florida.* The sixth meeting was held at Miami University Law School, under the direction of Professor David Stern, on the subject of "Latin American Approaches to Contending Systems of World Order." It consisted of a single session with leading members of the Inter-American Bar Association.

The work of the Committee would be more extended and effective if it were possible to offer financial assistance to those areas where it is most difficult to organize a meeting. It is hoped that efforts to obtain funds for this purpose will continue to be made.

E. H. F.

## INTERNATIONAL LAW ASSOCIATION

At a meeting of the Executive Council of the International Law Association, held in London May 1 and 2, 1959, Lord McNair was elected Chairman. Dr. A. L. Goodhart, K.B.E., Q.C., (the retiring Chairman) was co-opted to the Council, and Mr. W. Harvey Moore, Q.C. (retiring Honorary Secretary General) was made a Vice President and elected to the Council.

The following subjects were chosen for discussion at the forthcoming 49th Conference of the Association, which is to be held at Hamburg, commencing on August 8, 1960: Nationalization and Foreign Property; Law of International Waterways; United Nations Forces; Custody of Children; Peaceful Co-existence; International Monetary Law; Enforcement of Foreign Judgments; International Trade Marks Law; and the Peaceful Uses of Nuclear Energy.

E. H. F.

## 1960 CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION IN SALZBURG, AUSTRIA

The Council of the International Bar Association, meeting at Lugano, Switzerland, has accepted the invitation of the Bar Association of Salzburg, supported by the Vienna Bar Association (*Salzburg Rechtsanwaltskammer* and the *Rechtsanwaltskammer für Wien, Niederösterreich und das Burgenland*) to hold the Eighth Conference of the Association in Salzburg July 4 to 8, 1960. The subjects to be considered at Salzburg are: (1) The Function of a Bar Association in Providing Services to the Profession and the Public—Continuing Education of the Profession; (2) Professional Conduct: (a) The Client's Privilege of Secrecy in His Communications with His Attorney; (b) The Propriety of Attorneys *inter se* Using Wire Recorders and Film Cameras for Evidence, etc.; (3) Monopolies and Restrictive Trade Practices; (4) Court and Court Procedure for Protection of Investments Abroad; (5) Atomic Energy; (6) A Draft Convention for Taking Evidence and Serving Documents Abroad; (7) The Formation and Operation of Foreign Subsidiaries and Branches, including the Extent to Which Foreign Subsidiaries Are Entitled to Special Treatment under the Law of their Incorporation or under International Law.

The International Bar Association is a federation of national bar associations from thirty-three countries of the free world, and was established in 1947 upon the initiative of the American Bar Association. Books are published after each of its biennial conferences containing the papers discussed at the meeting. Notable among recent undertakings are the establishment of an International Legal Aid Association, the adoption of an International Code of Ethics for the Legal Profession, the current proposals for a convention on International Shipbuilding Contracts and a convention on Administration of Foreign Estates, and continuing work on Taking Evidence and Serving Documents Abroad, which it is hoped will culminate next year in a proposed convention.

Individual members of the legal profession who are interested in the work of the Association are affiliated as Patrons. Complete information

and Patrons' application forms may be obtained from the Secretary General, Gerald J. McMahon, at 501 Fifth Avenue, New York 17, N. Y.

E. H. F.

#### DEPARTMENT OF STATE TRAINING ON THE UNITED NATIONS

The Foreign Service Institute of the Department of State has in recent years substantially increased its training programs on the United Nations offered to officers in the Foreign Service, Department of State and other Government agencies. Not only is the United Nations studied in the Institute's basic career programs, but also there is now an Institute course specifically set up to increase the familiarity and understanding of government officers with the structure and functions of the United Nations and with the means by which United States policy towards the United Nations is formulated and implemented.

This new course was first offered in early 1958, and was presented for a second time in January and February, 1959. It consists of four weeks of full-time study through a combination of lectures, discussions and reading periods. While administered by a member of the Institute staff, Mrs. Barbara B. Burn, the course relies for its speakers upon teachers at universities, practicing international lawyers, and officers within the Government, especially from the Bureau of International Organization Affairs in the Department of State.

After three weeks' intensive study at the Foreign Service Institute the fifteen officers in the recent course spent a full week in New York. Here the United States Mission to the United Nations arranged a comprehensive program covering such topics as the functions of the Mission, the United Nations and public opinion, and the attitudes and policies of other states Members of the United Nations towards the organization. The class met with Secretariat officials, as well as with representatives of other states to the United Nations.

The basic assumption of the course is that a systematic knowledge of the United Nations is indispensable not only to members of the United States Mission to the United Nations and officers in the Department working specifically on United Nations affairs, but also to a large number of officers scattered at foreign service posts throughout the world who are called upon from time to time to discuss United Nations issues with the local foreign offices. Under the circumstances it is probable that the new Foreign Service Institute course will continue to be offered on an annual basis for a long time to come.

B. B. B.

## JUDICIAL DECISIONS

BY BRUNSON MACCHESNEY

*Of the Board of Editors*

*Acceptance of compulsory jurisdiction of International Court of Justice—limitation to disputes after date of acceptance—reciprocity—domestic jurisdiction and United States reservation to acceptance—exhaustion of local remedies*

INTERHANDEL CASE (SWITZERLAND *v.* UNITED STATES). PRELIMINARY OBJECTIONS.\* I.C.J. Reports, 1959, p. 6.

International Court of Justice,<sup>1</sup> Judgment of March 21, 1959.

On October 2, 1957, Switzerland instituted proceedings relating to the dispute with the United States regarding the Swiss claim to restitution by the United States of assets of *Société internationale pour participations industrielles et commerciales S.A.*, a Swiss company commonly known as "Interhandel." The Swiss application invoked the acceptance of compulsory jurisdiction under Article 36, paragraph 2, of the Court's Statute by the United States on August 26, 1946, and by Switzerland on July 28, 1948.

The United States raised the following preliminary objections:

- (1) *First Preliminary Objection*  
that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1946, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective;
- (2) *Second Preliminary Objection*  
that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland;
- (3) *Third Preliminary Objection*  
that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts;

\* Digested by Wm. W. Bishop, Jr., of the Board of Editors.

<sup>1</sup> Composed for this case of President Klaestad, Vice President Zafrulla Khan, Judges Basdevant, Hackworth, Winarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos, and Spender, and Judge *ad hoc* Carry.



(4) *Fourth Preliminary Objection*

- (a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline and Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and
- (b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.

In their final form of November 3, 1958, the Swiss Submissions read:

A. *Principal Submissions*

- 1. that the Government of the United States of America is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel);
- 2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of its Statute, with the task of:
  - (a) examining the documents put at the disposal of the American courts by Interhandel,
  - (b) examining the files and accounting records of the Sturzenegger Bank, the seizure of which was ordered by the public authorities (*Ministère public*) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case, and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons, if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. *Alternative Principal Submission*

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property, the Govern-

ment of the United States is acting contrary to the decision of January 5th, 1948, of the Swiss Authority of Review based on the Washington Accord, and is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of the law of nations.

C. *Submissions regarding the Submissions of the Government of the United States following its Preliminary Objections*

1. To dismiss the first preliminary objection of the United States of America;
2. To dismiss the second preliminary objection of the United States;
3. Either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;
4. Either to dismiss, or to join to the merits, the preliminary objection 4(a) of the United States of America;  
either to dismiss, or to join to the merits, the preliminary objection 4(b) of the United States of America;

*In the alternative*

should the Court uphold one or the other of the preliminary objections of the United States of America, to declare its competence in any case to decide whether the United States of America is under an obligation to submit the dispute regarding the validity of the Swiss Government's claim either to the arbitral procedure provided for in Article VI of the Washington Accord of 1946, or to the Arbitral Tribunal provided for in the 1931 Treaty of Arbitration and Conciliation, or to the Conciliation Commission provided for in the same Treaty, and to fix the subsequent procedure.

D. *Submissions on the merits in the event of the Court accepting one or other of the preliminary objections of the United States of America and accepting jurisdiction in conformity with the alternative submission as under C*

1. To declare that the United States of America is under an obligation to submit the dispute for examination either to the arbitral procedure of the Washington Accord or to the Tribunal provided for in the Arbitration and Conciliation Treaty of 1931, and that the choice of one or the other Tribunal belongs to the Applicant State.
2. *In the alternative:*  
that the United States of America is under an obligation to submit the dispute to the arbitral procedure provided for in Article VI of the Washington Accord of 1946.
3. *In the further alternative:*  
that the United States of America is under an obligation to submit the dispute to the Arbitral Tribunal provided for in the Arbitration and Conciliation Treaty of 1931 between the Swiss Confederation and the United States of America.
4. *In the final alternative:*  
that the United States of America is under an obligation to submit the dispute for examination by the Permanent Conciliation Commission provided for in Articles II-IV of the Arbitration and Conciliation Treaty of 1931.

In its Judgment the Court rejected the First Preliminary Objection by 10 votes to 5; unanimously rejected the Second Preliminary Objection; by 10 votes to 5 found "that it is not necessary to adjudicate upon part (a) of the Fourth Preliminary Objection"; by 14 votes to 1 rejected part (b) of the Fourth Preliminary Objection; and by 9 votes to 6 upheld the Third Preliminary Objection and "holds that the Application of the Government of the Swiss Confederation is inadmissible."

The Court quoted the relevant part of the Declaration of the United States of August 14, 1946 (in force since August 26, 1946), as recognizing "as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning" [the specified list in Article 36, paragraph 2 of the Statute], with the proviso "that this declaration shall not apply to . . . (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." The Swiss Declaration of June 6, 1948 (in force since July 28, 1948), recognized the compulsory jurisdiction "in relation to any other State accepting the same obligation," and stated that "This declaration . . . shall take effect from the date on which the Swiss Confederation becomes a party" to the I.C.J. Statute (July 28, 1948).

The Court's opinion said, in part:

The present proceedings are concerned only with the preliminary objections raised by the Government of the United States of America. It is nevertheless convenient to set out briefly the facts and circumstances as submitted by the Parties which constitute the origin of the present dispute.

By its decisions of February 16th and April 24th, 1942, based on the Trading with the Enemy Act of October 6th, 1917, as amended, the Government of the United States vested almost all of the shares of General Aniline and Film Corporation (briefly referred to as the GAF), a company incorporated in the United States, on the ground that these shares in reality belonged to the I. G. Farbenindustrie company of Frankfurt or that the GAF was in one way or another controlled by that enemy company.

It is not disputed that until 1940 I. G. Farben controlled the GAF through the *Société internationale pour entreprises chimiques S.A.* (I. G. Chemie), entered in the Commercial Register of the Canton of Bâle-Ville in 1928. However, according to the contention of the Swiss Government, the links between the German company I. G. Farben and the Swiss company I. G. Chemie were finally severed by the cancellation of the contract for an option and for the guarantee of dividends, a cancellation which was effected in June 1940, that is, well before the entry of the United States into the war. The Swiss company adopted the name of *Société internationale pour participations industrielles et commerciales S.A.* (briefly referred to as Interhandel); Article 2 of its Statute as modified in 1940 defines it as follows: "The enterprise is a holding company. Its object is participation in industrial and commercial undertakings of every kind, especially in the chemical field, in Switzerland and abroad, but excluding banking and the professional purchase and sale of securities." The largest item

in the assets of Interhandel is its participation in the GAF. Approximately 75% of the GAF "A" shares and all its issued "B" shares are said to belong to Interhandel. A considerable part, approximately 90%, of these shares and a sum of approximately 1,800,000 dollars, have been vested by the Government of the United States.

Towards the end of the war, under a provisional agreement between Switzerland, the United States of America, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked (Decree of the Federal Council of February 16th, 1945). The Swiss Compensation Office was entrusted with the task of uncovering property in Switzerland belonging to Germans or controlled by them. In the course of these investigations, the question of the character of Interhandel was raised, but as a result of investigations carried out in June and July, 1945, the Office, considering it to have been proved that Interhandel had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets.

For its part, the Government of the United States, considering that Interhandel was still controlled by I. G. Farben, continued to seek evidence of such control. In these circumstances the Federal Department of Public Economy and the Federal Political Department ordered the Swiss Compensation Office provisionally to block the assets of Interhandel; this was done on October 30th, 1945. The Office then carried out a second investigation (November 1945–February 1946) which led it to the same conclusion as had the first.

On May 25th, 1946, an agreement was concluded between the three Allied Powers and Switzerland (the Washington Accord). Under one of the provisions of the Accord, Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. It was the Compensation Office which was "empowered to uncover, take into possession, and liquidate German property" (Accord, Annex, II, A), in collaboration with a Joint Commission "composed of representatives of each of the four Governments" (Annex, II, B). The Accord lays down the details of that collaboration (Annex, II, C, D, E, F) and provides that, in the event of disagreement between the Joint Commission and the Compensation Office or if the party in interest so desires, the matter may within a period of one month be submitted to a Swiss Authority of Review composed of three members and presided over by a Judge. "The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final" (Annex, III). In the event, however, of disagreement with the Swiss Authority of Review on certain given matters, "the three Allied Governments may, within one month, require the difference to be submitted to arbitration" (Annex, III).

The Washington Accord further provides:

*"Article IV, paragraph I.*

The Government of the United States will unblock Swiss Assets in the United States. The necessary procedure will be determined without delay.

*Article VI.*

In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration."

After the conclusion of the Washington Accord, discussions with regard to Interhandel between the Swiss Compensation Office and the Joint Commission as well as between representatives of Switzerland and the United States were continued without reaching any conclusion accepted by the two parties. The Office, while declaring itself ready to examine any evidence as to the German character of Interhandel which might be submitted to it, continued to accept the results of its two investigations; the Joint Commission challenged these results and continued its investigations. By its decision of January 5th, 1948, given on appeal by Interhandel, the Swiss Authority of Review annulled the blocking with retroactive effect. It had invited the Joint Commission to participate in the procedure, but the latter had declined the invitation. This question was not referred to the arbitration provided for in the Washington Accord.

In these circumstances, the Swiss Government considered itself entitled to regard the decision of the Swiss Authority of Review as a final one, having the force of *res judicata* vis-à-vis the Powers parties to the Washington Accord. Consequently, in a Note of May 4th, 1948, to the Department of State, the Swiss Legation at Washington invoked this decision and the Washington Accord to request the Government of the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, 1948 the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not affect the assets vested in the United States and claimed by I. G. Chemie. On September 7th, 1948, in a Note to the Department of State, the Swiss Legation in Washington, still relying on its interpretation of the Washington Accord, maintained that the decision of the Swiss Authority of Review recognizing Interhandel as a Swiss company was legally binding upon the signatories of that Accord. It expressed the hope that the United States Government would accordingly release the assets of Interhandel in the United States, failing which the Swiss Government would have to submit the question to the arbitral procedure laid down in Article VI of the Washington Accord. On October 12th, 1948, the Department of State replied to that communication, maintaining its previous view that the decision of the Swiss Authority of Review was inapplicable to property vested in the United States. It added that United States law in regard to the seizure and disposal of enemy property authorized non-enemy foreigners to demand the restitution of vested property and to apply for it to the courts. On October 21st, 1948, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States District Court for the District of Columbia. Direct discussion between the two Governments was then interrupted until April 9th, 1953, on which day the Swiss Government sent to the Government of the United States a Note questioning the procedure applied in the United States in the Interhandel case, stating that this procedure had led to a deadlock, and suggesting negotiations for a satisfactory settlement.

Up to 1957 the proceedings in the United States courts had made little progress on the merits. Interhandel, though it had produced a considerable number of the documents called for, did not produce all of them; it contended that the production of certain documents was prohibited by the Swiss authorities as constituting an offence under 273 of the Swiss Criminal Code and as violating banking secrecy (Article 47 of the Federal Law of November 8th, 1934). The action brought by Interhandel was the subject of a number of appeals in the

United States courts and in a Memorandum appended to the Note addressed by the Department of State to the Swiss Minister on January 11th, 1957, it was said that Interhandel had finally failed in its suit. It was then that the Swiss Government, on October 2nd, 1957, addressed to the Court the Application instituting the present proceedings. The assertion in the Note of January 11th, 1957, that Interhandel's claim was finally rejected proved, however, to be premature, as the Court will have occasion to point out in considering the Third Objection of the United States.

As stated, the exchange of notes with regard to Interhandel which had taken place in 1948, was resumed in 1953. In its Note of April 9th, 1953, the Swiss Legation at Washington suggested negotiations between the two Governments with a view to arriving amicably at a just and practical solution of the problem of Interhandel; these suggestions were repeated in the Notes of December 1st, 1954, and March 1st, 1955; they were not accepted by the Department of State. Finally, the Swiss Note of August 9th, 1956, formulated proposals for the settlement of the dispute either by means of arbitration or conciliation as provided for in the Treaty between Switzerland and the United States of February 16th, 1931, or by means of arbitration as provided for in the Washington Accord. This approach did not meet with the approval of the Government of the United States, which rejected it in its Note, already referred to, of January 11th, 1957.

The subject of the claim as set forth in the final submissions presented on behalf of the Swiss Government, and disregarding certain items of a subsidiary character which can be left aside for the moment, is expressed essentially in two propositions:

- (1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel);
- (2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure in accordance with certain conditions set forth first in the principle submissions and then in the alternative submissions.

The Government of the United States has put forward four preliminary objections to the Court's dealing with the claims of the Swiss Government. . . .

After finding that the Swiss Alternative Principal Submission B requesting a declaratory judgment "constitutes a new claim involving the merits of the dispute," and that since it had first been presented by Switzerland in her Observations and Submissions on the U. S. Preliminary Objections after the suspension of the proceedings on the merits in accordance with Article 62, par. 3, of the Rules of the Court, it therefore "cannot be considered by the Court at the present stage of the proceedings," the Court continued:

#### *First Preliminary Objection*

The First Objection of the Government of the United States seeks a declaration that the Court is without jurisdiction on the ground that the present dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the

United States came into force. The declaration of the United States does indeed relate to legal disputes "hereafter arising." The Government of the United States maintains that the dispute goes back at least to the middle of the year 1945, and that divergent opinions as to the character of Interhandel were exchanged between the American and Swiss authorities on a number of occasions before August 26th, 1946.

The Court would recall that the subject of the present dispute is indicated in the Application and in the Principal Final Submission of the Swiss Government which seeks the return to Interhandel of the assets vested in the United States. An examination of the documents reveals that a request to this effect was formulated by Switzerland for the first time in the Note of the Swiss Legation at Washington dated May 4th, 1948. The negative reply, which the Department of State describes as its final and considered view, is dated July 26th, 1948. Two other notes exchanged shortly afterwards (on September 7th and October 12th of that same year) confirm that the divergent views of the two Governments were concerned with a clearly-defined legal question, namely, the restitution of Interhandel's assets in the United States, and that the negotiations to this end rapidly reached a deadlock. Thus the dispute now submitted to the Court can clearly be placed at July 26th, 1948, the date of the first negative reply which the Government of the United States described as its final and considered view rejecting the demand for the restitution of the assets. Consequently the dispute arose subsequently to the date of the entry into force of the Declaration of the United States.

During the period indicated by the Government of the United States (the years 1945 and 1946), the exchanges of views between the Swiss authorities on the one hand and the Allied and, in the first place, the American authorities, on the other, related to the search for, and the blocking and liquidation of, German property and interests in Switzerland; the question of the Swiss or German character of Interhandel was the subject of investigations and exchanges of views for the purpose of reaching a decision as to the fate of the assets in Switzerland of that company. It was only after the decision of the Swiss Authority of Review of January 5th, 1948, definitely recognizing the non-enemy character of the assets of Interhandel and, in consequence, putting an end to the provisional blocking of these assets in Switzerland, had, in the opinion of the Federal Government, acquired the authority of *res judicata*, that that Government for the first time addressed to the United States its claim for the restitution of Interhandel's assets in the United States.

The discussions regarding Interhandel between the Swiss and American authorities in 1945, 1946 and 1947 took place within the framework of the collaboration established between them prior to the Washington Accord and defined in that Accord. The representatives of the Joint Commission and those of the Swiss Compensation Office communicated to each other the results of their enquiries and investigations, and discussed their opinions with regard to Interhandel, without arriving at any final conclusions. Thus, for instance, the minute of the meeting of the Joint Commission on September 8th, 1947, records:

"The representatives of the Swiss Compensation Office stated that their investigations had yielded only negative results and that they were still waiting for the Allies to furnish their documents which the Swiss Compensation Office was ready to discuss with the Allied experts."

The Court cannot see in these discussions between the Allied and Swiss officials a dispute between Governments which had already arisen with regard to the restitution of the assets claimed by Interhandel in the United States; the facts and situations which have led to a dispute must not be confused with the dispute itself; the documents relating to this collaboration between the Allied and Swiss authorities for the purpose of liquidating German property in Switzerland and are not relevant to the solution of the question raised by the first objection of the United States.

The First Preliminary Objection must therefore be rejected so far as the principal submission of Switzerland is concerned.

In the Alternative Submission, Switzerland asks the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation.

In raising its objection *ratione temporis* to the Application of the Swiss Government, the Government of the United States has not distinguished between the principal claim and the alternative claim in the Application. It is, however, clear that the alternative claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement.

The point here in dispute is the obligation of the Government of the United States to submit to arbitration or to conciliation an obligation the existence of which is asserted by Switzerland and denied by the United States. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel's assets in the United States, since the procedure proposed by Switzerland and rejected by the United States was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957.

With regard to the Alternative Submission of Switzerland, the First Preliminary Objection cannot therefore be upheld.

### ✓ Second Preliminary Objection (✓)

According to this Objection, the present dispute, even if it is subsequent to the date of the Declaration of the United States, arose before July 28th, 1948, the date of the entry into force of the Swiss Declaration. The argument set out in the Preliminary Objections is as follows:

"The United States Declaration, which was effective August 26th, 1946, contained the clause limiting the Court's jurisdiction to disputes 'hereafter arising', while no such qualifying clause is contained in the Swiss Declaration which was effective July 28th, 1948. But the reciprocity principle . . . requires that as between the United States and Switzerland the Court's jurisdiction be limited to disputes arising after July 28th, 1948. . . . Otherwise, retroactive effect would be given to the compulsory jurisdiction of the Court."

In particular, it was contended with regard to disputes arising after August 26th, 1946, but before July 28th, 1948, that "Switzerland, as a Respondent, could have invoked the principle of reciprocity and claimed that, in the same way as the United States is not bound to accept the Court's jurisdiction with respect to disputes arising before its acceptance, Switzerland, too, could not be required to accept the Court's jurisdiction in relation to disputes arising before its acceptance."



Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation *ratione temporis*, while the United States has accepted the compulsory jurisdiction of the Court only on respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection. Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.

The Second Preliminary Objection must therefore be rejected so far as the Principal Submission of Switzerland is concerned.

Since it has already been found that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957, the Second Preliminary Objection must also be rejected so far as the Alternative Submission of Switzerland is concerned.

#### *Fourth Preliminary Objection*

Since the Fourth Preliminary Objection of the United States relates to the jurisdiction of the Court in the present case, the Court will proceed to consider it before the Third Objection which is an objection to admissibility. This Fourth Objection really consists of two objections which are of different character and of unequal scope. The Court will deal in the first place with part (b) of this Objection.

The Government of the United States submits "that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States."

In challenging before the Court the seizure and retention of these shares by the authorities of the United States, the Swiss Government invokes the Washington Accord and general international law.

In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions

relating to the validity and interpretation of those grounds are questions of international law.

With regard to its principal Submission that the Government of the United States is under an obligation to restore the assets of Interhandel in the United States, the Swiss Government invokes Article IV of the Washington Accord. The Government of the United States contends that this Accord relates only to German property in Switzerland, and that Article IV "is of no relevance whatever in the present dispute."

By Article IV of this international agreement, the United States has assumed the obligation to unblock Swiss Assets in the United States. The Parties are in disagreement with regard to the meaning of the term "unblock" and the term "Swiss assets." The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

✓ The Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

In its alternative Submission, the Swiss Government requests the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation. The Swiss Government invokes Article VI of the Washington Accord, which provides: "In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration." It also invokes the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16th, 1931. Article I of this Treaty provides: "Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, when ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide." The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.

Part (b) of the Fourth Preliminary Objection must therefore be rejected.

Part (a) of the Fourth Objection seeks a finding from the Court that it is without jurisdiction to entertain the Application of the Swiss Government, for the reason that the sale or disposition by the Government of the United States of the shares of the GAF which have been vested as enemy property "has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country."

The Preliminary Objections state that "Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946)", but they add: "in so far as the determination of the issues would affect the sale or disposition of the shares." And they immediately go on to say: "However, the determination pursuant to paragraph (b) of the Conditions attached to this country's acceptance of the Court's compulsory jurisdiction is made only as regards the sale or disposition of the assets."

During the oral arguments, the Agent for the United States continued to maintain that the scope of part (a) of the Fourth Objection was limited to the sale and disposition of the shares. At the same time, while insisting that local remedies were once more available to Interhandel and that, pending the final decision of the Courts of the United States, the disputed shares could not be sold, he declared on several occasions that part (a) of the Fourth Objection has lost practical significance, that "it has become somewhat academic," and that it is "somewhat moot."

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.

### *Third Preliminary Objection*

The Third Preliminary Objection seeks a finding that "there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts."

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that Interhandel's suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of Interhandel made on August 6th, 1957, granted a writ of *certiorari* and readmitted Interhandel into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary

international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.

The Court does not consider it necessary to dwell upon the assertion of the Swiss Government that "the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts." It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State of January 11th, 1957. This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.

However, the Swiss Government has raised against the Third Objection other considerations which require examination.

In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken, not only by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.

It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

The Parties have argued the question of the binding force before the courts of the United States of international instruments which, according to the practice of the United States, fall within the category of Executive Agreements; the Washington Accord is said to belong to

that category. At the present stage of the proceedings it is not necessary for the Court to express an opinion on the matter. Neither is it practicable, before the final decision of the domestic courts, to anticipate what basis they may adopt for their judgment.

Finally, the Swiss Government laid special stress on the argument that the character of the principal Submission of Switzerland is that of a claim for the implementation of the decision given on January 5th, 1948, by the Swiss Authority of Review and based on the Washington Accord, a decision which the Swiss Government regards as an international judicial decision. "When an international decision has not been executed, there are no local remedies to exhaust, for the injury has been caused directly to the injured State." It has therefore contended that the failure by the United States to implement the decision constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland as the Applicant State. The Court notes in the first place that to implement a decision is to apply its operative part. In the operative part of its decision, however, the Swiss Authority of Review "Decrees: (1) that the Appeal is sustained and the decision subjecting the appellant to the blocking of German property in Switzerland is annulled. . . ." The decision of the Swiss Authority of Review relates to the unblocking of the assets of Interhandel in Switzerland; the Swiss claim is designed to secure the restitution of the assets of Interhandel in the United States. Without prejudging the validity of any arguments which the Swiss Government seeks or may seek to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.

For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned.

In its alternative claim, the Swiss Government asks the Court to declare its competence to decide whether the United States is under an obligation to submit the dispute to arbitration or conciliation. The Government of the United States contends that this claim, while not identical with the principal claim, is designed to secure the same object, namely, the restitution of the assets of Interhandel in the United States, and that for this reason the Third Objection applies equally to it. It maintains that the rule of the exhaustion of local remedies applies to each of the principal and alternative Submissions which seek "a ruling by this Court to the effect that some other international tribunal now has jurisdiction to determine that very same issue, even though that issue is at the same time being actively litigated in the United States courts."

The Court considers that one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of the exhaustion of local remedies is based are the

same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.

It accordingly upholds the Third Preliminary Objection also as regards the alternative Submission of Switzerland.

Judge Basdevant concurred in the Judgment, but stated that his reasoning was somewhat different. Judge Kojevnikov concurred in the Judgment concerning the First, Second, Third and part (a) of the Fourth Preliminary Objection; but thought that the Third Objection should have been upheld as going to the jurisdiction as well as the admissibility of the application. He thought part (b) of the Fourth Preliminary Objection ought not to have been rejected, but joined to the merits if the Court had not upheld the Third Objection.

Judge *ad hoc* Carry could not agree with the decision on the Third and part (a) of the Fourth Objection, believing the Third Objection should not be upheld so far as directed toward the alternative Swiss claim relating to arbitration or conciliation. He agreed generally with President Klaestad's dissenting opinion.

Judge Hackworth agreed with the conclusion on inadmissibility of the application for non-exhaustion by Interhandel of its remedies in the United States courts. He believed that the First Preliminary Objection should also have been sustained, on the ground that the actual dispute arose before the United States acceptance of compulsory jurisdiction August 26, 1946. Judge Zafrulla Khan agreed with Judge Hackworth.

Judge Córdova also thought that the dispute arose prior to that crucial date; on exhaustion of local remedies he said that "Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated," so that "an international claim does not yet exist in any of its different possible faces, restoration of property, submission to arbitration or conciliation, or compliance with the terms of the Washington Accord, until the tribunals of the United States hand down their last and final decision on the suit brought before them by Interhandel." Judge Wellington Koo also agreed in sustaining the Third Objection (non-exhaustion of local remedies), but believed that the First Objection should also have been upheld since he found the dispute to have arisen before the United States acceptance of August 26, 1946.

Sir Percy Spender concurred in the decision, but on the ground that in view of Objection 4(a) and the limitation in proviso (b) of the United States acceptance, "the Court has no valid United States acceptance of its jurisdiction before it and is without competence to entertain the Application of the Government of Switzerland." He found the American acceptance "inconsistent and incompatible with Article 36 (6) of the Statute and with the concept of compulsory jurisdiction and reciprocal obligation contemplated in Article 36 (2) thereof. An 'obligation' to recognize the

jurisdiction of the Court, the existence or extent of which 'obligation' in respect to any particular dispute is a matter which can be determined by the State concerned, is not a legal obligation at all." Since he found the American reservation inseparable from the acceptance, the whole acceptance by the United States "is null and void." Therefore "The United States cannot sue or be sued in this Court on the basis of its Declaration. It has, in short, never legally submitted to the jurisdiction of the Court." If, however, the Court were to look at the other objections, he thought the First should be upheld, since he found the dispute to have arisen prior to August 26, 1946. He agreed with the court in upholding the Third Objection and rejecting part (b) of the Fourth.

President Klaestad's dissenting opinion agreed that the First and Second Objections should be rejected; but believed that the Court should have dealt with part (a) of the Fourth Objection. He believed the American reservation concerning American determination of what is domestic to be void as in conflict with Article 36 (6), but that this "does not necessarily imply that it is impossible for the Court to give effect to other parts of the Declaration of Acceptance which are in conformity with the Statute"; he would therefore reject part (a) of the Fourth Objection. He would have joined consideration of the Third Objection to the merits, and added that "the alternative Swiss claim relating to the question whether the International Court of Justice is competent to decide whether the dispute should be referred to arbitration or conciliation, cannot in any case be determined by the local courts in the United States."

Judge Winiarski thought the Third Objection should have been dismissed, stating "where the rights and obligations of the two States flow directly from their treaties and agreements there can be no question of settling such dispute by recourse to local remedies. The American courts are competent to adjudicate on the rights of a Swiss national; they have no competence to adjudicate on the existence of an obligation on the part of the United States to submit to arbitration or conciliation . . . a decision by the Court dismissing the Third Objection . . . so far as concerns the alternative submission would in no way affect the right of the arbitral tribunal, should one be set up, to apply the local remedies rule quite independently, should the occasion arise, while conciliation proceedings are not required to observe that rule."

Judge Armand-Ugon's dissenting opinion asserted that the exhaustion of local remedies was not an absolute and rigid requirement, but was merely for the purpose of having national tribunals examine in the first stage the international responsibility of defendant state; he believed the Third Objection should be joined to the merits. He also thought the proviso in the American acceptance of jurisdiction under Article 36 (2) was void, since it was in contradiction with Article 36 (6) of the Statute. The proviso should therefore be disregarded, and the acceptance of jurisdiction should stand alone, unqualified by the proviso. Thus Objection 4 (a) should have been dismissed and jurisdiction upheld.

In a long dissenting opinion Judge Lauterpacht said that, by declaring

the Swiss application "inadmissible on account of non-exhaustion of local remedies," the Court "has assumed jurisdiction both in the present case and in any future case connected with the present proceedings after the local remedies have been exhausted. In my view, there being before the Court no valid declaration of acceptance of its jurisdiction and no voluntary submission to it, the Court is not in a position to exercise any kind of jurisdiction over this case, including that of declaring the claim to be inadmissible." He thought that the validity of the American reservation must be passed upon before the Court decided on exhaustion of local remedies or any other objection raised by the United States. He found no valid American acceptance of jurisdiction, since the reservation, "while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court." It further deprived the Declaration of Acceptance of the character of a legal instrument. On the other hand, the American reservation was so clearly adopted and so strongly represented a general American attitude toward submission to international adjudication, that Judge Lauterpacht believed it could not be separated from the acceptance; it "must be regarded as representing the consistent and deliberate position of that country."

Though he believed that the Court should have decided on this ground alone, Judge Lauterpacht indicated his concurrence in the decision of the court on the First and Second Objections. He thought the Third Objection should have been joined to the merits. He concurred in the action of the Court rejecting part (b) of the Fourth Objection, emphasizing that in the United States acceptance there was no reservation concerning matters which by international law are solely within the domestic jurisdiction. He thought this should be treated as a plea on the merits, rather than an objection to jurisdiction.

Judge Spiropoulos' dissenting opinion was to the effect that the Third Objection should be joined to the merits. He expressed no opinion as to whether Objection 4 (a) should be upheld, joined to the merits, or rejected.

#### RECENT SIGNIFICANT GERMAN DECISIONS \*

##### *Confiscation of enterprise in the Soviet zone—effect on trade name and trademarks in Western Germany—injunctive relief and damages*

CARL ZEISS, HEIDENHEIM AN DER BRENZ, v. VEB CARL ZEISS JENA AND DIA FEINMECHANIK-OPTIK

Federal Supreme Court, First Civ. Div., July 25, 1957 (I ZR 21/56).<sup>1</sup>

The plaintiff, a West German firm, sued to enjoin the defendants from using the firm name "VEB Carl Zeiss Jena" and the trademarks registered in the name of the Carl Zeiss Foundation in West Germany and West Berlin as well as in foreign countries. The firm Carl Zeiss Jena, one of

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<sup>1</sup> Briefly reported in 11 Neue Juristische Wochenschrift 17 (1958); more fully reported in 60 Gewerblicher Rechtsschutz und Urheberrecht 189 (1958).



the two business enterprises of the famous Carl Zeiss Foundation in Jena, was confiscated by Soviet military orders and in 1950 became a "people-owned enterprise" (*volkseigener Betrieb*, VEB) of the Soviet zone. The second defendant was a sales agency for the VEB. The plaintiff firm was established by the former managers of Carl Zeiss Jena, who had been taken to the West by the American troops when these troops had been withdrawn from Jena in June of 1945. In 1949 these managers, in their capacity as "authorized agents" of the Carl Zeiss Foundation, obtained the approval of the State authorities of Baden-Württemberg to transfer the legal domicile of the Foundation from Jena to Heidenheim. In 1953 the firm Carl Zeiss was entered in the Commercial Register of Heidenheim. It produces and sells optical goods under the firm name "Carl Zeiss Heidenheim an der Brenz" and under the trademarks registered for the Carl Zeiss Foundation.

The Supreme Court granted the injunction and affirmed plaintiff's right to an accounting and damages on the following grounds:

The enterprise conducted under the firm name of plaintiff is legally identical with the Foundation enterprise Optical Workshop (Firm Carl Zeiss) which was formerly domiciled in Jena. . . . The confiscation carried out in the Soviet zone deprived the firm Carl Zeiss . . . only of those assets of its business capital which were situated in the territory of the Soviet zone. The assets located in the West zones, on the other hand, were not reached by the confiscation. This legal conclusion follows from the firmly established rule [citations of decisions omitted here] that the effect of an expropriation ceases where the territorial sovereignty of the expropriating power stops (principle of territoriality), and from the further rule of public policy (Article 30 of the Introductory Law to the Civil Code) that an expropriation without compensation cannot have any legal effect on the property of the owner which is situated in the territory of the Federal Republic. . . .

B. I. The Carl Zeiss Foundation is the sole owner of the rights in the firm name and the trademarks here in dispute. It is entitled to assert these rights, as it did in the present action, under the firm name of plaintiff, *i.e.*, of the Foundation enterprise which holds these rights as part of its business assets (section 6 of the Foundation Charter).

1. This is beyond doubt if one applies the legal principles which have been developed by court decisions in the Federal Republic dealing with the confiscations in the Soviet zone of private industrial and commercial enterprises having corporate personality. According to these legal principles (see Decisions of the Federal Supreme Court in Civil Matters, Vol. 5, page 27, at 35; Vol. 17, page 209, at 213) the trade-name and trademark rights of such enterprises are not affected by such confiscation at least in so far as the territory outside the Soviet zone is concerned. In the present case this leads to the result that within the territory outside the Soviet zone the trade-name and trademark rights which had been established for the Carl Zeiss Foundation and which formed part of the separate property of the Foundation enterprise Firm Carl Zeiss belong to the Foundation alone, as before, despite the confiscation of the Foundation enterprise, the Foundation being entitled to the priority which was established by registration or use on the part of the Foundation enterprise Optical Workshop (Firm Carl Zeiss). Since furthermore, as explained, the Foundation enterprise

Firm Carl Zeiss was not destroyed by the confiscation but is being continued in the Federal Republic by the plaintiff which is legally identical with it, it follows also that these trade-name and trademark rights must be attributed to the property aggregate held together under the firm name of plaintiff, and can therefore be asserted by the plaintiff, i.e., the Foundation acting under plaintiff's firm name.

These legal consequences exist independently of the fact that plaintiff was registered in the Commercial Register of the County Court of Heidenheim/Brenz and that the transfer of its domicile was entered therein, and of the further fact that those trademarks which were not newly registered were transferred to plaintiff's name in the Trade-Mark Register of the German Patent Office. No more do they depend on the question whether the legal domicile of the Carl Zeiss Foundation was validly transferred to Heidenheim or whether a second domicile of the Foundation was established in Heidenheim. They result solely from the fact that the rights in dispute form part of the separate property of the Carl Zeiss Foundation situated in the West and comprised under the firm name of plaintiff, and therefore could not be reached by the confiscation in the Soviet Zone. Those actions taken by the court in charge of the Commercial Register and by the Patent Office do not have the effect of creating rights. While it is true that they have facilitated the establishing of a business enterprise able to function in the Federal Republic, they are, from the viewpoint of substantive law, without significance for the question to be decided here. . . .

2. On the other hand it must be conceded to defendants-appellants that the present factual situation, as compared to the previously decided cases involving confiscations of private enterprises in the Soviet zone, presents peculiar features owing to the organizational structure of the Carl Zeiss Foundation and its purposes, which give rise to the question whether it is proper to apply here the legal principles developed for those cases without modification. While in those previous cases we proceeded on the theory that the people-owned enterprise which took the place of the confiscated enterprise in the Soviet zone does not continue the tradition of such enterprise and therefore is not entitled to use the name of the confiscated enterprise (decision of the Federal Supreme Court GRUR 1956, page 555—Jurid case), the question may be asked in the present case whether, in view of the peculiarities mentioned, defendant No. 1, although it has existed as a separate legal entity since January 1, 1951 only, may perhaps claim that it continues the old Foundation enterprise, though in a changed legal form. This view argued by defendant No. 1 might be justified if we had to conclude that both the "confiscation" of the Jena enterprise and of the other assets of the Foundation enterprise Firm Carl Zeiss located in the Soviet zone and the transfer of this aggregate of property to the ownership of defendant No. 1 had merely resulted in a change in the *organizational form* of the property administration as fixed by the Foundation Charter, in other words, a change of such nature that it could not be assimilated altogether to the change of ownership enforced by confiscation in cases of other enterprises. Such a view, however, is not supported by the facts before the Court. The only condition under which the change in ownership brought about by the confiscation could be regarded economically as a mere change in the legal form of administering a separate property destined for special purposes would exist if defendant No. 1, as the new owner of this property, had subjected itself to the Foundation Charter, that is, if it

had assumed legally binding obligations toward the Carl Zeiss Foundation to the effect that it would administer the property taken from the Foundation as a separate property set aside for special purposes in the spirit of the plant socialism envisioned by the founder, and that it would comply in all important respects with the rules laid down in the Foundation Charter. However, the facts presented by defendants do not furnish any support for this conclusion. . . .

3. Nor can defendant No. 1 base a claim for trade-name and trademark rights superior or equal to the rights of plaintiff or for a right of concurrent use of plaintiff's name and marks upon other legal arguments.

a) Defendants cannot rely upon the legal principles developed in cases of identical names. In order to make these principles applicable it would have to be shown that defendant No. 1 uses its firm name *lawfully*. . . . This is, however, not the case here. Defendant No. 1 derives his alleged right to use its firm name from a governmental grant. But the firm name thus acquired cannot be recognized in the Federal Republic as having been lawfully acquired.

Under the rule of conflict of laws the right of a natural or juridical person in a name is governed by the law of its nationality, as defendants-appellants correctly state (Palandt, Appendix to Art. 7 of the Introductory Law to the Civil Code, Note 2; Decisions of the Supreme Court, vol. 117, page 217). The question whether this rule can be applied indiscriminately to the inter-territorial relations between the Federal Republic and the Soviet zone of Germany may be doubtful. It may, however, remain unanswered in the present case, since here the assertion of the right created by the grant of the name violates the public policy of the Federal Republic (Art. 30 of the Introductory Law to the Civil Code). Plaintiff No. 1 has not been granted just any name but rather the name lawfully borne by another legal person, namely the Carl Zeiss Foundation, which acts commercially under this name, *i.e.*, plaintiff's firm name. This is irreconcilable with the legal order of the Federal Republic in view of the fact that defendant No. 1 was meant to and does carry on business under the name granted to it in the same field in which the Carl Zeiss Foundation did business and is doing business under the name Firm Carl Zeiss; the more so as defendant No. 1 operates an enterprise under the name granted to it which was taken from the Carl Zeiss Foundation by a confiscation. The counter-arguments which defendants-appellants put forward are not apt to support a different conclusion. The facts that the place of business remained the same, that a large portion of the former labor force is employed there and that thus defendant No. 1 is in a position to utilize their plant experience, finally that certain portions of the profits of defendant No. 1 are directly or indirectly set aside for Foundation purposes, certainly furnished to the granting authority a point of reference for granting precisely the name Carl Zeiss, and may thus explain the choice of that name. But since this grant was possible only through a corresponding deprivation of plaintiff, defendant No. 1 cannot be regarded in the Federal Republic as having lawfully acquired the right to use plaintiff's firm name. . . .

C. Consequently . . . the *claims for injunctive relief* asserted by the complaint appear to be essentially well-founded in so far as they refer to the use of the names and marks under dispute *within the territory of the Federal Republic and of West Berlin*.

I. 1. As regards its firm name, plaintiff enjoys the protection of section 12 of the Civil Code and section 16 para. 1 of the Law on Unfair Competition. Under these provisions it may enjoin any one who uses in commerce a name or a firm name in such manner as to cause confusion, unless the other party can show a better or an equal right to use that name or firm name. Defendant No. 1, as explained, has no such right. Hence the only pertinent question is whether the use of the firm name of defendant No. 1, "VEB Carl Zeiss Jena," in the territory of the Federal Republic and of West Berlin is apt to cause confusion with the firm name of plaintiff. The Court of Appeals has answered this question in the affirmative. No legal error can be found in this conclusion.

II. As explained before, defendants have likewise no right to use the trade-marks in dispute. Plaintiff, being the owner of these marks, is therefore entitled, as the Court of Appeals has decided without error, to enjoin defendants under sections 15 and 24 of the Trade-Mark Act from using the marks in the territory of the Federal Republic and of West Berlin. The claim for injunctive relief asserted by the complaint is well-founded also with regard to those trademarks which were newly registered in plaintiff's name in the Trade-Mark Register of the German Patent Office subsequent to the confiscation.

The Court denied, however, plaintiff's request to enjoin the VEB from using the Zeiss name and trademarks in *foreign* countries, for lack of jurisdiction. Under the applicable Section 32 of the Code of Civil Procedure, jurisdiction in actions for tort lies with the court in whose district the alleged tort was committed. Plaintiff had argued that the acts of defendant in using the Zeiss name and marks in Western Germany as well as in foreign countries were "the manifestations of a systematic, unfair and unlawful total conduct which constituted a single tort" and resulted in the jurisdiction of the courts of any place where a part of that single tort was committed. The Supreme Court, upholding the Court of Appeals, said:

Jurisdiction under section 32 of the Code of Civil Procedure could be supported by the reasoning of plaintiff-appellant only if it had to be assumed that defendants' deliveries into the Federal Republic (and specifically into the district of the trial court) were connected so closely with the deliveries to foreign countries that all deliveries were part of a single tort. . . . But plaintiff's theory rests upon a too widely expanded concept of a single tort. If the claim asserted in the complaint with regard to foreign countries must be decided in each instance according to the law of the country for whose territory it is asserted, there must be considered as many claims as there are countries to which defendants export goods under the name and the trademarks of plaintiff. Each of these claims rests on a different legal basis. It is therefore not feasible to combine all these claims, together with the claims arising from deliveries into the district of the trial court, under the viewpoint of a single tort. To the extent that German law should govern the decision on the claim asserted with regard to foreign countries, the plaintiff-appellant erroneously disregards the fact that even on this premise the basis for judging the claims involved is by no means uniform, at least not necessarily. To be sure, the decisions of the Federal Supreme Court have recognized that German merchants must be guided in their competition at home as well as abroad by the

principles of German law [citations omitted]. But in the application of these principles, especially of the broad general provision of section 1 of the Law on Unfair Competition, the views prevailing in the respective foreign countries must be taken into consideration. If a foreign country considers as lawful a conduct which under German law would be unfair competition, the German court must ask the question whether *under these circumstances* . . . it is reconcilable with the views of a decent German business man and hence not violative of section 1 of the Law on Unfair Competition. Thus, even where German law applies, the decision may vary in each instance, depending on the country in which the competitive act was committed.

The Court of Appeals erred in holding that jurisdiction under section 32 cannot be established by the fact that a portion of defendants' products destined for sale abroad and marked with the names and trademarks in dispute passes in transit through the territory of the Federal Republic. To be sure, the mere passage of goods through the territory of the Federal Republic does not constitute "marketing" within that territory in the meaning of the Trade-Mark Act. . . . Where, however, the sale of the products abroad constitutes an infringement of foreign rights in a trade name and trademarks or an act of unfair competition and hence a tort, then shipment through the territory of the Federal Republic is a part, committed in that territory, of the tort, and therefore a proper basis of jurisdiction under section 32 . . . but only if such transit shipment had occurred within the district of the court where the action was brought. But there is no evidence here to support such an assumption, as plaintiff has merely asserted that the goods had passed in transit through the territory of the Federal Republic.

NOTE: Several decisions of courts outside Germany upheld the right of Carl Zeiss Heidenheim in the Zeiss trade name and trademarks:

(1) The Court of First Instance in Cairo, Egypt, prohibited DIA Fein-Mechanik Optik, the sales agency of VEB Zeiss-Jena, from exhibiting its products bearing the Zeiss marks at an exposition in March of 1954. *Carl Zeiss Heidenheim v. DIA Fein-Mechanik Optik*, decrees of March 6, 1954 and March 15, 1954, published in German translation in Walter David, *Die Carl-Zeiss-Stiftung: ihre Vergangenheit und ihre gegenwaertige rechtliche Lage* 259 *et seq.* (1954).

(2) The District Court of Utrecht, Holland, enjoined DIA from using the name Zeiss and the Zeiss trademarks in connection with the Utrecht Spring Fair of 1954. *Carl Zeiss Foundation v. DIA et al.*, decision of April 2, 1954, published in German translation in David, *op. cit.* 269 *et seq.*

(3) The Commercial Court in Vienna, Austria, enjoined VEB Carl Zeiss Jena from using in business within Austria any firm name containing the word "Zeiss." *Carl Zeiss Heidenheim v. VEB Carl Zeiss Jena*, decree of June 9, 1956 (9 Cg 185/56), *aff'd.* Sept. 5, 1956 (temporary injunction); decision of May 18, 1957 (23 Cg 23/57), affirmed by Court of Appeals of Vienna, Sept. 19, 1957 (1 R 372/57) (permanent injunction), 7 *Oesterreichische Blaetter fuer Gewerblichen Rechtsschutz und Urheberrecht* 12. See also decision of Commercial Court of Vienna in *Carl Zeiss Heidenheim v. Freundl*, Sept. 12, 1956 (9 Cg 105/56).

*Extradition—effect of request for extradition motivated by political factors—ordinary crime connected with political offense*

HECTOR JOSÉ CÁMPORA AND OTHERS IN THE MATTER OF EXTRADITION.\*

Revista de Derecho Internacional y de Ciencias Diplomáticas, Rosario, Argentina, VI<sup>th</sup> Year, 1957, No. 12, pp. 143–195.

Chile, Supreme Court of Justice, September 24, 1957.

Extradition proceedings were instituted following a request by Argentina for the return by Chile of six prisoners who escaped from an Argentine jail and fled to Chile, March 18, 1957. The prisoners had held various posts in the Perón Government, and Argentina requested extradition on the ground that they had been convicted of ordinary criminal acts under Argentine law.

The Chilean court of first instance denied the Argentine request for extradition on two grounds: (1) as to the majority of the fugitives, that there was insufficient proof under the requirements of Article 647, subsection (3), Chilean Code of Criminal Procedure, that the crimes charged had been committed; (2) as to the other prisoners, that the offenses charged were political or that extradition was requested by Argentina for political reasons. With respect to the second group, the trial court applied Article 4 of the Convention on Diplomatic Asylum, signed at Caracas in 1954. This provision in the Convention reads:

... Extradition shall not be made when the request relates to persons who according to the classification of the state to which the request is made have been charged with political offenses or with common [criminal] offenses committed for political ends, nor when extradition is requested for predominantly political reasons. . . .

Argentina appealed to the Supreme Court of Justice. There it was held that the decision below should be revised: (1) to provide for the extradition to Argentina of one of the fugitives, Guillermo Patricio Kelly, and (2) to make it clear that the Convention of Caracas was inapplicable, not having been ratified by either Argentina or Chile. As to (2) the Court noted that the Convention provided for ratification before coming into effect, and that out of twenty signatories, only six had ratified, thus "it lacks general acceptance among the nations."

The Supreme Court then proceeded to examine all the international agreements relating to extradition in effect as law in Chile and came to the conclusion that extradition may only be denied (assuming satisfactory proof of the offense) when the offense is political or an ordinary crime connected with a political offense. As to the concept of "political offense" the Court said:

"Political offense" does not appear to be defined in our positive legislation, nor in the international conventions and treaties previously enumerated, but generally accepted principles are in agreement that a political offense is that which is directed against the political organization of the state or against the civil rights of its citizens and

\* Digested by Covey T. Oliver of the Board of Editors.

that the legally protected right which the offense damages is the constitutional normality of the country affected. Also included in the concept are acts which have as their end the alteration of the established political or social orders established in the state.

A majority of the authorities consider, moreover, that in order to distinguish between ordinary and political crimes, it is necessary to take into account the goals and motives of the persons charged; that is to say, to consider the objective aspect of the offense as well as its subjective one. Political and social offenses obey motives of political and collective interest and are characterized by the sense of altruism or patriotism which animates them, while ordinary criminal offenses are motivated by egoistic sentiments, more or less excusable (emotion, love, honor), or to be reproached (vengeance, hate, financial gain).

In this area [of non-extraditable offenses] there are to be identified, *purely political offenses*, which are directed against the form and political organization of the state; *improper political offenses*, which embitter social or economic tranquility; *mixed or complex political offenses*, which damage at the same time public order and ordinary criminal law, such as the assassination of the head of state for political reasons; and *connected political offenses*, which are common crimes committed in the course of attempts against the security of the state or related to political offenses, it being necessary to examine intent to determine whether the ordinary crime is one connected, or not, to a political one. [Emphasis supplied]

The Supreme Court then turned to the charges against each of the six fugitives and ruled against extradition in five of the cases on grounds which varied from case to case, but including: (1) failure of sufficient proof; (2) typically political nature of the offense; (3) offenses providing for less than one year in prison [under the Bustamante Code, Article 354, offenses carrying penalties of a year or less are not extraditable]; (4) ordinary crimes connected to political offenses.

In the case of Kelly, the Court ruled that as to three of the charges against him he was subject to extradition. These charges illustrate the application of the doctrines declared by the Court, *viz*:

1. *Extortion*: Kelly asked a third person to find for him someone willing to sell black-market dollars. Martinez came forward with the dollars, and Kelly made Martinez surrender the dollars to him on threat of prosecution for violation of the exchange control law of Argentina. Martinez was required to sign a receipt that he had received payment at the official rate for the dollars and was promised that later he would actually receive payment, which he never did.

2. *Murder* of Francisco Blanco during a *robbery* of a local Communist headquarters in Buenos Aires. Kelly conducted a raid, shot the gatekeeper dead, and removed typewriters and other equipment from the office. The Court said:

These crimes did not occur during an attack (by Kelly) on the security of the state, such as to be considered connected to a separate political offense. They took place at a time of public tranquility during which the murder and theft were isolated acts. The ultimate objective may have been the political one of annihilating communists,

but the principles of public international law which this decision accepts do not admit that an ordinary crime is converted into a political one solely because of its ultimate objective.

NOTE: In view of its having recognized as political for non-extradition "mixed or complex political acts," the treatment of the murder-robbery charges by the Court is somewhat confusing, unless the implication is that in the category of *connected political offenses* there is some requirement that the end or objective, the elimination of Communists, is too remote with respect to the act, shooting down almost at first sight the gatekeeper of a local Communist cell and making off with the chattels therein.

#### NOTES

##### *Admiralty—Jones Act—choice of law*

Action under Jones Act and general maritime law for injury sustained in an American port by a foreign seaman on board a foreign vessel in the course of a voyage beginning and ending in a foreign country was dismissed as an inappropriate choice of law on the facts. *Romero v. International Terminal Operating Co.*, 358 U. S. 354 (U. S. Supreme Court, Feb. 24, 1959, Frankfurter, J.).

##### *Jurisdiction—civilian employee of armed forces abroad and capital offense—constitutionality of court-martial*

In *Grisham v. Taylor*, 261 F. 2d 204 (U. S. Ct. A, 3rd Circuit., Nov. 20, 1958, Goodrich, Ct. J.), the decision below, noted in 53 A.J.I.L. 192 (1959), refusing habeas corpus, was affirmed. Note: See also, *In Re Yokoyama*, 170 F. Supp. 467 (U. S. Dist. Ct., S.D., Calif., Cent. Div., Jan. 28, 1959, Yankwich, C.J.), upholding application of the Code of Military Justice to a civilian employee accompanying the armed forces abroad. The decision to the contrary in *U. S. v. McElroy*, 259 F. 2d 927, noted in 53 A.J.I.L. 445 (1959), was granted certiorari, 359 U. S. 904 (Feb. 24, 1959). See also, *U. S. v. Bolando*, 167 F. Supp. 791 (D. Co. 1958), sustaining court-martial jurisdiction over civilian employee.

##### *Constitutionality of Trade Agreements Act of 1934—delegation and executive agreements*

Importer attacked the constitutionality of Section 350 (a) of the Tariff Act of 1930, as amended, as an undue delegation of legislative power, and that the use of an executive agreement pursuant thereto contravened the treaty power. The contentions were rejected. *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (U. S. Customs Ct., 1st Div., Nov. 21, 1958, Wilson, J.).

##### *Foreign flag shipping—labor relations*

Liberian and Panamanian corporations, operating vessels under Liberian or Panamanian flags and registry, sued international unions and officials



representing most unlicensed seamen employed on American flag vessels. A motion for a preliminary injunction was denied on the ground there was a "labor dispute" depriving the court of jurisdiction by virtue of the Norris-LaGuardia Act. *Afran Transport Company v. National Maritime Union*, 169 F. Supp. 416 (U. S. Dist. Ct., S.D.N.Y., Dec. 19, 1958, F.V.P. Bryan, D.J.).

*Admiralty—applicability of Death on the High Seas Act*

In *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (U. S. Dist. Ct., D.N.J., Dec. 23, 1958, W. F. Smith, D.J.), the court held that the Death on the High Seas Act applied to a death over the high seas in a Venezuelan flag plane, in a suit by executors of an American decedent against an American corporation which allegedly negligently serviced the plane prior to its departure from the U. S. See also, *Noel v. Linea Aeropostal Venezolana*, 247 F. 2d 677, noted in 52 A.J.I.L. 346 (1958).

*Extradition—"offenses of a political character"—probable cause*

In *United States v. Artukovic*, 170 F. Supp. 383 (U. S. Dist. Ct., S.D. Calif., C.D., Jan. 15, 1959, Hocke, U. S. Commissioner), the proceedings for extradition against an alleged Yugoslav "war criminal" were dismissed on the dual ground of failure to prove reasonable and probable cause of the alleged charges, and that the offenses charged were of a "political character." The case was previously noted in 52 A.J.I.L. 345 (1958).

*Jurisdiction—service—airspace over state*

A person served with process in a commercial aircraft over Arkansas was held to be within the "territorial limits" of the State within the Federal Rules of Civil Procedure. *Grace v. MacArthur*, 170 F. Supp. 442 (U. S. Dist. Ct., E.D., Ark., N.D., Feb. 16, 1959, Henley, D.J.).

*Sale of goods—groundnuts—c.i.f. Hamburg—closing of Suez Canal—hostilities but not war*

A sale of Sudanese groundnuts c.i.f. Hamburg contained a clause that, in event of war, the period of shipping would be extended for two months. The seller requested an extension of time due to the blocking of the Suez Canal. The buyer refused, treated the contract as repudiated, and claimed damages. The Arbitration Award of the Board of Appeal of the Incorporated Oil Seed Association held that shipping the groundnuts via the Cape of Good Hope "was not commercially or fundamentally" different from shipping through the Canal. The Award also stated that there were hostilities but not war in Egypt at that time, though neither war nor hostilities would in this case have prevented shipment. Diplock, J., upheld the award, since it was possible to bring the goods to a port and load them on board a vessel prepared to carry them to their destination. *Carapanayoti & Co. Ltd. v. E. T. Green, Ltd.*, digested in 53 A.J.I.L. 188 (1959), was

distinguished. *Tsakiroglou & Co., Ltd. v. Noble Thorl G.m.b.H.*, [1959] 2 W.L.R. 179, 1 All E.R. 45 (Q.B.D. Com. Ct. Diplock J., Dec. 9, 1958).

*Charter-party—restriction by foreign sovereign—duty to obtain permission to load*

In absence of charterer's knowledge that the ship had called at an Israeli port and thus would not be permitted to load in a Syrian port unless special permission were granted, a provision must be read into the charter-party, so as to give it business efficacy, that the shipowner would exercise reasonable diligence in obtaining such permission and would obtain such permission within a reasonable time. *Compagnie Algerienne de Meunerie v. Katana Societa di Navigazione Marittima, S. P. A.*, [1959] 2 W.L.R. 366, 1 All E.R. 272 (Q.B.D. Com. Ct. Diplock J., Dec. 5, 1958).

AMERICAN CASES ON ENEMY PROPERTY AND TRADING WITH THE ENEMY \*

*Enemy Property.* *Rogers v. Calumet National Bank of Hammond*, 358 U. S. 331 (Jan. 26, 1959), State courts have no jurisdiction to review the Attorney General's exercise of discretion in making vesting order; *International Silk Guild Inc. v. Rogers*, 262 F. 2d 219 (D.C. Cir., Nov. 26, 1958), conversion of Japanese debt to dollars at first rate prevailing after termination of hostilities; *Rogers v. Hertlein*, 167 F. Supp. 454 (E.D.N.Y., Oct. 31, 1958), though war is terminated, the Attorney General can still make a vesting order if a debt existed; *Von Bredow v. U. S.*, 169 F. Supp. 256 (Ct. Cl., Jan. 14, 1959), a vesting order can be made, though only interest payable to enemy alien and capital subject to divestment; *Security-First National Bank of Los Angeles v. Rogers*, 330 Pac. 2d 811 (Calif. Sup. Ct., Oct. 24, 1958), payment to beneficiaries "personally, solely and individually," with gift over at discretion of trustees in event of impossibility prevents vesting order; *Rogers v. Holmes*, 332 Pac. 2d 608 (Oreg. Sup. Ct., Dec. 3, 1958), property declared to escheat to the State cannot be claimed by a vesting order nor can escheat action be reopened by the Attorney General, as the State did not submit to being sued by him; *Closterman v. Schmidt*, 332 Pac. 2d 1036 (Oreg. Sup. Ct., Dec. 10, 1958), occupation of area by U. S. troops prior to the surrender of Germany did not revive pre-Nazi laws so as to allow for reciprocity; *Camp Clearwater Inc. v. Plock*, 146 A. 2d 527 (N.J. Sup. Ct. Ch.D., Nov. 21, 1958), vesting order terminates period of prescription.

*Trading with the Enemy.* *U. S. v. Weishaupt*, 167 F. Supp. 211 (E.D.N.Y., Nov. 6, 1958), postage stamps are articles "which are growth, produce, or manufacture of China"; *U. S. v. Wagman*, 168 F. Supp. 248 (S.D.N.Y., Dec. 10, 1958), partial financing of the purchase of goods whose origin is Communist China is within prohibition.

\* The assistance of Egon Guttman, Esq., LL.B., LL.M. [London], Ford Graduate Fellow, Northwestern University School of Law, with respect to the English, Netherlands, Japanese and American nationality cases is acknowledged.

## AMERICAN CASES ON NATIONALITY

*Citizenship.* *Wong Ho v. Dulles*, 261 F. 2d 456 (9th Cir., Nov. 6, 1958), burden of proof is the ordinary burden in a civil action; *Lee Hon Lung v. Dulles*, 261 F. 2d 719 (9th Cir., Nov. 10, 1958), "clear, unequivocal and convincing" evidence is required to rebut a long-standing decision of the Board of Special Inquiries of Immigration holding plaintiff a citizen; *Moldoveanu v. Dulles*, 168 F. Supp. 1 (E.D.Mich., Nov. 10, 1958), compulsory induction into a foreign army, though linked with oath, is not voluntary service, nor is participation in dictatorial plebiscite a voluntary participation in a political election nor did native-born citizen lose his nationality when his father became a national of Rumania by reason of the Treaty of Paris of Dec. 9, 1919, for nationality was not imposed on application of the father; *Suey Fong v. Dulles*, 169 F. Supp. 537 (E. D. Wis., Dec. 30, 1958), blood test excluded the possibility of parent-child relationship.

*Naturalization.* *In re Santo's Petition*, 169 F. Supp. 115 (S.D.N.Y., Dec. 17, 1958), during the existence of an outstanding final finding of deportability pursuant to a warrant of arrest, no petition for naturalization can be determined; *Petition for Naturalization of Kostas*, 169 F. Supp. 77 (D. Del., Dec. 19, 1958), "living in marital union with a citizen spouse" requires evidence of "a close, relatively uninterrupted union" prior to application; *Petition for Naturalization of Felleston*, 169 F. Supp. 471 (N.D. Ill., Dec. 30, 1958), an alien who voluntarily served during requisite period under Public Law 86 after he had claimed exemption, held entitled to naturalization, though application was under general naturalization law.

*Denaturalization.* *Title v. U. S.*, 263 F. 2d 28 (9th Cir., Jan. 6, 1959), a denaturalization judgment made in the absence of an "affidavit showing good cause" cannot be set aside where appeal is not prosecuted, for it is not contrary to a fundamental jurisdictional element; *U. S. v. Profaci*, 168 F. Supp. 631 (E.D.N.Y., Dec. 9, 1958), revocation of naturalization, though criminal record was concealed for twenty-five years.

*Deportation.* *Fungiani v. Barber*, 261 F. 2d 709 (9th Cir., July 11, 1958), voluntary departure of an alien is at the sole discretion of the Attorney General and the court cannot interfere; *Tomaselli v. Lehmann*, 260 F. 2d 519 (6th Cir., Oct. 16, 1958), the Act of 1952 is retroactive, allowing deportation for a narcotic offense committed in 1917; *Paktorovics v. Murff*, 260 F. 2d 610 (2d Cir., Nov. 6, 1958), Hungarian Parolee is entitled to "due process" under the Constitution, but not to a hearing on the merits prior to the exercise of discretion by the Attorney General; *Gubbels v. Hoy*, 261 F. 2d 952 (9th Cir., Nov. 14, 1958) (reversing 152 F. Supp. 277), court-martial sentences cannot be used as a basis for a deportation order; *Denis v. Murff*, 260 F. 2d 955 (2d Cir., Nov. 20, 1958), petition dismissed, petitioner engaged in prostitution not denied opportunity to consult with counsel; *Diaz v. Barber*, 261 F. 2d 300 (9th Cir., Nov. 21, 1958), an old and somewhat uneducated laborer was a "small rabbit in the communist hutch," thus there was no meaningful association; *Carlisle v. Rogers*, 262 F. 2d 19 (D.C. Cir., Nov. 24, 1958), refusal to produce a prehearing statement made

by a witness constitutes prejudicial error; *Van den Berg v. Lehmann*, 261 F. 2d 828 (6th Cir., Dec. 15, 1958), deportation order stayed to enable representation; *Roccaforte v. Mulcahey*, 262 F. 2d 957 (1st Cir., Dec. 17, 1958) (affirming judgment in 169 F. Supp. 360), the Immigration Procedural Regulations do not violate the "due process" provision of the Constitution; the provisions of the Appropriation Act, 1951, relating thereto are not limited to that fiscal year; an indeterminable sentence which can extend for more than one year and a sentence for three years of which one year has not yet elapsed are both sentences "to more than one year"; *Gallegos v. Hoy*, 262 F. 2d 665 (9th Cir., Dec. 29, 1958), deportability for inducing an alien to enter illegally requires obtaining a real financial gain therefrom, such as paying less than standard rates of pay; *Arrellano-Flores v. Hoy*, 262 F. 2d 667 (9th Cir., Dec. 29, 1958), "convicted" in statute authorizing deportation means a plea of "guilty" or finding of "guilty," though a suspended sentence is not a "conviction" under California law; *Rogers v. Alfred Dodge Lu*, 262 F. 2d 471 (D.C. Cir., Dec. 30, 1958), deportation to Chinese mainland is only possible if Chinese Peoples' Republic advise that they would accept alien; *Veissidis v. Anadell*, 262 F. 2d 398 (7th Cir., Jan. 5, 1959), the Charter of the United Nations has no effect on the quota system nor has an unlawful arrest any effect on subsequent deportation proceedings; *Orlando v. Robinson*, 262 F. 2d 850 (7th Cir., Jan. 5, 1959), larceny or theft is a crime *malum in se* and all crimes *mala in se* involve moral turpitude; the withdrawal of a petition for naturalization containing false statements before it was acted upon does not exclude petitioner from the definition of a person who has given false testimony; *Montalban v. Rogers*, 262 F. 2d 923 (D.C. Cir., Jan. 8, 1959), an alien seaman on an American flag vessel landing in the U. S. in 1953 did not last enter more than two years prior to June 27, 1952; *Mo Ching Shing v. Murff*, 168 F. Supp. 381 (S.D.N.Y., Sept. 4, 1958), a seaman in possession of evidence of British nationality can be deported to Hong Kong if there is no evidence to show that he would be deported to the Chinese mainland from there; *Tie Sing Eng v. Murff*, 165 F. Supp. 633 (S.D.N.Y., Oct. 6, 1958), the fact that return to Holland may result in ultimate return to the Chinese mainland is no reason for suspension of deportation to Holland; *Moy Wing Yin v. Murff*, 167 F. Supp. 828 (S.D.N.Y., Nov. 7, 1958), the alleged conduct of an investigator in inducing recantation of perjury is insufficient to amount to waiver or to create estoppel against deportation; *Molina v. Murff*, 167 F. Supp. 655 (S.D.N.Y., Nov. 26, 1958), the deportation of an alien receiving support from an alien mother does not amount to "extreme hardship" to an alien lawfully admitted to permanent residence; *Chao Chin Chen v. Murff*, 168 F. Supp. 349 (S.D.N.Y., Dec. 2, 1958), the qualification of consent to deportation to China "as it existed before the Communists occupied the same" is a withdrawal of such consent; *Garcia v. Murff*, 168 F. Supp. 890 (S.D.N.Y., Dec. 23, 1958), the Attorney General has no discretion to permit an excludable alien to apply for permanent residence where deportation proceedings are pending on the ground of crimes involving moral turpitude; *Da Silva Pereira v. Murff*, 169 F. Supp. 81 (S.D.N.Y., Dec. 26,

1958), a statement by an alien that he entered as a non-immigrant is sufficient to determine deportability; *Sharaiha v. Hoy*, 169 F. Supp. 598 (S.D. Calif., Jan. 14, 1959), a statement in a certificate of acceptance attached to an application for extended stay is not "testimony" so as to preclude establishment of "good moral character" permitting voluntary departure.

#### NETHERLANDS CASES

Since last noted in this JOURNAL, 50 A.J.I.L. 968 (1956), a number of further decisions of the Netherlands courts involving international law have been digested in English in the *Tijdschrift voor Internationaal Recht*, Vols. 3-6 (1956-1958). Of note among these decisions is the first decision of the Hoge Raad (Supreme Court) as a Prize Court since it was constituted as such in 1827. In this decision the court indicated that the rule of the Netherlands Constitution giving pre-eminence to international treaties and agreements to which the Netherlands is a party, does not apply to the unwritten rules of international law so as to oust internal law. In connection with the question of state succession, the Republic of Indonesia was held responsible for the salary of a civil servant of the government of that area, but the change of the international status of that area was held not to affect the status of bankruptcy and to have excluded the Territory of Netherlands New Guinea. The incorporation of Lithuania into the U.S.S.R. was considered the voluntary act of a sovereign state, with the result that Soviet Russian law was applicable to the succession of a person who died domiciled there during the German occupation of Lithuania. The attempt by Germany to reintroduce the previous Lithuanian law being treated as contrary to Article 43 of the Hague Rules on Land Warfare which allows an occupier to abolish laws only in cases of absolute necessity. The termination of war otherwise than by peace treaty or by cessation of fighting followed by incorporation was expressly recognized to be possible by Executive announcement and return to peaceful diplomatic relationship.

In the realm of nationality, the rejection of the Berlin Treaty of November 20, 1938, following the Munich Pact as being null and void on the ground of duress through threat of war on Czechoslovakia nullified the German legislation attempting to confer German nationality on those resident in or having a "*Heimatsrecht*" in the Sudetenland. This legislation was in addition held unlawful on the ground of its inconsistency with the Munich Pact, in that it did not allow, to those affected, an option to retain Czechoslovakian nationality. The Czechoslovakian Presidential Decree of August 2, 1945, was held to be in conformity with this interpretation and not to amount to a ratification of the German nationality laws. Though marriage confers the nationality of the husband on the wife, this was held to presuppose the existence of a marriage valid by the laws of both parties, so that a decree of nullity granted by the national court of one party, if granted on grounds not *contra ordre public* of the Netherlands, will be recognized so that the wife does not acquire Netherlands nationality.

In connection with the Rhine Convention the decisions indicated that

Germany's unlawful denunciation of the Convention in 1936 and the exercise of jurisdiction in matters concerning the Convention by German domestic courts, merely resulted in the *de facto* but not in the *de jure* termination of that Convention. The Convention thus became effective once more after the war when the proper courts were re-established in Germany.

#### JAPANESE CASES

Since 1957 the Japanese Branch of the International Law Association has been publishing an English-language journal, *The Japanese Annual of International Law*.<sup>1</sup> In addition to articles on topics of international law and the conflict of laws, this journal contains translations of documents relating to Japan's external affairs, a chronological list of treaties and other international agreements concluded by Japan since August 15, 1945, as well as a chronology of Japanese foreign affairs since November, 1943 (the Cairo Declaration). A number of decisions of Japanese courts in the realm of public international law and the conflict of laws since 1952 are also reprinted.

Of interest in the field of public international law are those dealing with the interpretation of Article 17 (3)(a)(ii) of the Administrative Agreement entered into under Article 3 of the Security Treaty between Japan and the United States. Thus, an act done during the hours of duty was held not to be an act in performance of official duties when the accused committed rape. Two British sailors who committed robbery while on shore leave were held subject to the jurisdiction of Japanese courts on the ground that their shore leave was unconnected with any official duty. Had the offense been committed in the course of the official duties of these sailors while visiting a Japanese port, this might have resulted in jurisdiction not being exercised by a Japanese court on the ground that the Japanese Constitution gave pre-eminence to treaties and to the established customary law of nations so that on the latter ground some extraterritoriality might have been claimed by the British authorities. Of interest in connection with the exercise of jurisdiction over former allied nationals is the case of a captain of a Russian fishing-patrol vessel, who was convicted of smuggling a Japanese into and out of Japan. The court held that it had jurisdiction and need not comply with the demands of the Soviet Mission to release the accused. Item 6 of the Instrument of Surrender was held no longer effective and binding on Japan which had discharged her duties thereunder. Also there was no longer any unifying intention among the Allied nations as manifested by the existence of a Supreme Commander. The Soviet Mission, being in Japan in an advisory capacity, was not a "designated representative of the Allied Powers," whose instructions had to be heeded. The court also discussed the position of state-owned vessels in international law. Considering the Officers' Club at Misawa and the Tokyo Civilian Open Mess "so-called unappropriated fund organizations" and thus instrumentalities of the Federal Government of the United States,

<sup>1</sup> See Periodical Literature of International Law, in previous issues of this JOURNAL.

the court refused to entertain an action against these bodies, as it would involve an action against a foreign sovereign. An action by the Republic of China, brought through its Ambassador was allowed, for bringing the action indicated submission to the Japanese courts and the Ambassador had the right to bring the action on behalf of the Republic of China, as he was the recognized governmental agency. He had succeeded to the rights of the Chinese Delegation to the Allied Council for Japan, which had been so recognized when the cause of action arose. The distinction between an international convention and a mining concession to a private firm was brought out by an adjudication on the ownership of oil bought from the National Iranian Oil Co., and claimed by the Anglo-Iranian Oil Co. The court held that though there had been nationalization in Iran, there had been no discrimination against aliens and provision had been made for compensation. In connection with nationality, a British subject, who became naturalized during the war in order to avoid being treated as an enemy alien, was denied a declaratory judgment avoiding the naturalization, for there was no duress proven to the satisfaction of the court. Though he could not lose his British nationality during time of war, this did not amount to "a grave and obvious violation" of Japanese naturalization laws.

## BOOK REVIEWS AND NOTES

*Völkerrecht. Ein Lehrbuch.* Vol. I. By Friedrich August Freiherr von der Heydte. Köln: Verlag für Politik und Wirtschaft, 1958. pp. 370. Index. DM. 19.80.

This is the first of the two volumes of a new German textbook on international law. It is written for the avowed purpose of equipping professional students of this discipline with a solid knowledge of the accepted core of international legal norms. Its author, a professor of international law at the University of Würzburg, should be no stranger to the readers of the JOURNAL, having published a much-cited article on "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" in the pages of the 1935 volume. As the vintage of this contribution shows, the author of the new manual is no novice in the field but an experienced scholar and teacher.

The volume bears the subtitle *The Constitution of the International Community* and is to be followed by a companion on *Controversies and Their Settlement under International Law*. The present book treats the chief topics which one would expect to find under such an arrangement. Thus there are three initial chapters on the nature, the history and the sources of international law, which are followed by ten further chapters dealing with the legal position of the state, the associations of states, regional blocs, the Holy See, the beginning and end of statehood as a matter of international law, the status of space, nationalities and individuals, and, finally, state succession and responsibility for breaches of international law. The presentation is balanced, straightforward and concise, with a sound emphasis on modern structural and organizational, as well as ideological, developments. Since the work professes to be no more than a printed version of the author's lectures, it contains little discussion of controversial details or conflicting views. Likewise there are only a few citations and no footnotes or other scholarly paraphernalia. There is, however, an appendix with copious though selective bibliographical references to each chapter, the listed items covering the publications since 1955.

The book makes no pretense of being, nor can it be deemed to constitute, a substantial enrichment of the existing literature on international law. But, barring a few slips (such as conveying the erroneous impression that OTC is already a reality), it is gratifying to acknowledge that the author has deftly and attractively acquitted himself of his more modest yet difficult task of fashioning a manageable, competent, and apparently much-needed modern compendium for the German university student and the public servant requiring no more than a general background in the field.

STEFAN A. RIESENFELD



*Prawo Międzynarodowe [International Law]*. 4th ed. By Ludwik Ehrlich. Warsaw: 1958. pp. 749.

Each successive edition of Professor Ehrlich's work has been an event in the academic life of Poland. In Poland a book of this type is required to meet many standards and respond to many needs. It has to be a reference tool for the practicing lawyer, a manual for the law student, and a theoretical formulation of the author's standpoint on the basic issues of international law. It has to be both a great compendium, similar to those existing in the West, paying attention to *minutiae*, and a theoretical exposé of international law reduced to a logical order of basic principles. There is also always the problem of size, and a partial reason for the success of this book is its extreme economy of space, precise formulation and beautiful organization.

Additional interest attaches to the book by reason of the fact that, although it is a second edition, coming out after World War II, it is the first edition to be published since Poland declared itself a People's Republic. In this sense it represents a remarkable sense of proportion and of understanding of the purely scientific approach, untainted with political propaganda or the momentary needs of a regime. That the book has come out in this form represents perhaps the involuntary homage of the powers that be to the stature and scholarship of the author. This is not to say that the author did not have to make concessions to the current line. But these are insignificant and limited to the formal aspects of the work. The title of the book, which was *Prawo Narodow (Law of Nations)* for the first three editions, has been changed to *Prawo Międzynarodowe (International Law)*. Also the organization of the book has been changed somewhat.

The binding force of international law is, according to our author, a direct result of the principle of good faith. Rules of international law fall into two categories: statutory, *i.e.*, those contained in international treaties or regulations or rules founded on an authorization based on such international treaties, and rules of international common law. To this last category belongs customary law, and those rules which are a consequence of the basic principles of international law and are either established by judicial precedent or by the teachings of scholars. However, there is no rule of international law which would constitute a *jus cogens*. All rules of international law establish only a presumption that they are in force between the parties concerned.

One of the most important contributions of the book to the general store of legal science is perhaps its complete record of the Polish school of international law. It begins with the Polish doctrine of the law of war in the first decades of the fifteenth century and continues almost uninterruptedly, in the writings of a considerable number of scholars, to the present day. According to Professor Ehrlich, there were three great periods characterized by forces which contributed most to the growth of international law. The greatness of the first period was mostly due to the theoretical formulation of its principles by a whole line of great writers. Then came the

period of international agreements concluded at international congresses and conferences. Finally the creation of the Permanent Court of International Justice opened up a new and most modern era. Judicial decision takes precedence over all other methods for the advancement of international law.

In this connection Professor Ehrlich states that an important development has taken place in the realm of the theory of international law. A new neo-positivistic school of international law is being formed which places great emphasis on the study of judicial precedent. According to this school, the binding force of a legal rule is based on its acceptance by the state concerned, either directly expressed or resulting from general principles, in the last analysis, the principle of good faith.

Three important points in the methodological approach of our author must be stressed. His system of international law is built on the broad basis of diplomatic and judicial practice seeking not so much to discover the theoretical formulation as to establish a positive legal rule actually in force. This search for the actual rule is combined with a fine discernment of a system of legal rules from the principle on which international law rests, and which binds it into a logical and systematic whole. A strong sense of history pervades the entire book. Theoretical formulations and information on concrete legal rules are placed against the background of the historical development of international law seen through two media—the history of international relations and the history of legal ideas. Professor Ehrlich rejects any temporal limitations in regard to the study of international law.

The history of ideas knows no limits. In various stages of human development various systems of legal regulation in force among organized groups can be found. The study of the history of contemporary international law is the study of the systems of international law which have existed in the history of mankind.

KAZIMIERZ GRZYBOWSKI

*Il Diritto Internazionale e il Problema della Pace.* By Giorgio Del Vecchio. Rome: Universale Studium, 1956. pp. 119. Index. L. 200.

The subject of peace and war and the problem of the legitimacy or admissibility of armed conflict, which were given serious study even in previous centuries, have assumed particular importance for humanists, philosophers and jurists in our own times. Attention has repeatedly been drawn to the inconsistency of the many schools of thought which seek, by means of arguments not infrequently devoid of a sound scientific basis, to confirm the "*suprema potestas*" of national states and their right to resort indiscriminately to the use of force; attempts have likewise been made to evolve effective juridical bodies to ensure the peaceful settlement of international disputes. Professor Del Vecchio has given a course on these much-debated issues at the *Istituto di Diritto e Politica Internazionale* of the Pro Deo University in Rome and has written a number of essays which

have been adapted for publication in a pocketbook edition available to a wide public.

"Many causes of war," he states, "which in the past were considered a sufficient justification for it, are nowadays rightly regarded as illegitimate." Only the necessity of safeguarding a right which is endangered or impaired and cannot be defended by other means can make resort to war admissible. The state cannot be denied the right to react to aggression—"a right which pertains indisputably to every individual, since *naturalis ratio permittit se defendere*." In principle, Del Vecchio also concedes that war may be waged to assert—and not only to defend—an individual right or the right of an oppressed people, but this reason for the use of armed force is hedged about with so many reservations that the initial admission eventually loses all value. The author points out that this should be a genuine right based on natural law and not simply a question of interest, and adds that the right should not amount to an aspiration—albeit legitimate—but should be identified with an essential right to life. Furthermore, for this cause of war to be considered legitimate, every available means of arriving at an equitable solution to the dispute must have been tried. Reflections on the use of modern weapons of mass destruction and on the widespread devastation caused by the last world war lead Professor Del Vecchio to limit still further the possibilities of legitimately exercising the right to resort to force:

If it were true, as has been claimed, that such methods of warfare are the inevitable outcome of the invention of new weapons, and if it proved impossible to reach agreement on banning them . . . one would have to conclude that the admissibility of war should not merely be confined to the very narrow limits imposed by the foregoing considerations, but should be ruled out altogether, except in extreme cases of legitimate defense against aggression and legitimate reaction to an intolerable violation of elementary human rights.

Del Vecchio bases his statements on principles of natural law, but he does not attempt to refute the numerous arguments of modern humanists and philosophers who are equally peace-loving and inspired by high ideals of freedom, against the very definition of natural law, which they consider to be nothing more than an intellectual device—an abstraction without a scientific basis.

This work is deserving of notice also for the moral ideals underlying it and for the sincere and, in fact, wholehearted participation in the serious problems discussed.

GIORGIO PAGNANELLI

*Makarov Festgabe. Abhandlungen zum Völkerrecht.* Stuttgart and Cologne: W. Kohlhammer, 1958. pp. viii, 605.

Professor Alexander N. Makarov was born in 1888 at Zarskoje Selo near St. Petersburg and became professor of international law at the University of St. Petersburg in 1919. In 1925 he went permanently to Germany and

became an outstanding German scholar in the fields of international law, conflict of laws, and comparative law. To honor him on the occasion of his seventieth birthday, the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, edited by the Institute of Foreign Public and International Law, formerly at Berlin, and since 1949 at Heidelberg, with which he has been connected for decades, has published a *Festschrift*. It is contained in the first three issues of volume 19(1958) of the *Zeitschrift* and was published also as a separate, bound volume which is here under review.

This seems to be an excellent opportunity to say, first, a few words on the *Journal*, in which the *Festschrift* appeared. This *Journal*, founded by Viktor Bruns, which was suspended toward the end of the second World War and revived a few years after the end of the war, is certainly the leading German journal of international law and one of the most important journals in this field in the world. It presents articles of the highest scientific quality, reports, and documents, and a great number of excellent and detailed book reviews. It also publishes a highly useful review of reviews and yearbooks on international law, covering the whole world, and including also the leading general American law reviews, otherwise not too well known in Europe, as well as detailed bibliographical and documentary indications. Finally, the indices of each volume represent, together with the review of reviews, a most complete source of information on the periodical literature on international law all over the world.

The *Festgabe* consists of twenty-six essays by leading scholars from ten different countries; while the majority of contributions are written in German, there are four contributions in French, three in English and two in Italian. The subtitle of the volume is: *Essays on International Law*. Only two contributions deal with other subjects. The individual contributions deserve detailed review. Unfortunately, this is not possible here.

As Professor Makarov has dedicated a great deal of his fruitful research to the law of nationality, it is only natural that four contributions should treat this matter. Professor Hans Schneider (Heidelberg) writes on the refusal of a petition for naturalization by administrative courts (pp. 449-463); it is a critical study of the judicial practice of German administrative courts in this field rather than a study on international law. But the study of Fritz Münch (Berlin) on the problem of nationality in the Saar Territory is heavily interspersed with problems of international law. He analyzes Saar nationality, particularly in the period between 1948 and 1957, before the Saar Territory was incorporated into the Federal Republic of Germany and the special *nationalité Sarroise* was abolished. Helmut Strebel's (Heidelberg) contribution (pp. 483-508) on the so-called *Österreichergesetz* (the German Law of Nationality, concerning the nationality of Austrians, of May 17, 1956) is primarily a study in international law. It is an interesting and deep-searching inquiry, although this reviewer is not in accord with all the points made by the author. Clive Parry (Cambridge, England), himself a specialist in the law of nationality, investigates Article 1 of the Hague Convention of 1930, which provides that "it is for each state to determine under its own law who are its nationals"

and "this law shall be recognized by other states" (pp. 337-368). The author tries to show that the impact of this recognition duty is, in effect, small. As always, his knowledge and documentation of all corresponding municipal laws and all available cases, are admirable; but the study hardly ever rises above the level of mere case analysis and discussion.

Another group of contributions deals with general trends in present-day international law, with new concrete and important problems. Thus, Professor Emile Giraud (pp. 102-130) investigates the element of space in international law and shows in detail the multiple influence which space exercises on the development of rules of international law and on whole institutions, such as neutrality and collective security. Professor Louis Cavaré (Rennes) writes on the transformation of diplomatic protection (pp. 54-80). After having given a succinct description of the law of diplomatic protection, he treats the international protection of minorities and of human rights. We believe that his calling these developments "transformations of diplomatic protection" is not sound. The diplomatic protection of citizens abroad is an international institution *sui generis*; the international protection of minorities—no longer in force—and of human rights—hardly yet in force—are new developments. Of real transformations of diplomatic protection we can speak only of an advisory opinion of the International Court of Justice, concerning the right of protection as a right of international organizations, and of the *Nottebohm Case*. Professor Erich Kaufmann (Bonn) writes on the legal effect of the war on prewar treaties (pp. 225-233). The late Professor Gilbert Gidel investigates once more, with his supreme knowledge of the law of the high seas, the juridical bases of the "inherent right" of the coastal state over the soil and subsoil of the continental shelf (pp. 81-101). He finds them in the geophysical unity of the land with the soil and subsoil of the continental shelf, in the fact that it is physically an extension of the continental mass of the coastal state. Professor Alfred Verdross gives a complete monograph on Austria's permanent neutrality (pp. 512-530), its history, its coming into being, its relation to the neutrality of Switzerland; he lays down exhaustively Austria's international duties as a permanently neutral state, points to the difference between the law of neutrality and a neutrality policy, defends and explains Austria's membership in the United Nations and in the Council of Europe. Highly interesting is the contribution by Professor J. H. W. Verzijl (Utrecht) (pp. 531-550) on the solution of the problems arising from nationalization of enterprises. He tells us that "one of the main causes of the confusion obtaining in this field is the indiscriminate intermingling of two quite different viewpoints, those of international law and those of conflict of laws." He then develops the solution of the problem strictly from the point of view of international law.

Another important group of contributions deals with international organizations, universal and regional, general and specialized and with the procedures, political and judicial, for the peaceful settlement of international conflicts. Professor Hermann Mosler (Heidelberg) dedicates his

study (pp. 275-317) to what may be called the general theory of international organizations, namely, the problem of admission. It is a very complete study, beginning with adhesion to multilateral treaties and admission to present-day international organizations, forms of admission, privileges or disadvantages, conditions, right and duty to accede, special forms of participation, legal evaluation of admission. It is a pity that the author has not considered the O.A.S.; here we find also today not the system of admission, but of a right to become a member, although this right is restricted to sovereign American states. Professor Hans J. Schlochauer (Frankfurt on Main) gives (pp. 416-448) an exhaustive study on the problem of revision of the U.N. Charter. Professor Ulrich Scheuner (Bonn) studies the problem of a U.N. Force (pp. 389-418). After a penetrating analysis of the international situation of the world at this moment, the author gives the whole history of the development of an international force in the United Nations, a complete analysis of UNEF, and is in favor of a permanent force of this type. C. Wilfred Jenks, authority on the law of international organizations, particularly with regard to the I.L.O., treats the application of international labor conventions by means of collective agreements (pp. 197-224).

Three very valuable contributions deal with the three regional supranational organizations in Europe. Professor Schüle (Tübingen) deals with a highly complicated problem concerning the economic interventions of the High Authority of the European Coal and Steel Community (pp. 464-482). Dr. Jaemicke, writing on the European Common Market (pp. 153-196), gives a full exposé of its organization and analyzes it from the point of view of its supra-national character. Dr. Ballreich presents a detailed investigation of the organization of the Euratom Community and its supra-national character, constituting a further step of these six European states toward integration (pp. 24-53).

Professor Hans Wehberg (Geneva) has chosen conciliation commissions in modern international law as the topic of his contribution (pp. 551-593). From the Hague Convention of 1907 and the Bryan treaties, through the corresponding conventions, bilateral and multilateral, during the period of the League of Nations, the Covenant and the General Act of 1929, the Gondra Pact of 1923, the General Inter-American Treaty of Conciliation (1929), the Saavedra Lamas Treaty (1933), and the Bogotá Pact (1948), to the European Convention on the Peaceful Settlement of International Conflicts (Strasbourg, April 29, 1958), the history and importance of international conciliation are given. Then follows a study of the proceedings and results of the conciliation commissions which up to now have functioned in Europe, a study partly based on material not yet published. It is an excellent and exhaustive study and does honor to this indefatigable protagonist of peace.

Three very valuable studies concern the International Court of Justice. Edvard Hambro discusses the problem of the enlargement of membership of the Court (pp. 141-152). The considerations on the competence of the Court by Professor Juraj Andrássy (Belgrade) (pp. 1-23) are excellent.

Professor Guggenheim's (Geneva) penetrating remarks on preliminary objections (pp. 131-140) are very interesting. Professor Gaetano Morelli's (Rome) pages on the Court of Justice of the European Communities (pp. 269-274) are vitiated by the dualistic doctrine.

Two contributions deal with the basic problem of the relation between international and municipal law. Professor Gabriele Salvioi (Florence) in a few pages (pp. 385-388) tries to show that, even from the standpoint of the dualistic doctrine, one must arrive at the supremacy of international law. Professor Hans Kelsen (Berkeley) writes once more on the unity of international and municipal law (pp. 234-248). In close reasoning he defends, as he has always done, the impossibility of the dualistic and the inevitability of a monistic doctrine. But the latter may be a construction of the primacy of the municipal law of one state or the primacy of international law. As he has done from the beginning, he defends the possibility of choice between the two monistic constructions. The choice is determined by political, not theoretical, considerations. But a new argument has been added. The two monistic constructions are not only put into parallels with the opposition between a subjectivistic and an objectivistic, between an imperialist and a pacifist ideology, but also with the opposition between the Ptolemaic and the Copernican idea of the Universe. Referring to a word by Max Planck, that both ideas are only different ways of looking at the same reality, that both are equally correct and justified, Kelsen now holds that the primacy of municipal and the primacy of international law are both equally correct and justified. Just as the Universe, as object described, remains the same under both hypotheses, thus the opposition between the two monistic constructions has no influence on the contents of international law.

JOSEF L. KUNZ

*The British Year Book of International Law, 1957.* Vol. 33. Edited by C. H. M. Waldock. London, New York, Toronto: Oxford University Press, 1958. pp. viii, 394. Index. \$10.40.

The 33rd issue of the *British Year Book of International Law* continues the fine tradition of providing readers with articles of exceptional value. In his "The General Principles of Law Recognized by Civilized Nations," Lord McNair suggests that when a concession is granted to a foreign corporation by a government the legal system of which is not sufficiently modernized to provide a governing law, neither public international law nor the law of either party is likely to provide a solution as suitable as the general principles of law recognized by civilized nations. F. A. Mann, in "Reflections on a Commercial Law of Nations," suggests the need for its development by the comparative lawyer for the benefit of the international lawyer, who is less likely to be versed in commercial law. In "The Protection of Merchant Ships," A. D. Watts distinguishes the right to exercise protection over merchant vessels from the requirement of na-

tionality, and prefers national ownership to registration as the criterion for the exercise of protection. Theodor Meron contributes a valuable article on "International Responsibility of States for Unauthorized Acts of their Officials." I. C. MacGibbon adds to his previous studies on the rôle of protest and acquiescence in international law an enlightening study of "Customary International Law and Acquiescence." D. W. Bowett clarifies the concept of estoppel in his "Estoppel before International Tribunals and Its Relation to Acquiescence." R. Y. Jennings finds that United States courts have pushed their claims to extraterritorial jurisdiction to extreme—even to offending—limits, in his interesting "Extraterritorial Jurisdiction and the United States Antitrust Laws."

In continuing his series of penetrating analyses of "The Law and Procedure of the International Court of Justice," Sir Gerald Fitzmaurice devotes 90 pages to treaty interpretation by the Court from 1951 to 1954. Among the notes contained in the volume should be mentioned "The Foreign Office Certificate: Some Recent Tendencies," by A. B. Lyons, and "*Détournement de Pouvoir* by International Organizations," by J. E. S. Fawcett. Digests of British court decisions on international law during 1956-57 and book reviews complete the volume.

HERBERT W. BRIGGS

*Legal Effect of World War II on Treaties of the United States.* By Stuart Hull McIntyre. The Hague: Martinus Nijhoff, 1958. pp. xii, 392. Index. Gld. 28.50.

Dr. McIntyre has written a book that deserves to be widely consulted by students and practitioners of international law. His subject—the effect of war on treaties—is one of traditional importance, and interest in it has been heightened by the uncertainties of doctrine and decision that have followed in the wake of the two great wars of the twentieth century. In his study, Dr. McIntyre has relegated doctrine to a position of secondary importance and has, instead, adopted an empirical approach based on state practice. His approach yields good fruit. Although his book is mainly restricted to the practice of the United States, his findings will suggest that reconsideration of some textbook statements concerning the effect of war on treaties is now in order.

The introductory chapter to the study summarizes the doctrinal positions regarding the effect of war on treaties, discusses definitions of "war" and "treaty," and points up the relevance of the principle of *rebus sic stantibus* to the subject under inquiry. The next chapter treats of United States practice prior to World War II. With respect to pre-World War II developments, Dr. McIntyre notes that United States practice had begun to evidence a "general tendency to diminish the effect of war on treaties" (p. 50).

As to the effect of World War II, Dr. McIntyre concludes that "one cannot with certainty point to a single treaty which the United States may



be said to have regarded as terminated by World War II. This extends even to political treaties" (p. 355). It is this finding that stands in sharp contrast to a traditional view found in many textbooks that war abrogates political treaties.<sup>1</sup> The evidence presented by Dr. McIntyre to substantiate his conclusion is a matter of importance here, and the evidence is impressive. He has considered some 170 treaties in force between the United States and one or more enemy states at the outbreak of World War II. Judicial decisions have, of course, been consulted, but court decisions dealing with the effect of World War II on treaty provisions have been relatively few. As a consequence, Dr. McIntyre has made extensive use of evidence of non-judicial origin, particularly statements by officials of the Department of State, actions of Congress in appropriating money or enacting legislation relative to particular treaty obligations, provisions of the postwar peace treaties, and, in the case of multilateral treaties, activities of other party states or of the organizations created by such treaties.

To be sure, as the *Karnuth* case of 1929 relative to the Jay Treaty teaches, Dr. McIntyre's finding as to termination of treaties may not prove an infallible guide to every future decision. Even so, cases like *Argento v. Horn* (241 F. 2d 258 (1957)), decided after the completion of his manuscript and holding that the Extradition Treaty of 1868 with Italy was only suspended during World War II, continue to bear out the strength of the evidence on which Dr. McIntyre's finding is based.

Another conclusion reached by Dr. McIntyre is that

whether the intention theory, or the classification theory, or the municipal standard of compatibility with national policy in time of war is applied, the result will normally be the same when the effect of war on a particular treaty is being considered. (p. 360.)

This is a tempered conclusion, and Dr. McIntyre's study does reveal some instances in which differing views have been taken on particular treaties. For example, the West German Government apparently regards the entire treaty of 1923 as abrogated; this is a position which the United States has not taken, although official doubts have been expressed as to the status of particular provisions of the treaty (pp. 163-64).

A reviewer could go on at great length discussing data brought together by Dr. McIntyre pertaining to each of the treaties studied. But it will suffice to say that his book provides a veritable mine of information concerning the treaties and period covered. From this information it clearly appears that a troublesome problem still remains for United States practice and its interpretation: Just which branch or agency of the Government is to decide whether or not a treaty is abrogated or still in effect?

DAVID R. DEENER

<sup>1</sup> For expression of this view, see, *inter alia*, Brierly, *The Law of Nations* 255 (5th ed., 1955); Fenwick, *International Law* 675 (3rd ed., 1948); Gould, *An Introduction to International Law* 345-346 (1957).

*Servitudes of International Law*. 2nd ed. By F. A. Váli. New York: Frederick A. Praeger, 1958. pp. xvi, 349. Index. \$12.50.

The author of this book published the first edition a quarter of a century ago.<sup>1</sup> As he suggests, servitudes have greatly increased during these twenty-five parlous years, although in the 1930's it was customary to disparage their use and existence. Servitudes were found especially useful in resolving controversial boundary problems and in providing access to ports for land-locked states. Air, naval and other military bases on foreign soil represent another rather recent development in this field, one certainly not overlooked by the author, since he devotes an entire chapter (Ch. 17) to it. A related chapter deals with the Panama Canal Zone.

This volume is divided into four parts, the first dealing with preliminary topics, including definitions, and the history and problem of international servitudes. "The Practice of States" deals with specific servitudes, beginning with fisheries (Ch. 7). Then follows an examination of rights of transit (Ch. 8), and common railway stations (Ch. 9), such as those between France and Italy, and France and Belgium, and more recently, stations on the German-Swiss frontier. In a specific case, action was instituted in the German Labor Court at Karlsruhe alleging wrongful discharge of a railway employee. The court, in dismissing the action, stated that this was a question of international law, and that since the employee worked in the common railway station in Basel, Switzerland, the German court had no jurisdiction (pp. 131 f.)

Free zones and leases are discussed in Chapter 10. Succeeding chapters treat the use of waters and waterways, customs, free zones, and mining rights. Much more modern are the chapters dealing with practice bombing sites, and the use of foreign military bases (Chs. 16 and 17). After discussing the bases acquired by the United States in the Caribbean, the author concentrates on the British bases and the bases made available to the United States by Britain in connection with the delivery by the United States of fifty destroyers to Great Britain (p. 230). The author does not concern himself with their legality, but confines his discussion to a factual account of the provisions of the lease agreements. He closes this subject by citing *Vermilya-Brown Co. v. Cornell*.<sup>2</sup> After a survey of American bases in the Philippines, Japan, Greenland, Iceland and Morocco (pp. 236-249), the author reviews the history of the Soviet bases in Finland and Port Arthur (pp. 249-252).

Chapter 18 is devoted to a comprehensive analysis of the character of the Panama Canal Zone and its legal relations, especially with the Republic of Panama. This individual treatment is justified by the author's stating that he does so "partly because it is a case of particular importance, partly because it displays features not to be found in other cases of administration of foreign territories" (p. 254). Various parts of the Hay-

<sup>1</sup> See review by Edward Dumbauld, 27 A.J.I.L. 805 (1933).

<sup>2</sup> 335 U. S. 377; 93 L. Ed. 76; 69 S. Ct. 140 (1948). Rehearing denied, 336 U. S. 928; 93 L. Ed. 1089; 69 S. Ct. 652.

Bunau-Varilla Treaty are quoted to demonstrate that the Canal Zone may not "be regarded for all intents and purposes as United States territory" (p. 255). The subsequent treaty of March 2, 1936, is also quoted to this end. The chapter closes with an examination of the case law which indicates that the courts of the United States have viewed the Canal Zone as foreign territory (pp. 261 ff.)

The last three chapters in this part are entitled "Demilitarized Areas," "Administration of Foreign Territories," where appears a discussion of the situation in Cyprus under the treaty of July 1, 1878, and "Miscellaneous Cases of Rights in Foreign Territory," which closes with a section entitled "The Headquarters of the United Nations" (pp. 295 ff.), wherein appears the agreement between the United States and the United Nations giving the "Headquarters" an extraterritorial status, according to the author (p. 296). Part four of Váli's book deals with the inferences to be drawn from the practice of states, which he introduces with a quotation from a well-known writer:

this indivisibility of sovereignty, though it belongs to Austin's system, does not belong to International Law. The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another.<sup>3</sup>

In his final chapter, the author classifies the various combinations which may exist "in the sphere of rights in foreign territory" (p. 333) and illustrates them graphically. He concludes that most of the rights in foreign territory may be described as "special-local" (*ibid.*).

This study of servitudes is the most comprehensive that has come to the attention of the reviewer during the many years he has been interested in the development of international law. Students of that subject will be well advised to make a careful study of Dr. Váli's opportune contribution to this field of law.

WALTER H. E. JAEGER

*Grabież dzieł sztuki, Rodowód zbrodni międzynarodowej* [*The Depredation of Works of Art, the Genealogy of an International Crime*]. By Stanisław Nahlik. Wrocław-Kraków: Ossolineum, 1958. pp. 482.

This work is much wider in scope than the title suggests. Its real theme is the evolution of international protection of works of art in time of war, from times of antiquity down to the present. The book opens with a "*recueil des causes célèbres*" of depredations and destruction of artistic and cultural property in time of war. The account of these events in antiquity is brief and the detailed history begins with the "*Sacco di Roma*" (1526). From that date on it continues to World Wars I and II. Obviously it was not possible to make the *recueil* complete, a reservation which the author duly made. The *recueil* closes with an account of the Polish

<sup>3</sup> Maine, *International Law* 58, quoted *op. cit.* 300.

claims for the restitution of the treasures from the Royal Castle and the Cathedral in Krakow deposited in Canada.

The strongest point of the book is an exhaustive review of the international literature concerning the protection of cultural and artistic property, beginning with Cicero, who formulated the principles which have only recently won recognition and embodiment in a legal rule, however precarious. The author widens our horizons in regard to the importance of writers hitherto considered secondary in the development of legal thought. An interesting analysis of the late medieval and renaissance authors of Poland is an important contribution in this connection.

The history of international practice in the protection and restitution of artistic and cultural property is dealt with simultaneously, demonstrating how the concept of cultural and artistic property and international interest in its protection developed. It begins with the early medieval prohibitions of the Popes, and includes an analysis of the Code of Chivalry, military articles, court decisions, and peace treaties, ending with international agreements affecting the conduct of war.

The final chapter of the book deals with the International Convention for the Protection of Cultural Property of 1954, concluded under the auspices of UNESCO, which provides a platform for the reappraisal of the present international situation as regards protection of cultural and artistic property.

Mr. Nahlik's book was conceived in terms of the Marxist approach, which sees in a legal rule a part of an ideological superstructure predicated on the changing social and economic basis. Although the author's effort to range historical facts according to those lines of thought has been executed with skill and talent, the results, to put it mildly, are not convincing. With all these reservations this is an interesting and stimulating book, and its extensive bibliography alone would justify its presence on any bookshelf.

KAZIMIERZ GRZYBOWSKI

*The Definition of Law.* By Hermann Kantorowicz. Edited by A. H. Campbell with an Introduction by A. L. Goodhart. New York: Cambridge University Press, 1958. pp. xxiv, 113. \$3.00.

This essay was written in 1939 as a part of an introduction to a projected history of legal science of which Dr. Kantorowicz was to have been co-editor. The history proposed to cover the sweep of the ages from ancient times to the present and also to touch upon international law, comparative law, canon law, and jurisprudence. World War II and the death of Dr. Kantorowicz in 1940 cut short this ambitious endeavor.

In the essay Dr. Kantorowicz is concerned with framing a definition of law to serve for a comprehensive history of legal science (which term he prefers to jurisprudence). The first point he takes up is the problem of definition itself. For scientific purposes a dictionary definition is not sufficient, he argues. Nor is the search for a scientific definition a search

for a true statement. There is no true answer to the question "What is law?" and to proceed as if there were, is to fall into the error of the school of "verbal realism" (as Dr. Kantorowicz terms it).

Instead Dr. Kantorowicz advances the method of "conceptual pragmatism." In this method a scientific definition is put as a proposition: "what ought to be understood by law" for the scientific purposes at hand. Obviously various definitions may be proposed, and to evaluate among them Dr. Kantorowicz would use the test of comparative usefulness.

Dr. Kantorowicz then proceeds to consider what he calls "useless criteria" of law. In the course of dismissing various "useless criteria," he also dismisses as inadequate for scientific purposes several familiar notions of law. Among these are: law as positive law, law as only the rules enforced by courts, law as a product of the will of the state, law as only absolutely binding rules, and law as consisting of "real facts" (he includes in this last category attempts to define law in terms of the behavior of judges). Of course, Dr. Kantorowicz has a definition to propose. It is: "A body of rules prescribing external conduct and considered justiciable." The bulk of the essay is devoted to explanation and justification of his definition and its several elements.

As Professor Goodhart points out in his introduction, Dr. Kantorowicz did not propose his definition as the only possible one. Nor is it likely that it will quiet controversy. Questions will remain even after Dr. Kantorowicz' skillful defense of his definition. Why limit law to prescribing external actions only? Why not internal as well? What is meant by "justiciable"? But such questions serve rather to underline the provocative quality of the essay as opposed to the didactic tone that often triumphs when matters of definition are under discussion.

Furthermore, it is good to have the problem of the definition of law attacked by someone with the catholicity of learning of Dr. Kantorowicz. And it is refreshing to have borderline cases like the rules of baseball discussed in relation to a proposed definition of law (incidentally, Dr. Kantorowicz is willing to class such as law in terms of his definition). A by-product of the broad approach adopted by Kantorowicz of interest to international lawyers is his inclusion of international law within his definition. Indeed, he has borrowed from international law a key term in his definition—"justiciable."

It was a happy thought to have this essay published, even though the larger project did not reach fruition.

DAVID R. DEENER

*Abendländische Rechtsphilosophie.* By Alfred Verdross. Vienna: Springer-Verlag, 1958. pp. x, 270. Index. S. 5.95, paper; S. 6.65, cloth.

While within the framework of this JOURNAL only a few words can be said about the book under review, it seems essential to direct the attention of international lawyers to it. In this work Professor Verdross gives a brief but nevertheless detailed, deep, objective and clear exposé of the Oc-

cidental philosophy of law since Greek times. He traces the development of the oldest type of philosophy of law, that of natural law: the "traditional" natural law of the Greeks, Cicero and the Catholic Middle Ages and the "classic" natural law of the sixteenth, seventeenth and eighteenth centuries. He fully reviews the positivistic schools of the nineteenth and twentieth centuries, the analytical as well as the sociological schools in their many shades. Finally, he describes the powerful return of natural-law thinking in our own times. He concludes with a critical evaluation of the nearly three-thousand-years-old Occidental philosophy of law, and with an exposé of what he considers the legitimate natural law deduced from man's nature. The book is restricted to the Occidental philosophy in Europe and does not consider its influence and development in the overseas countries belonging to the Occidental culture, nor does it deal with non-occidental cultures.

Free from any fanaticism or prejudice, fully recognizing the legitimacy of all three main types of philosophy of law, extremely restrained, as far as natural law goes, which the author correctly holds to be a part of ethics, it is a brilliant work, the result of life-long thinking and studies.

In a period when Occidental culture is fighting for its very survival, when international law, built on the values of that culture, is challenged, not only by competing, although compatible, non-Occidental cultures, but also by the essentially incompatible Soviet ideology—in such a period it is necessary that the Occident become again fully conscious of the fundamental values of our culture which must play an important rôle in the shaping of the international law of the future, built on the Occidental value of human dignity. Just as Professor Verdross as an international lawyer has had to dedicate his life also to the philosophy of law, the book under review is indispensable reading, not only for philosophers of law, but also for international lawyers.

JOSEF L. KUNZ

*Edmund Burke and the Natural Law.* By Peter J. Stanlis. Preface by Russell Kirke. Ann Arbor: University of Michigan Press; Binghamton, N. Y.: Vail-Ballou Press, 1958. pp. xiii, 311. Index. \$5.75.

If it should seem difficult for some readers to see why a whole book is needed to prove what ought to be obvious to any one who has read Burke at first hand, or perhaps read only "Conciliation with America" and the "Reflections upon the French Revolution," the explanation probably lies in the fact that so many writers a generation or two ago confused the old traditional "law of nature" with the new "law of a state of nature," with the result that the great name of Burke suffered in the process. Burke's attack upon the excesses of the French Revolution appeared to certain liberals to be an attack upon the fundamental principles of human liberty, when in reality it was no more than an attack upon an artificial conception of liberty which, Burke held, could only lead to the destruction of liberty. To an extravagant admirer of Burke, such as the author, and indeed the

reviewer, these misinterpretations simply must be corrected even at the expense of what might be said by some to be unnecessary detail.

In two introductory chapters the author surveys first the philosophic content and historical importance of the natural law, then the connection between natural law and revolutionary "natural rights." These two background chapters are followed by a study of Burke's attitude toward the natural law in all of its manifestations and misinterpretations—the law of nations, revolutionary "natural rights," "human nature," church and state, and the sovereignty of natural law. References to the literature of Burke's time and of later critics and commentators are extensive, so that the volume, in spite of its more restricted title, constitutes rather a study of political theory revolving around one of the greatest of philosopher-statesmen.

To associate Burke with the fantastic conception of rights arising in a state of nature or rights originating in a social compact is indeed historically so inaccurate as to justify the author's effort to correct it. Less unpardonable has been the designation of Burke as a conservative with no understanding or sympathy for human rights. His standard of a statesman was "a disposition to preserve" combined with "an ability to improve." It was a standard of ordered liberty, of respect for constitutional traditions as against abstract theories of right. Confronted with the tyranny of the mob, Burke gave us a statement as true today as in the period of the French Revolution:

It is ordained in the eternal constitution of things that men of intemperate natures can not be free. Their passions forge their fetters.

It might be classed among the first principles of the natural law. Whether Burke's sense of law and order may not at times have led him to feel less keenly the injustices that led to revolution may, indeed, be argued. The question is an acute one at the present day.

C. G. FENWICK

*Existenzialismus und Rechtswissenschaft.* By Georg Cohn. Basel: Kommissionsverlag Helbing & Lichtenhahn, 1955. pp. 192.

The aim of this book is to establish a science of law on the basis of a "new" apprehension of law, which the author calls "existential," in opposition to the traditional "conceptual" jurisprudence (*Begriffsjurisprudenz*). Conceptual jurisprudence, in the author's opinion, conceives of law in "norms" (that is, general rules) or abstract "concepts." Consequently, a concrete case implying a conflict of interests can be decided only by the application of a pre-established general norm from which the judicial decision is derived. According to existential jurisprudence, on the contrary, law—the "real" law—is immanent, not in a general norm, but in the concrete situation and can be found only by a careful analysis of the facts involved in the case at hand. Therefore, the judge in deciding a case should not be bound by pre-established general norms. Only then can his decision be satisfactory, that is, just.

The view that the "real," the just, law is immanent in reality, that is, in the nature of facts, is not at all a new theory; it is the old natural-law doctrine, and, like that doctrine, is based on the logical impossibility of finding in reality, in that which is, the answer to the question what *ought* to be or to be done. The author presents his natural-law doctrine as existentialism because he erroneously identifies general legal norms with abstract concepts. Existentialism he understands as a philosophy which denies the possibility of grasping reality by abstract concepts and hence substitutes for conceptual thinking (*Begriffsdenken*), which is the result of a passive-negative attitude toward reality, "reality-thinking" (*Wirklichkeitsdenken*), which implies an active-positive attitude toward reality. What the author means by this kind of existential "thinking" is not quite clear; but it is of no importance as far as existential jurisprudence is concerned. For, in his opinion, existentialism in the field of law is reached when judicial decisions are not bound by pre-established general norms, and "general norms" mean, according to the author, the same as abstract concepts. However, a general norm is something quite different from an abstract concept. A norm *prescribes* an object, especially a definite behavior, by expressing the idea that it ought to be. Behavior that corresponds to the norm is "good," represents a positive value; behavior that does not correspond to the norm is "bad," represents a negative value. A concept *describes* an object by indicating its essential attributes. The meaning of a concept is not that the object ought to have the attributes indicated. That an object has the attributes does not imply its goodness, and that it does not have the attributes does not imply its badness. The concept does not—as does the norm—constitute a value. If an object has the attributes indicated by the concept it can be, if it has not the attributes, it cannot be subsumed under the concept; but in the latter case it can be subsumed under another concept. A norm is the function of an act of will, a concept is the function of an act of thinking.

A judicial decision is not an act of thinking but an act of will; and the difference between a judicial process bound, and a judicial process not bound, by pre-established general norms is not a difference between two legal sciences, but between two legal techniques postulated by two opposite legal policies. The legal policy according to which judicial decisions should not be bound by pre-established general norms has been advanced in Germany by the so-called "free-law" movement. The opposition between those who prefer the one and those who prefer the other policy is almost as old as the law itself. Whether a legal system corresponds to the one or to the other legal policy, the science describing the system, that is, an objective science of law, can fulfil its function only by forming and applying abstract concepts, such as law, obligation, right, sanction, jurisdiction, judicial decision and so on. The so-called existential theory of law is a mixture of a natural-law doctrine and the legal policy of the old free-law movement.



*Human Rights and World Order: The Struggle for Human Rights in the United Nations.* By Moses Moskowitz. New York: Oceana Publications, 1958. pp. xii, 239. Appendices. Index. \$3.95.

While this book is a thoroughly documented study—there are twenty-eight pages of notes with hundreds of citations to primary sources—it also reflects the personal knowledge acquired by the author who has been, since 1947, representative of the Consultative Council of Jewish Organizations to the U. N. Economic and Social Council.

Persons concerned with the program and work of the United Nations in the field of human rights have found it difficult to get a comprehensive yet detailed picture of an extremely complex situation. The *Yearbooks on Human Rights*, now in ten volumes, are helpful, but only as source books. The great need for a single, authoritative work is filled by *Human Rights and World Order*. It would be desirable, however, if provision were made for keeping this book up to date by revision every few years.

A special value of this book is its treatment of special issues with regard to which it is difficult to get information without resorting to the welter of original documents; e.g., the concern in the United Nations with racial discrimination in the Union of South Africa; the many and complex problems relating to the implementation of human rights through the adoption of covenants; the question of the right of an aggrieved individual to file charges or claims; the proposal of Uruguay for the creation of a U.N. Attorney General who would look after the rights of individual claimants. Another helpful feature is the reprinting, in one of the appendices, of draft covenants on human rights.

The author is in favor of vesting in aggrieved individuals the right to invoke covenanted human rights, or, as an alternative, the adoption of the Uruguay-sponsored proposal. But, as the author points out, it is necessary first to get the United Nations, with its eighty-two Members, to agree on proposed covenants, and this seems to be an insuperable obstacle to the advancement of human rights; unless, perhaps, the United States were to drop its obstructionism or indifference, and assume a position of leadership in the struggle for human rights.

MILTON R. KONVITZ

*La Belgique et les Nations Unies.* Etude préparée par une commission de l'Institut Royal des Relations Internationales pour la Dotation Carnegie pour la Paix Internationale. New York: Manhattan Publishing Company, 1958. pp. xii, 372. Index. \$3.00.

This case study of the Belgian experience with and in the United Nations, prepared with admirable objectivity and scholarly thoroughness, is particularly useful to the student of the United Nations. Meticulous quantitative studies of both the debates in the Belgian Parliament and of press articles devoted to United Nations matters are very revealing. The views among Belgian scholars concerning the Dumbarton Oaks draft and

the United Nations Charter, and the contribution of its remarkably able and eminent representatives at the San Francisco Conference, are presented and their general tenor synthesized. Finally, the part played by Belgian representatives, both permanent and *ad hoc*, with respect to the important issues which have come before the United Nations bodies since 1945, is well summarized.

At San Francisco Belgium was opposed to the Security Council veto as accepted, and it gave strong support to the plan for an international police force. Very early its representatives saw clearly the necessity for regional arrangements, but above all for great-Power harmony, at the same time that they anticipated trouble in maintaining it. Likewise, as strong supporters of the International Court of Justice, they fought in vain for the obligatory adjudication of legal questions, and finally settled for the general agreement on the Optional Clause. Belgium worked hard to increase the power of the General Assembly, and opposed any provision for expulsion from the United Nations. Its energetic insistence on the reservation of domestic questions anticipated its later stand for freedom of action of colonial Powers with regard to their non-self-governing possessions. While Belgium had grave reservations about some crucial provisions of the Charter as accepted at San Francisco, it nevertheless ratified it, with obvious resignation, in the belief that even a bad charter was better than none.

Faced by the facts of Soviet obstructionism, particularly after the *coup d'État* in Czechoslovakia, Belgium came out strongly for regional arrangements, abandoning its earlier hesitation motivated by the fear of arousing Russian irritation. Thus, it accepted with some regret the return to the alliance system, carefully harmonized, however, with the principles of Article 51 (individual and collective self-defense). Belgium also admitted the necessity of a frank dependence on the power of the United States for the maintenance of world peace. The abusive and frequent use of the veto by the U.S.S.R. was particularly resented by the Belgian delegates.

Certain prejudices of the Belgian Government were revealed in its strong opposition to efforts to broaden the prerogatives of the Trusteeship Council, when it insisted strongly, invoking Article 2, paragraph 7, of the Charter, that any effort to extend the trusteeship system to the non-self-governing territories was a violation of the original intentions of the delegates at San Francisco, and a violation of the Charter itself. It should be added, too, that Belgium had strong misgivings as to the probable results of the addition of so many small Afro-Asian states as Members, for fear it would modify the balance of power in the General Assembly.

JOHN B. WHITTON

*UNESCO: Purpose, Progress, Prospects.* By Walter H. C. Laves and Charles A. Thomson. Bloomington: Indiana University Press, 1957. pp. xxiii, 469. Index. \$7.50.

Lawyers and political scientists have come to know UNESCO primarily through two international learned societies, created under its tutelage in

the late 1940's, namely, the International Association of Legal Science and the International Political Science Association. Both have established for considerable numbers of Americans forums in which friendships have been established in many parts of the world, through which have developed exchanges of books, articles and even teaching platforms. Incredible as it now seems, these currently essential associations had to await the initiative taken by UNESCO before they were born, and each still relies in large part on UNESCO appropriations to continue what has come to be a vital service in the international exchange of experience and ideas.

Walter H. C. Laves and Charles A. Thomson have been close to UNESCO, both as members of its staff and of the United States National Commission. Their record of UNESCO's first decade is, therefore, authoritative. They have provided a most readable and inclusive account of UNESCO's mammoth operation as well as a penetrating evaluation of its activities and its potentials. They open to view not only the activities of which lawyers and political scientists know much, but also the wide area of general education to which UNESCO has devoted much of its energies.

Americans are criticized for failure to appreciate UNESCO's value as an instrument of foreign policy. The authors find that successive Secretaries of State have shown little appreciation of UNESCO's importance in strengthening values needed in a free and peaceful world community. The authors are realistic in their criticism, however, for they discern no major effect of UNESCO in alleviating the tensions of the cold war. This failure they lay partly to the failure of the United States to seek to involve UNESCO in such an activity and partly to the effort of the U.S.S.R. since its admission in 1954 to make UNESCO an instrument of value in its effort to win friends and allies in the cold war rather than as an instrument to reduce the tensions which have created cold-war conditions.

Soviet participation in UNESCO seems to the authors to have challenged the agency's basic assumptions, which were those of Western democratic liberalism, namely, that education, information and personal association will help international understanding, and that understanding will contribute to peace. Yet Laves and Thomson do not regret Soviet participation, since they feel that increased association of Soviet scholars with their counterparts abroad may lead to a demand for an even greater degree of freedom within the U.S.S.R. which the Soviet Government may not be able to curb or control.

No experienced administrator can expect any agency to be successful in all things, the more so if its program has imaginatively conceived elements and is developed through discussion in a general conference comprising delegates from many cultures. Obviously some errors will be made, both in conception of programs and in their execution, yet the authors are probably right in concluding that UNESCO has been a useful instrument in furthering international intercourse and could be more useful if governments were to devote the skill of more outstanding people and greater financial resources to its activities.

Lawyers have definitely benefited from the activities of two of the

UNESCO-sponsored learned societies. Judging by this experience it is possible that Laves and Thomson might have chosen to give more encouragement to the development of the learned society aspect of UNESCO's work. These societies produce by indirection imaginative and useful programs requiring less administration at UNESCO headquarters than projects administered directly. Like great philanthropic foundations, UNESCO is always tempted to perform a task itself, while it might be more effective if it stimulated development of more non-governmental organizations of scholars and experts. These people, once they have been brought together with expenses paid to an organizational meeting, can be counted upon to carry out UNESCO's purposes with less expense to the parent agency than if that agency had sought to conduct the operation itself. The scholars will work for expenses alone, while bureaucrats require salaries. To be sure, UNESCO cannot count on eliminating the learned societies from its budget once they have been created, for scholars are notoriously poor, but experience has shown that the annual grants provided to learned societies by UNESCO provide real value in most cases. If these expenses are audited to make sure that UNESCO funds are not misused, the governments that contribute to the UNESCO budget can have reason to conclude that to the extent that international interchange of ideas and experience has value in preserving the peace, they are obtaining the maximum value possible from their francs, pounds, rupees or dollars.

JOHN N. HAZARD

*De Gespecialiseerde Organisaties. Hun Bouw en Inrichting* [The Specialized Agencies: Their Structure and Organization]. By H. G. Schermers. Leiden: A. W. Sijthoff, 1957. pp. xii, 221. Index.

In this volume a young Dutch scholar has provided students of international law and organization with a useful study of the legal position of the Specialized Agencies of the United Nations, and of their structural and organizational similarities and differences. After a general, introductory chapter in which the problem of co-ordination among the many functional agencies is discussed and their position in international law is examined, Dr. Schermers takes up in turn the membership, organs, and activity of the Specialized Agencies. By activity is not meant function or field of activities but methods of operation and procedure, such as drafting of conventions, recommendations, publications, finances, and sanctions.

Dr. Schermers states that the international position of the Specialized Agencies resembles that of the Vatican between 1870 and 1929, when it was generally regarded as a subject of international law, even though it possessed no territory. He would further strengthen the legal position of international organizations by revising Article 96 of the Charter of the United Nations and Article 34 of the Statute of the International Court of Justice so as to give the General Assembly the power to confer on them the right to appear before the Court as parties. He suggests a common membership for the United Nations and the Specialized Agencies as a means

of facilitating co-ordination and of keeping political questions out of the technical organizations. He recommends collective recognition of new governments and states by the General Assembly of the United Nations.

In conclusion Dr. Schermers considers an amalgamation of the United Nations and the Specialized Agencies into one self-embracing organization; the differences among the agencies do not present an obstacle to such amalgamation.

This is a good study of the Specialized Agencies, descriptive rather than critical.

AMRY VANDENBOSCH

*Annuaire européen* [*European Yearbook*]. Vol. IV. Published under the auspices of the Council of Europe. The Hague: Martinus Nijhoff, 1958. pp. xxi, 708. Index. Gld. 37.50.

"*La Relance européenne*" (The New Drive in Europe) is the title of the leading article of this *Yearbook* to welcome into the integrative system of the Council of Europe the European Economic and Atomic Energy Communities. This fourth issue of the *Yearbook*, by decision of the Committee of Ministers of the Council of Europe, continues on a permanent basis a publication first authorized for a trial period. The annual selection of articles serves well to provide an annual appraisal of the numerous activities which are working together under or in co-operation with the Council of Europe toward its goal of integration. Chronologies in the 12 documentary chapters for the year covered, 1956, provide diaries of organization action, and some half dozen charters, conventions, *et cetera*, complete to 1956 a record which has been lagging.

This volume contains the official French and the approved English versions of the Treaty establishing the European Economic Community, its annexes and its 12 protocols, as well as the Final Act of Rome, March 25, 1957. The English text (51 A.J.I.L. 854-954) of the treaty and two other instruments printed in this JOURNAL, is accurate but in alternative language. These documents take more than a third of the volume. The Treaty establishing the European Atomic Energy Community and the Convention on Common Institutions (51 A.J.I.L. 955-1004) and a protocol are held over to the next *Yearbook*. The entire system is optimistically discussed in the paper "*La Relance européenne*" by C. F. Ophüls, head of the German Delegation to the Brussels Conference, with EURATOM analyzed in relation to the energy problem by Louis Armand, Chairman of its Commission, and discussed with respect to European organization by George R. Nelson of the Council of Europe Secretariat.

The Common Assembly of the European Coal and Steel Community provides the political nexus of the several communities. Its function is examined in a paper by Mr. M. F. F. A. de Nerée tot Barberich, and the external relations of E.C.S.C. (French: C.E.C.A.) by Professor Riccardo Monaco of Rome. Einar Ljøchen, in an enlightening comparison, discusses the parliamentary characteristics of its Common Assembly, and the organs

of the Council of Europe, the Nordic Council, N.A.T.O., the Western European Union and Benelux. A British view of "Strasbourg in Perspective" is provided by R. W. G. Mackay, while Ludwik Gelberg of Warsaw produces some observations on the problem of European unification from one sector of the Communist bloc. Professor R. L. Bindschedler of Berne points out the limitations which the neutrality of Switzerland puts upon it in participating in the integration of Europe.

DENYS P. MYERS

*La Réforme du Conseil de l'Europe.* By Pierre Duclos. Paris: Librairie Générale de Droit et de Jurisprudence, 1958. pp. 527. Fr. 3,980.

This volume, published in a collection sponsored by the Union of European Federalists, is a pathetic document about a pathological case: the Council of Europe, which is still trying in vain ten years after its creation to overcome the impotence and paralysis to which it has been condemned by its very Statute.

Mr. Duclos' study is a detailed survey of the countless proposals which have been made since 1949 for the reform of the Council. The book begins with a brief history of the reform movement and of the organization's successive attempts at playing a meaningful rôle. The various reform proposals are discussed in the rest of Mr. Duclos' text and listed in the documentary annexes which occupy the second half of the volume. The author concludes on a note of almost total helplessness; even those proposals which would have amounted merely to an improvement of the present set-up, rather than to a deep transformation, have been rejected or pigeon-holed by the Committee of Ministers. The few amendments or new practices accepted by the Ministers have had very little impact on the organization.

Mr. Duclos' painstaking inventory of dead suggestions tends to create among his readers the same "kind of dizziness" which he himself experiences. He is right in concluding that the real problem is the creation of a European political authority capable of "taking European decisions." But until European solidarity becomes more real, it will be pointless to try to reform the Council of Europe, as the author recognizes in his very last sentence. There comes a time when Sisyphus should take a holiday.

STANLEY HOFFMANN

*The I.L.O. in a Changing World.* Report of the Director-General to the 42nd Session of the I. L. O. Conference, 1958. Geneva: International Labor Office, 1958. pp. 127. \$1.00.

Attention of the readers of the JOURNAL is drawn to this Report. Unlike previous Reports confined to an annual account of the activities of the I.L.O., this Report represents an attempt "to look at the I.L.O.'s work as a whole in the perspective of change over a period of years." One of the

major trends in the Organization has been "the steady growth of operational activity over a period of years in response to the practical needs of the current world social situation." The key areas of I.L.O.'s concern are reviewed, and the Director General, Mr. David A. Morse, develops the theme that, widespread as have been the activities of the Organization in response to needs for social action, there is yet a gap: "There remains the need to be able to understand and deal constructively with social problems in their concrete shape as they arise in specific times and places. This need," he argues, "is primarily a matter of education, and of education in the classical sense of the development of the individual's latent capacities which will enable him to assume social responsibilities and to help work out in his own way the solutions to the social problems of his community" (p. 7). This is an eminently useful and stimulating account of the I.L.O.'s work and prospects.

LEO GROSS

*The International Protection of Trade Union Freedom.* By C. Wilfred Jenks. London: Stevens & Sons; New York: Frederick A. Praeger, 1957. pp. xi, 592. Index. \$15.00.

For the student of the evolution of international procedures for the protection of human rights this is a fascinating book. It is mainly, though not exclusively, devoted to an exposition and analysis of the body of case law and the growth of customary rules and principles which have emerged from the "allegations procedure" for the protection of trade union rights which was agreed upon by the International Labor Organization and the Economic and Social Council of the United Nations in 1949-50.

The right of association for all lawful purposes has been among the principles of special and urgent importance to which the International Labor Organization has been committed since the Treaty of Versailles (Article 427). Conditions during the inter-war period were not propitious for the adoption of an international convention embodying a clear-cut obligation to give effect to the principle. An attempt to secure the adoption of a general convention concerning freedom of association was abandoned in 1927. The Declaration of Philadelphia of 1944 reaffirmed that "freedom of expression and association are essential to sustained progress." The time to formulate precise standards of freedom of association for trade union purposes and to establish special international machinery for its protection came, however, only after the second World War. Strong encouragement of action to this effect was given by the Economic and Social Council (resolutions 52(II), 84(V) and 239(IX)) and by the General Assembly (resolutions 128(II) and 279(III)) of the United Nations. The Freedom of Association and Protection of the Right to Organize Convention, 1948, is the most important instrument setting forth the substantive international law on the subject. It was followed in 1949 by the Right to Organize and Collective Bargaining Convention.

The Constitution of the International Labor Organization provides for the implementation of these and all other international labor conventions in various ways: the reporting by governments on both ratified and unratified conventions; the right of industrial associations of employers and workers to make representations; complaints by states parties to conventions; inquiries initiated by the Governing Body of its own motion or on receipt of a complaint from a delegate to the Conference; reference to the International Court of Justice.

In addition to these procedures which apply to all international labor conventions, the International Labor Organization has, on behalf of the United Nations as well as on its own behalf,<sup>1</sup> made special procedural arrangements for the international protection of trade union rights. As originally conceived, these consisted of the establishment of a "Fact-Finding and Conciliation Commission on Freedom of Association," to which the Governing Body, the Conference, the Economic and Social Council and the General Assembly can refer for impartial examination and investigation any allegations of infringements of trade union rights which are received either from organizations of workers or employers or from governments. With the exception of cases under the complaint procedure of the Constitution mentioned above, no complaint can be referred to the Fact-Finding and Conciliation Commission without the consent of the government concerned, a provision as to which serious reservations were expressed when consultations between the United Nations and the International Labor Organization took place in 1949.<sup>2</sup>

In their original form the arrangements provided that any communication alleging the violation of trade union rights would be examined, in the first instance, by the officers of the Governing Body. If the officers found that a *prima facie* case had been made out, they would circulate the complaint to the Governing Body as a whole and it would be open to any member of the Governing Body to suggest the reference of the case to the Commission, subject to the consent of the accused government. The arrangement as planned did not prove effective in practice.

The I.L.O. found an ingenious way to overcome the difficulty: In November, 1951, the Governing Body entrusted the preliminary examination of allegations to a wider group of its members and established for this purpose a "Committee on Freedom of Association" and the examination of cases by that Committee has developed in practice from a preliminary review of the desirability of requesting the government concerned to give its consent to allegations being referred to the Fact-Finding and Conciliation Commission into what is in substance an examination of the merits. On account of its less formal character and the fact that it continues to be in form a preliminary review by a committee advising the Governing Body, the consent of the accused government is not required. This development has occurred with the active co-operation—at the time

<sup>1</sup> Decisions taken at the 109th to 112th Sessions of the Governing Body of the I.L.O.; resolutions of the Economic and Social Council 239 (IX) and 277 (X).

<sup>2</sup> U.N. Doc. E/1566, paragraphs 11-13.



of the writing of Mr. Jenks' book—of sixty-six governments in all parts of the world. Such co-operation has been forthcoming because this development of the procedure corresponds to a real and generally recognized need.

Dr. Jenks supplements the case law of the Committee with the views of the Committee of Experts which examines the reports of governments and with the findings of the Committee on the Freedom of Employers' and Workers' Organizations from Government Domination and Control which sat in 1955-1956 under the chairmanship of Lord McNair. This survey had been prompted by controversies which arose with regard to the appointment of employers' and workers' delegates to the Conference from states with socialized economies.

In addition to the presentation of its main subject, the book gives a masterly introduction to the constitution, structure and general procedures of the International Labor Organization and an incisive analysis of the special status of the I.L.O. as a tripartite body among purely governmental international organizations and of the consequences which flow from this tripartite character for the development of international law and, in particular, of the law of treaties.

EGON SCHWELB \*

*Boundary Waters Problems of Canada and the United States. (The International Joint Commission 1912-1958.)* By L. M. Bloomfield and Gerald F. Fitzgerald. Toronto: Carswell Co. Ltd., 1958. pp. x, 264. Appendix. Index.

The world-wide increasing need for utilization of water resources has in recent years led to an increasing concern with the legal regime governing international inland waters. The International Joint Commission, created by the Treaty of 1909, is unique among international institutions because of its long-continued (46 years) operation as a judicial, investigative, and administrative body with regard to waters of common concern to Canada and the United States. The principles and modes developed and followed by the Commission furnish a rich source for the guidance of those seeking pragmatic solutions to similar problems elsewhere. The work of the Commission also demonstrates that the settlement of international water problems can be peacefully worked out between good neighbors.

Unfortunately, little has been written of the Commission's work since Chacko's *The International Joint Commission* (1932),<sup>1</sup> and the instant book does not, nor was it intended to, fill that gap. In the words of the Canadian authors:

This work does not purport to be in the nature of a scholarly and exhaustive survey of all material that has become available since the publication of Dr. Chacko's book, but it constitutes a modest attempt on the part of the authors to make a factual contribution to current

\* The views expressed in this review are those of the author and do not necessarily reflect the official opinion of the United Nations Secretariat.

<sup>1</sup> Reviewed in 27 A.J.I.L. 187 (1938).

discussions on international rivers through a summary of the experience of the International Joint Commission since its inception and the collection of documentary material associated with its work.

The summary of the Commission's experience is presented in two parts, and the documentary material in an appendix.

The heart of the book, and its most valuable contribution to the general subject, is Part II—summaries of the 71 cases coming before the Commission from its inception to mid-1958. Each summary indicates the treaty article under which the Commission had jurisdiction; the factual situation involved; the parties' leading arguments insofar as they relate to international law, past practices and principles developed by the Commission and interpretation of the treaty; and the disposition of the case. Perusal of the parties' arguments indicates, as is to be expected, that neither side has always been wholly consistent. But such is the substance from which law evolves.

Of particular interest at the present time is the summary of Docket No. 51, the Columbia River, a matter which is still unsettled. The views put forward in the United States and Canada both in and out of the Commission are fairly summarized. But the authors' interpolation that Article II of the treaty "contains the much discussed Harmon Doctrine" is not universally accepted.

Part I opens with a brief discussion of the Commission's historical antecedents. However, the account of the treaty negotiations is too brief to be of any real value. This is followed by chapters discussing the Commission's judicial, investigative, and administrative functions. Part I closes with the authors' brief but valuable appraisal of the conclusions to be drawn from the Commission's labors. Superb use of footnotes has been made to cross-reference the discussion in Part I to the docket summaries in Part II.

The Appendix contains, *inter alia*, the treaties and implementing statutes pertaining to the Commission's work, its rules of procedure, an excellent selected bibliography, and a useful map. The book's usefulness is also enhanced by an excellent index.

WILLIAM L. GRIFFIN

*Die Rechtsquellen des internationalen Wassernutzungsrechts.* By F. J. Berber. München: R. Oldenbourg Verlag, 1955. pp. 206. Index. DM. 17.50.

This comparatively slender volume, published almost four years ago, represents the laudable and interesting undertaking by a German law professor of tilling a quite stony and heretofore little-plowed field in international law, *viz.*, that of the rules governing the use of international drainage basins, especially rivers. This subject has gained tremendous practical importance in recent years and, consequently, attracted increasing attention from scholars. As it may be remembered, the topic formed the

basis of a lively discussion during the 48th Conference of the International Law Association, held at New York in September, 1958.

Professor Berber approaches the object of his inquiry from a deliberately chosen vantage-point and upon a carefully planned methodological route. After circumscribing his problem and canvassing the various views expressed by preceding students of the question, he examines and assesses the legal significance of possible sources of customary international law in this area, especially international treaties, decisions and opinions of international tribunals and other agencies, and municipal legislation and adjudication. At the end of his detailed and rigorous investigation the author concludes that no generally applicable rules can be gathered from any of these three bases and that only the carefully analyzed and classified international treaties may have some, though at best merely regional, law-creating effect. Professor Berber then turns to the general principles of law recognized by civilized nations as another potential source of international rules governing his subject, such as, particularly, the principles proscribing abuse of rights, requiring good faith, or ordaining mutual restrictions in the interest of neighborliness. But again he is forced to find that the existing divergencies in national conceptions and the vagueness of these principles prevent the legitimate resort thereto for the solution of interest conflicts in the use of international waters. Thus the author is thrown back upon the unholy dogma of unqualified territorial sovereignty and the resulting exasperating dilemmas. He extricates himself from this tangle by the conclusion that the area is not as yet covered by customary legal rules and can only be governed satisfactorily by a network of appropriate international treaties. Of course, from a rigidly positivistic point of view this appears to be the only possible answer. But is modern international law really that barren?

STEFAN A. RIESENFELD

*Om Allmänt Vattenområdes Rättsliga Ställning* [Zur rechtlichen Stellung öffentlicher Gewässer]. By Svante Bergström. (Institutet för Offentlig och Internationell Rätt, Stockholm.) Uppsala: Almqvist & Wiksells Boktryckeri AB, 1957. pp. 59. Kr. 2.40, paper.

This brief study deals with the position in Swedish law of "public water areas" or "public waters" (*allmänt vattenområde*, *allmänt vatten*)—waters of the territorial sea and of certain inland seas to which no private ownership rights can apply. A few years ago industrial utilization of materials on the sea bottom became desirable, and interim legislation was enacted to govern it: the right to remove sand, gravel and stone from public waters was reserved for the Crown. However, the basic question of the legal status of public waters remained unsettled. Are they Crown property, or are they *res communis omnium*? Bergström places them in the latter category, with the Crown (state) as manager and trustee thereof.

ABRAHAM M. HIRSCH

*The Evolution of the Suez Canal Status from 1869 up to 1956.* By Benno Avram. Geneva: Librairie E. Droz, 1958. pp. 172. Sw. Fr. 14.

The title claims the monograph to be an "historico-juridical" study of the status of the Suez Canal from 1869 up to 1956. The introduction states, however, that it is essentially limited to a consideration of the right of passage through the Suez Canal judged mainly "in the light of compliance or non-compliance with certain international agreements." The author further disavows any claim of the study being a research in politics or political history, and the reader must therefore not look for solutions to the problems raised by the political developments in Egypt or by the events concerning the Suez Canal, since he regards these to be purely political matters which are outside the scope of his work.

To the reviewer the author has not lived up to the expectations which the title and introduction would lead one to entertain. The work hardly fulfills the promise of an erudite historical and legal analysis of the status of the Suez Canal for the scholar or the specialist. At most it is an historical outline of the various events which have taken place concerning Egypt and the Suez Canal, and a *précis* of the various relevant concession agreements and other international treaties and documents, coupled with an inadequate treatment of complex prize law. The *raison d'être* of the study, namely, right of passage in the Suez Canal, has been legally and, in its varied manifestations, more penetratingly and adequately analyzed in the many works and legal periodical literature cited in the appendix and elsewhere. The work adds very little original contribution to the real knowledge already available on the subject. The terminating date selected, 1956, cuts off consideration of the nationalization of the Suez Canal Company and the aftermath, which certainly constitute perhaps the most important change in the evolving status of the Canal. Also, failure by the author to consider the legal nature and character of concession agreements omits discussion of a significant phase of the Canal's legal status.

The monograph indicates a lack of careful and serious preparation necessary for a scholarly product, and a lack of minute distinctions and careful technical accuracies which legal precision requires. There is a careless and loose use of legal terminology and enunciations of legal conclusions and statements of facts without adequate citation of supporting authorities and footnotes. Throughout the work there is also evident a lack of synthesis of the treatises, legal literature and official materials available. Traditional legal concepts are not expressed in conventional legal terminology or technical phraseology. Nor is the use of particular terms consistently maintained. For example, the terms "Act," "Convention" and "Canal Convention" are also used to refer to the concession agreements.

Apparently, too, the announcement of the use of official documents must be taken with caution. On page 33 the author states the conclusion that the Preamble of the Constantinople Convention of 1888, by the use of the word "complete," made the concession agreements "part of an

international agreement." He cites secondary sources as supporting authority. It happens that the reviewer, in the article written by him to which the author refers on page 25, had searched the relevant official records carefully, and, by appropriate citations in the article to the official records, had shown that such a conclusion was wrong and not based upon an historic fact. The confidence of the reviewer is further shaken by such technical errors as those appearing on page 145, for example: "Hide," "Dana Weaton" and the "7th edition" of Moore's *Digest of International Law*. The second part of the quotation in footnote 323 on the same page, commencing "it was declared . . ." and which is attributed "as Section 2," in Hyde, is inaccurate and is in fact a footnote in Hyde's work referred to.

The monograph can hardly be regarded as a comprehensive and definitive treatment of the very extensive and complex subject, and clearly is not one the authority of which on specific points can be accepted without question or verification. But as a general review it is perhaps useful to a general reader or student of international relations as his *point de départ* and stimulus for further research. It contains a rather extensive bibliography of official documents, general works and legal periodical literature, although here, too, there are notable omissions.

THOMAS T. F. HUANG \*

*Infraction Internationale. Ses Éléments Constitutifs et ses Aspects Juridiques. Exposé sur la Base du Droit Pénal Comparé.* By Stefan Glaser. Paris: Librairie Générale de Droit et de Jurisprudence, 1957. pp. viii, 226. Index. Fr. 2,130.

Since general principles of law recognized by civilized nations are "a third source of International Law independent of, although merely supplementary to, custom or treaty,"<sup>1</sup> a comparative law approach to such principles cannot be but a valuable adjunct to the study of international law. This is probably what inspired the author of the present book, a member of the Faculty of Law of the University of Liège, Belgium, to attempt a *textual* presentation of a comparative law system of fundamental principles of criminal law and of their applicability in determining criminality under international law. The material is, without any intrinsic reason therefor, divided into two main parts, the major one being a reproduction of a series of lectures delivered by the author at the *Institut des Hautes Etudes Internationales* of the University of Paris, and the very short second part filling certain gaps in that prior coverage. The book makes interesting reading, but has substantial shortcomings from a scholarly point of view. As far as comparative criminal law is concerned, the author's vista is strongly one-sided in that he mainly considers the continental European systems and gives hardly more than a stepchild treatment to Anglo-American law. With respect to international law, he does not always keep a clear line between criminality and responsibility

\* The views expressed are the personal opinions of the reviewer only.

<sup>1</sup> 1 Lauterpacht-Oppenheim, *International Law* 28 (7th ed., 1958).

for damages, as appears, for instance, from his manner of reference to the *Alabama Claims* Arbitration and the *Caroline* affair. His reasoning is mainly conceptual, with only scant coverage of adjudicated cases. The documentation has measurable gaps, especially insofar as Anglo-American material is concerned, and the author's conclusions do not always stand on firm ground. For instance, he draws the inference that certain acts were, even prior to World War II, crimes under international law from facts merely showing that they were considered unlawful under international law, an obvious *non sequitur*. He only apparently, but not actually, cures the fallacy inherent in this argument by alleging that a violation of international law is a crime under international law if it is considered by the legal conscience of the international community ("*conscience juridique internationale*," p. 153) as deserving criminal punishment. Such an abstract formula is hardly of any usefulness from a pragmatic point of view, since it begs the question as to what may be considered as a sufficient indication of the fact that the legal conscience of the international community calls for the punishment of a certain violation of international law. While, for these and other reasons, the book does not fully reach the scholarly goal to which it points, it nevertheless represents a thought-provoking study in, and a valuable contribution to, an important field bordering on general and international law.

MAXIMILIAN KOESSLER

*Die Genfer Abkommen von 1923 und 1927 ueber die internationale private Schiedsgerichtsbarkeit.* By Hans-Walter Greminger. Winterthur: Verlag P. G. Keller, 1957. pp. xiv, 113.

Experiences with the 1923 Geneva Convention and 1927 Protocol on international commercial arbitration are considered in this Swiss thesis, which deals also with approximately sixty court decisions of various countries. Valuable as a history of the 1920's and 1930's may be, a more useful evaluation of the Geneva agreements would have been afforded had this 1957 publication utilized the deliberations of the United Nations Committee on the Enforcement of International Arbitral Awards, U.N. Docs. E/2704, of March 28, 1955, E/2822, of January 31, 1956, and E/2840, of March 27, 1956.

MARTIN DOMKE

*L'Adoption dans les Législations Modernes.* 2d ed. Institut de Droit Comparé de l'Université de Paris, under the direction of Marc Ancel. Paris: Recueil Sirey, 1958. pp. xv, 332. Index.

This is an enlarged and revised edition of a comparative study of adoption laws in the world first brought out by the Paris Institute of Comparative Law during the German occupation under trying conditions (see p. xiv of the new edition). Like the first edition of 1943, the new one opens with a comparative survey made by Judge Marc Ancel on the basis

of the now 53 national reports, which form the second part of the volume. Primary attention is given by Judge Ancel to the legislative problem, conditions for adoption, its effects, and revocation. Conclusions are drawn as to present trends. The national reports, collected under the direction of J.-B. Herzog, Yvonne Marx, and Michel Lambert, are due to staff members and correspondents of the Institute. Though often somewhat rudimentary, the summaries have practical value. They would be even more helpful if bibliographies had been added to every report. Not all reports seem to be up to date. In the part, "United States," reference to the Uniform Adoption Act of 1953, enacted in at least two of our States, is lacking. Thanks to planning and teamwork, the Paris Institute, in producing this volume on a topic of particular human interest, has once more made a valuable contribution to knowledge about foreign law. May we hope that the work is kept up to date and that, in new editions, coverage is extended to the troublesome questions of private international law.

KURT H. NADELMANN

*The Legal Framework of World Trade.* By V. A. Seyid Muhammad.

Published under the auspices of the London Institute of World Affairs.

New York: Frederick A. Praeger, 1958. pp. xv, 348. Index. \$9.50.

This book is a detailed analysis of the General Agreement on Tariffs and Trade (GATT) and of the activities of the Contracting Parties to that agreement in administering its provisions and applying its principles in the field of international trade. The breadth of Dr. Muhammad's research has enabled him to put the General Agreement in its historical perspective. He traces the contributions made by the League of Nations, the development of the General Agreement during the negotiation of the abortive Havana Charter for an International Trade Organization, the evolution of the Agreement, culminating in the negotiation of amendments and of a new organizational agreement at the Review Session of the Contracting Parties in 1954 and 1955, and the recent problems resulting from market integration projects in Europe and in Latin America.

However, this is not an historical study in broad strokes, but a painstaking analysis of the complicated provisions of the Agreement and of their application during almost a decade. This study should prove of considerable value to anyone desiring to delve into the intricacies of almost any aspect of the General Agreement, whether it be the tariff concessions, the basic most-favored-nation provisions, the limitations imposed by the Agreement on the use of trade restrictions other than tariffs, the numerous substantive exceptions such as those for balance of payments difficulties, security, or regional market integration programs, the procedures for settlement of disputes, or the more technical questions as those relating to acceptance, entry into force, and termination.

In his conclusions the author places great hope in the "flexibility" of the Agreement which he has illustrated in his discussion of waivers, re-

negotiations, and amendment. He expresses the view that perhaps "the greatest contribution of the Agreement to international economic law is the standard of economic-good-neighborliness" resulting from the numerous provisions in the Agreement for consultation for the solution of problems; especial mention is also made of "the principles of equity" embodied in Article XXIII and other provisions envisaging adjustments based on reciprocity where the balance of advantage under the Agreement has been upset. He discusses some of the problems involved in the relatively unique situation under the General Agreement resulting from the fact that normally only one or two parties have a trade interest in particular tariff concessions in which all have legal rights under this multilateral Agreement.

It is to be expected that such an attempt to delve into the maze which has grown up around the General Agreement, to organize the confusing detail, and to present it to the reading public would contain some errors; and it is to be regretted that this book contains an unfortunate number. Dr. Muhammad's analytical study nevertheless constitutes an important contribution to the literature relating to the legal and technical aspects of both contemporary commercial policy and international organization.

WALTER HOLLIS

*Public Control of Business. An International Approach.* By Philip C. Newman. New York: Frederick A. Praeger, 1956. pp. 500. \$14.00.

In this collection of readings, Dr. Newman seeks to provide teachers of industrial organization, marketing and public control of business with materials. In this he is following the practice, which has long been predominant in American law schools, of providing students with cases and materials rather than textbooks. It is an interesting attempt, and the collection should prove valuable to those who are teaching or studying the many borderline problems of law and business organization.

The book has seven main divisions: A. Cartel Agreements Based on the Licensing of Patents; B. Cartel Agreements—Other than Patent Licensing; C. International Commodity Agreements; D. National Laws on Monopolies and Combinations; E. Judicial Interpretation of Anti-Monopoly Legislation; F. Consent Judgments and Other Enforcement Techniques; G. International Proposals to Deal with the Monopoly Problem. Of these main divisions, the last three are very largely co-extensive with the materials that would be provided in a law school course on trade regulation, although the author's choice of antitrust cases is in some respects unusual. Unfortunately, since the publication of the book, many major new developments have made some of the materials out of date. Both Great Britain and Western Germany have now new comprehensive antitrust laws which take the place of the materials presented in the book. In this reviewer's opinion, the new antitrust laws of France of 1953 would have provided more important material than the somewhat theoretical and meager provi-



sions of Brazil and Argentina. In the last section, a book published today would, of course, include either or both of the EURATOM and European Economic Community Treaties.

Such changes are inevitable, and they do not detract from the value of the attempt to collect materials under the aspect of "Public Control of Business." It should, however, be said that the first part deals with private market control agreements, which can hardly be put on the same level as public control legislation. It would have been interesting, and it would have added to the value of the book, if the editor, whose comments are very few, had provided an introduction which would have explained the reasons for linking private market control agreements with public control provisions under the common heading of "Public Control of Business."

W. FRIEDMANN

*Soviet Economic Aid: The New Aid and Trade Policy in Underdeveloped Countries.* By Joseph S. Berliner. New York: Frederick A. Praeger, for the Council on Foreign Relations, 1958. pp. xvi, 232. Index. \$4.25.

During the past two years we have heard repeatedly of the Soviet-bloc aid and trade "offensive" in the underdeveloped countries. But the reports have been vague both on facts and analysis. Just how large is Soviet economic aid to the underdeveloped countries? How does it compare in size to Western aid? Has the Soviet bloc begun to rival the West as a market for the products of the underdeveloped countries and as a source of supply? What political, economic, and other factors impelled the Soviets to embark on a substantial foreign aid and trade program? Does such a program necessarily work against U. S. foreign policy objectives? Has the Soviet bloc the capacity to expand its aid and trade activities still further? Is it likely to do so?

*Soviet Economic Aid* is a forthright and scholarly examination of these and other questions about Soviet-bloc aid and trade programs—probably the best that has appeared so far. One of the most striking conclusions of Mr. Berliner's study is that Soviet-bloc foreign aid and trade in underdeveloped countries, while large in comparison to bloc activities before the death of Stalin, is still very small compared with Western aid and trade. In 1957, for example (the latest year for which Berliner provides over-all figures), Soviet-bloc aid totaled only \$200 million compared with nearly \$5 billion of public aid and private investment from the free world. In 1956, Soviet-bloc export and import trade with the underdeveloped countries totaled but \$1.0 billion and \$911 million compared with \$22 billion and \$20.7 billion by the industrialized countries of the free world. These figures, Berliner emphasizes, do not mean that the Soviet-bloc economic offensive can be taken lightly, because it is being concentrated in key uncommitted underdeveloped countries of Asia and the Middle East, where it is capable of yielding significant political results.

The United States is still groping for a foreign economic policy equal to the challenge of the Communist economic offensive. Although not concerned directly with international law, Berliner's book should be read by all lawyers vitally interested in this problem.

RICHARD N. GARDNER

*International Equilibrium. A Theoretical Essay on the Politics and Organization of Security.* By George Liska. Cambridge, Mass.: Harvard University Press, 1957. pp. xii, 224. Index. \$5.00.

There has, perhaps, been too much writing about international relations and international organization in an external, not to say superficial, descriptive manner. The author of the present volume seeks to deal with the subject from the opposite point of view: theoretical analysis. He is also preoccupied with the old problem of the balance of power and seeks to integrate that concept with current international institutions. Whether he is successful or not, each reader will have to decide for himself. To the present reviewer it appears that Dr. Liska at times becomes too involved for the good of his treatment. "Another dynamic factor . . . are" (p. 66) may be merely slovenly editing, but elsewhere also one encounters traces of ponderous obscurity. Nevertheless, every serious student of international organization owes it to himself to struggle valiantly with this volume, for it does contain much valuable suggestive thought.

PITMAN B. POTTER

*El Orden Internacional en un Mundo Desunido.* By B. T. Halajczuk. Buenos Aires: Ediciones del Atlantico, 1958. pp. 342. Index.

The volume under examination follows, to a great extent, the ideas of this reviewer about the European origin of modern international law,<sup>1</sup> built on Occidental, Greek-Christian values, on the present disintegration of the international community, on the challenge of international law by competing, although compatible, non-Christian cultures, and by the essentially incompatible Soviet ideology, on the necessity of a comparative study of the different legal and value systems and, finally, on the combination of the three approaches—analytical, sociological and axiological—in the study of law. In this sense the author gives a detailed analysis of modern international law, as built on Occidental values, of its weaknesses, particularly as to the lack of a common system of values, of the present crisis which could not be overcome merely by proposed advancement in legal technique, as the failure of the League and the paralysis of the United Nations demonstrate. He describes in detail the growing phenomenon of regionalism. He gives a chapter to Asia, deals with the Islamic-Arab system and presents a detailed critique of the Soviet system.

<sup>1</sup> Josef L. Kunz, "Pluralismus der Naturrechte," *Österreichische Zeitschrift für Öffentliches Recht*, 1954, pp. 185-220, summarized in English: "Pluralism of Legal and Value Systems," in 49 *A.J.I.L.* 370-376 (1955).

The author goes considerably farther than this reviewer. He comes to the conclusion that a universal international law no longer exists, but only a regional Christian, and a regional Communist international law, with attempts at building some norms between the two systems, whereas Asia remains an *incognita*. He believes that Christianity should develop the regional international law of the Occidental culture and then try, not to impose it upon, but to win adherence of, the rest of the world, a *de lege ferenda* program which comes pretty near to that of Professor McDougal. Christianity? There are Christian (at least, technically) states behind the Iron Curtain; there are non-Christian states in the free world and among the "neutralist" countries. As to the universality of international law, it must be taken into consideration that, long before the present crisis, the bulk of international law consisted of treaty-created, i.e., particular, international law, whereas even today Communist states recognize the validity of general customary rules of international law. The author states that a universal international law depends on a common ethical basis. Has there ever been such a common ethical basis for the whole of mankind? Finally, it seems to this reviewer that in the threefold approach toward law, the author over-emphasizes the sociological and axiological approach, whereas the theoretical, analytical approach must remain equally important for the lawyer.

In all these aspects the book calls for clarification and re-thinking. But it is an interesting volume, based on considerable knowledge and inspired by a great enthusiasm, as it behooves a younger man.

JOSEF L. KUNZ

*Der Wiener Kongress und das Völkerrecht.* By Robert Rie. Bonn: Ludwig Röhrscheid Verlag, 1957. pp. 173. DM. 14.50.

This is a charming, scholarly, cogent and compact analysis of the work of the Congress of Vienna. Principal emphasis is placed, as indicated in the title, on the effects of the Congress on general principles of international law—balance of power, peace and security, legitimacy, and so on. It might, perhaps, have been slightly more accurate to speak of general principles of international relations or policy, rather than law. Some attention is given to the historical background, personnel, organization and procedure of the Congress, but chief attention is given to the implications of the decisions taken in or by the Congress relating to the fundamentals of international relations or even international organization. The estimate of the author of the work of the Congress may be slightly exaggerated (last paragraph, page 154); much of the subsequent history of European relations has turned on circumstances and general forces rather than upon the *Bestimmungen* of the Congress. However, the sympathetic analysis here offered is most stimulating and suggestive.

PITMAN B. POTTER

*Die Internationale Politik 1955. Eine Einfuehrung in das Geschehen der Gegenwart.* Herausgeber Arnold Bergstraesser und Wilhelm Cornides unter Mitwirkung von Walter Hofer und Hans Rothfels. Muenchen: Verlag R. Oldenbourg, 1958. pp. xv, 1055. Index. DM. 64.

The *Forschungsinstitut der Deutschen Gesellschaft fuer Auswaertige Politik* at Frankfurt am Main presents with this work the first volume of what it hopes will become a regular series of yearbooks on international politics. Compared with similar publications outside of Germany, the undertaking in its broad conception and scope resembles most closely the *Surveys of International Affairs* issued by Chatham House. In fact, the standard of scholarly analysis and interpretation attained in this opening volume recalls the earlier, and that means best, years of the *Surveys*. Like the latter, the present *Jahrbuch* is, accordingly, a historical treatise rather than a mere reference work.

The record of events covers, strictly speaking, the period from the summer of 1954, when the project of the European Defense Community collapsed, through the end of the year 1955, which had culminated in the Geneva Summit Conference. But the analysis of the factors and problems whose interplay gave shape to the situation at the end of 1954, goes much farther back and includes practically the whole postwar period. Indeed, there are brilliant reflections throughout the volume on international thought and action in historical periods prior to our own time. Clearly realizing that in mid-twentieth century the interdependence of domestic and foreign policy is becoming ever closer, the authors also consider the most important internal developments. This applies especially to what they call the "*Entwicklungslaender*," the underdeveloped countries in our own parlance. The analysis of the historical, political, cultural, and economic factors that account for the attitude of the nations uncommitted in the cold war between the democratic and Communist great Powers, deserves particular praise.

The authorship of the *Jahrbuch* is divided among its two chief editors and several experts on or attached to the research staff of the *Forschungsinstitut*. The annex to the text comprises almost two hundred pages and contains a bibliographical list, a list of documents, extensive notes, and an index. Elaborate as the index is, it should still be enlarged and further broken down in the future volumes. Such improvement would enhance the usefulness of the yearbook as a reference work.

ERICH HULA

*Dilemmas in Politics.* By Hans J. Morgenthau. Chicago: University of Chicago Press, 1958. pp. x, 390. \$7.50.

The obvious criticism of a volume of collected essays, written over an extended period of time on widely disparate topics, is that authorship is the only thing they usually appear to have in common. The collected essays which comprise the volume under review do not yield to this criticism.

When read as a whole they must be seen as a very effective vehicle in illuminating Professor Morgenthau's political philosophy and his distinctive approach to political problems, domestic and international. This result is neither a matter of accident nor is it merely a product of the author's skill in arranging the essays into various major groupings and in partially rewriting them in order to emphasize their common concern with the central dilemmas of politics. What gives unity to these essays, even if they had been left untouched, is Professor Morgenthau's constant preoccupation with a limited number of basic questions and his insistence upon applying throughout his work a method of analysis, the character and results of which will be apparent even to the casual reader.

Even so, note must be made of the excellent manner in which these essays have been arranged and the clarity with which the principal themes have been elaborated. Parts I and II afford a general introduction to the "dilemmas of understanding" encountered in the attempt to confront and to comprehend the contemporary political world. We cannot understand this world unless we are able to distinguish between what is novel in it and what is only a recurrence of perennial political problems. This task necessitates, Professor Morgenthau contends, a clear realization of the value that the tradition of political thought holds for us. Yet the proper utilization of that tradition requires, in turn, the ability to recognize what is eternally valid in the ideas that have come to us from the past and what is only the product of unique experiences and particular interests. It is Professor Morgenthau's position that the central vice of modern political science, particularly in America, must be found not merely in its inability to make this latter distinction, but even more profoundly in its almost complete rejection of the relevance of the tradition of political thought for the understanding of contemporary problems. Hence, the task to which the author addresses himself is one of demonstrating the value that tradition has for the present and the need for restoring its timeless features.

Part III of the volume pursues this major theme in several minor keys. Under the title of "The Burden of an Obsolescent Tradition," Professor Morgenthau analyzes a variety of political ideas and institutions in terms of their contemporary relevance. How and why did these ideas and institutions come to play their historic rôle? To what extent have they become obsolescent and to what degree do they transcend the particular circumstances that marked their origin and development? In this manner Professor Morgenthau deals with such problems as freedom, the separation of powers, nationalism, neutrality and the nature of the international legal order.

Part IV of the volume is concerned with the recognition of politics as an autonomous sphere of thought and action. It therefore emphasizes the elements which mark off this sphere from the other areas of human activity, the rules that govern political behavior, the inescapable moral dilemmas to which political behavior gives rise, and the dangers which follow upon the denial either of the rules governing the political world or

of the moral dilemmas which necessarily confront the political actor. The final section (Part V) deals with "dilemmas of restoration" and is a critical analysis of several notable attempts—Laski, Carr, de Jouvenel, Toynbee, Lippmann—to re-establish a relevant and morally acceptable system of political thought.

The criticisms that Professor Morgenthau's writings have always elicited cannot be reviewed here. Those who have disagreed with him in the past will no doubt continue to do so upon reading these essays. But whether for critics or for admirers, this volume must be welcomed, for it provides the reader with the opportunity to examine the more occasional writings of a distinguished scholar whose ideas possess a force and an integrity which cannot be denied.

ROBERT W. TUCKER

*Foreign Relations of the United States. Diplomatic Papers. 1939.* Vol. V: *The American Republics.* pp. vi, 827. Index. \$4.00. Washington: Government Printing Office, 1958.

1940. Vol. II: *General and Europe.* pp. vi, 915. Index. \$4.00; Vol. III: *The British Commonwealth, The Soviet Union, Near East, Africa.* pp. vi, 1028. Index. \$4.50; Vol. IV: *The Far East.* pp. iv, 1022. Index. \$3.75. Washington: Government Printing Office, 1955 (Vol. IV), 1957 (Vol. II), 1958 (Vol. III).

1941. Vol. I: *General, The Soviet Union.* pp. viii, 1048. Index. \$4.50. Washington: Government Printing Office, 1958.

These volumes, covering the period of turmoil which finally culminated in the participation of the United States in World War II, contain a vast amount of information for the analysts of international relations. Much of the correspondence is concerned with aggression. Ambassador Grew, with a great deal of foresight, reported from Japan:

Diplomacy might retard but would not stem the tide of aggression. Japan, alas, has become one of the predatory Powers, frankly and unashamedly opportunist, having submerged all sense of international morality, seeking to profit at every turn by the weakness of others . . . (1940, Vol. IV, p. 421.)

On the other hand, the less astute Pierre Laval was "convinced that Germany had no intention to crush France" (1940, Vol. II, p. 353). These documents also contain an unusually large amount of information on matters pertaining to international law. Due to the quantity of material and the limitations of review, attention will in the main be directed towards the latter.

*Territorial Claims.* The troublesome problem of postwar territorial claims was already emerging. The Polish Minister wanted to eliminate the East Prussian enclave, feared Russia would desire to retain certain territories in East Poland and insisted that Poland's prewar boundaries should be retained (*ibid.*, p. 376). It was "reported" that the Soviet Union had proposed a partition of China, but Japan had declined (1940,

Vol. IV, p. 339). Eden expressed fear that Great Britain could not arrive at an understanding with the Soviet Union in regard to postwar reconstruction, as the latter demanded her 1941 frontiers, including the Baltic states, Bessarabia, part of East Prussia and bases in Finland (1941, Vol. I, p. 200).

*Neutrality and Non-Belligerency.* The Declaration of Panama, in an attempt to isolate the Americas from the war, proclaimed a three-hundred-mile safety zone around the Western Hemisphere except for the territories of Canada and the European colonies or possessions within the specified area (1939, Vol. V, pp. 36-37). In connection with the *Graf Spee* incident, the United States Government reminded the Government of Uruguay of the latter's responsibilities under the law of neutrality (*ibid.*, pp. 93-94). Roosevelt was studying the possibility of transferring destroyers to Great Britain, but the Legal Adviser of the State Department found such an act would be in contravention of domestic law (1940, Vol. III, p. 60). *Izvestia* noted that certain English and American statesmen presumed

that the United States can in full conformity with international law and . . . neutrality sell anything, including even warships, whereas the Soviet Union cannot even sell grain to Germany without violating the policy of peace. (1941, Vol. I, p. 123.)

The halting of the delivery of machine tools to Russia and Japan occasioned diplomatic representation (*ibid.*, p. 667; 1940, Vol. III, p. 390 ff.; 1940, Vol. IV, p. 572 ff.). Japan protested against the ban of shipments of scrap iron and petroleum products (1940, Vol. IV, p. 590 ff.). The seizure of Italian and German vessels in American ports occasioned considerable comment on the right of angary and a reply that such vessels had disturbed the peace of the ports (1941, Vol. I, pp. 451-484).

*The Laws of War and Occupation.* The United States Government protested against the establishment of a British prize court in the Mandate of Palestine (1940, Vol. III, pp. 865-867). The Polish Minister in the United States objected to Soviet plundering and military conscription of Polish citizens in violation of the "elementary principles of law and international justice" and the Fourth Hague Convention (1941, Vol. I, pp. 215, 231). In response to American inquiries concerning the distribution of relief to occupied countries, Great Britain declared that such territories would be on the same footing as Germany, "as supplies admitted into such territories would inevitably fall into German hands" (1940, Vol. II, pp. 762-763). The Soviet Union announced it would observe the Hague Convention of 1907 relative to Prisoners of War, but refused to adhere to the Geneva Convention of 1929, as the latter entailed inspections of prisoner-of-war camps in the Soviet Union (1941, Vol. I, pp. 1005-1019).

*Recognition.* The office of the Legal Adviser of the Department of State issued some revealing memoranda on the subject of recognition (1939, Vol. V, p. 305 ff.). The United States informed defeated France that it would neither recognize nor acquiesce in any attempt to transfer territory in the Western Hemisphere from one non-American Power to another (1940, Vol. II, p. 494). Secretary Hull declared that the United States had never

recognized the sovereignty of either Great Britain or New Zealand in the Antarctic (1940, Vol. II, pp. 333-334). The American policy of non-recognition of territory acquired by acts of aggression, or in violation of international treaties, was maintained in regard to the Wang Ching Wei regime established by Japan in China (*ibid.*, p. 707; 1940, Vol. IV, p. 284), and the *de facto* incorporation of the Baltic states into the Soviet Union (1940, Vol. III, pp. 377-387; 1941, Vol. I, pp. 627, 708, 751, 760, 784-785).

*Protection of American Citizens and Interests.* The United States adopted an amazingly firm stand in its negotiations with the Soviet Union. A State Department memorandum accused the Soviet Union of violating the Litvinov Agreements and noted

not in one instance has the Soviet Government notified the American Consular representatives of . . . an arrest [of American citizens] until after repeated inquiries . . . have been made. (1940, Vol. III, p. 225.)

Three Russians were erroneously held in Toledo for two hours on suspicion of robbery. Mr. Gromyko registered a sharp protest which changed to "embarrassed silence" when asked if the representation meant that Americans detained by Soviet police would be permitted to communicate with their Embassy immediately (*ibid.*, p. 259). Representations were repeatedly made to the Soviet Union that the latter was not permitting American citizens in Eastern Poland to contact the Embassy for repatriation (*ibid.*, p. 336 ff.; 1941, Vol. I, p. 676). In order to repatriate certain Americans and their families, the Americans engaged in some old-fashioned "horse trading" by releasing two Russian nationals, a Mr. Ovakimiam, charged with illegally acting as the agent of a foreign Power (1941, Vol. I, p. 976), and a Mr. Gorin, convicted of espionage (*ibid.*, p. 930). The American Ambassador in the Soviet Union chided the Department of State for not demanding the release of a larger number of Americans in exchange for the two Soviet nationals. The undeclared war in China occasioned numerous representations on behalf of American interests (1940, Vol. IV, p. 251 ff.). Although the Philippines did not gain their independence until some years later, Secretary Hull, in discussing loans for the repatriation of American nationals, noted that "Loans are not authorized for Philippine citizens who must look to the Commonwealth Government for such financial assistance" (1940, Vol. IV, p. 948). No explanation is made of this unusual stand in regard to "Philippine citizens." The United States Government insisted upon prompt and just compensation for American property expropriated in Mexico (1939, Vol. V, pp. 654-656, 698, 704). The United States demanded that its extraterritorial rights be respected in China (1940, Vol. IV, p. 919 ff.) and in Morocco (1940, Vol. III, p. 805 ff.). Trade controls instituted by France and Great Britain, in their respective mandates, were declared by the United States to be in violation of American treaty rights (*ibid.*, pp. 120-121, 858, 934 ff.).

These volumes exhibit the usual high standards of editing to be found in *Foreign Relations*. The increased volume of diplomatic activity during the years reported adds to the problems of selection. Despite the steady in-



crease in the number of yearly volumes since 1929, the researcher is still hampered by the rather large amount of unreported material necessitated by the available space and other factors. Where such documents are not published due to a lack of funds, this is particularly lamentable. The utilization of the material is also rendered more difficult by the fact that the last up-to-date cumulative index ends with the year 1918 and only covers about half of the volumes published since 1861.

ROBERT E. CLUTE

*Documents on American Foreign Relations, 1957.* Edited by Paul E. Zinner. New York: Harper & Brothers, 1958, for the Council on Foreign Relations. pp. xxvi, 463. \$6.00.

With the issue under review, *Documents on American Foreign Relations* have been compiled for 20 years on the same scheme by the World Peace Foundation and, since 1952, by the Council on Foreign Relations. The selection of statements and documents from the White House, Department of State, international organizations and conferences, Congressional documents, reports and acts, affords a compact understanding of what the United States is doing in an unsettled world. In 1957 a total of 158 documents were chosen under 48 heads in 8 chapters. The editor notes in his preface that "1957 was a year of relative diplomatic quiescence," and that the inclusion of documents was dictated largely "by a desire for comprehensive coverage and for chronological continuity of a series of issues whose resolution is pending." Africa is assigned a chapter for the first time.

This annual is a companion volume to the analytical *United States in World Affairs*, which is an interpretation of what has been done. In that combination interest is concentrated on the debate rather than the decision. In 1957 the exposure of attitudes and opinions—what is called "policy"—outran decisive results. Conference *communiqués* and United Nations resolutions are about the most definite items printed. Could more of the fixed points in foreign relations be shown? The President's message of January 31, 1957, requesting legislation in favor of Hungarian refugees and changing the basis of immigration quotas is printed along with his statement on the Act of September 11, regretting the Congress' failure to do either; what Public Law 85-316 did do might have been shown in text, by citation or excerpts from reports. Keeping discussion for understanding and decision for knowledge in balance is a constant hazard in editing this kind of publication.

DENYS P. MYERS

*Daring Diplomacy: The Case of the First American Ultimatum.* By Andor Klay. Minneapolis: University of Minnesota Press, 1957. pp. xiii, 246. Index. \$5.00.

Martin Koszta, who took part in the Kossuth rebellion in 1848-49 in Hungary, declared his intention of acquiring United States citizenship on

July 13, 1852, and a year later went to Smyrna, Turkey, on a business trip, where he had previously been a refugee. On June 22, 1853, he was kidnaped by hirelings of the Austrian Consul General and imprisoned aboard its brig of war, *Hussar*. Captain Duncan N. Ingraham of the sloop *St. Louis*, in concert with Consul Edward S. Offley, demanded his release and he was taken to the French hospital July 4 under an agreement between the American and Austrian consular officers. He was embarked for New York on the barque *Sultana* on October 15, after some famous diplomatic correspondence at Washington and Constantinople. The resulting Koszta case is a leading one on nationality with respect to the right of expatriation. If any one doubts that law deals with life, it is proved by this intimate account of Koszta's action and plight that culminated in Secretary of State Marcy's notes, which established the right of an emigrant to protection along with his right to expatriate himself. The book is as good reading as it is biography, history or diplomatic incident.

DENYS P. MYERS

*Wilson's Foreign Policy in Perspective.* An Interpretation by Charles Seymour, Edward H. Buehrig, Harold M. Vinacke, Samuel Flagg Bemis, and Sir Llewellyn Woodward. Edited by Edward H. Buehrig. Bloomington: Indiana University Press, 1957. pp. 176. \$4.50.

This little volume is a contribution by Indiana University and the University Foundation to the celebration of the Wilson centenary year. The five lectures, each by an authority thoroughly qualified for his particular topic, were delivered on the Bloomington campus in the fall of 1956. As is stated in the preface, "each lecturer has taken only a facet of the whole," and even together they cannot "encompass the subject in its full breadth."

President Emeritus Seymour is the natural selectee to discuss "The Role of Colonel House in Wilson's Diplomacy." The significance of House's service grew as world war, centering in Europe, raised issues of neutrality and intervention, war aims, relations with allies, and co-ordination of effort. As the President's representative to the Inter-Allied Conference of October, 1918, Colonel House is credited with a distinguished diplomatic success in obtaining acceptance of the Fourteen Points "as the basis of the ultimate peace settlement," whatever the subsequent fate of that achievement; and, it is added, had his advice that the President treat with the Senate in the conciliatory spirit shown toward opposing Peace Conference colleagues been accepted, the Peace Treaty, with the League Covenant, "would have been ratified and a basis for cooperation . . . established."

In Professor Buehrig's treatment of "Woodrow Wilson and Collective Security," the story is traced from 1914, with the initiative of Colonel House in seeking "through the belligerent ambassadors in Washington to

promote a negotiated peace," through his fruitful negotiations with Sir Edward Grey and his endeavor to base upon the traditional doctrines of freedom of the seas and non-interference with the American continents from other parts of the world a universal rule of mutual protection of territorial integrity and political independence—collective security through the League of Nations.

The League of Nations as an agency for resolving the evil of Japanese power politics in Eastern Asia forms the climax of Professor Vinacke's valuable summary of "Woodrow Wilson's Far Eastern Policy." It is thought-provoking to re-read the President's characterization of the initial phase of the Chinese Revolution in 1911 as "the most significant, if not the most momentous, event of our generation." It is instructive to follow the story of the prompt recognition and subsequent troubled relations with the struggling new Chinese regime, and with Japan, where mounting aggressiveness was already becoming a menace to the development of order and justice in the world community. The paragraphs recounting the beginnings of self-government in the Philippines are a happy interlude; the portentous handicap of racial prejudice to negotiation at the Paris Peace Conference, a mournful final note.

The policy Wilson tried to put into practice with his proposed Pan American Liberty Pact and to embody and expand in the League of Nations is, it seems to Professor Bemis, whose lecture deals with "Woodrow Wilson and Latin America," the policy for which the people of that area "remember him most signally a hundred years after his birth." The review emphasizes the Mexican crisis which had become acute at the time of Wilson's first inauguration. It leaves a vivid impression of wrongness and futility in withholding recognition from governments in control and fulfilling international obligations, even though their internal policies or the character of their personnel may be obnoxious. But there is praise for the President's motives and for his over-all accomplishment, in which is seen the continuation of the vision of Bolívar and the precursor of the attitude of the good neighbor which has since uplifted inter-American relations.

Sir Llewellyn Woodward, presenting "A British View of Mr. Wilson's Foreign Policy," concludes the lectures. With admirable candor and objectivity he sets forth and analyzes such adverse criticism as that of Keynes, and discusses the views of several recent historians. A particularly sagacious treatment of self-determination stands out, and the general belief is expressed that the aims of the United Nations for an effective settlement after World War II "were in essentials a revival of Mr. Wilson's leading ideas." If human progress is to continue despite the fearful signs of these days, the lecturer is sure that the only road to the better era is through the political philosophy that the President held.

WALLACE MCCLURE

*L'Incorporation de l'Ukraine Subcarpathique à l'Ukraine Soviétique, 1944-1945.* By Vasyl Markus. Louvain: Centre Ukrainien d'Etudes en Belgique, 1956. pp. 144. Index.

This is a useful study of a problem that has usually escaped Western attention, namely, that of the Soviet annexation of the Sub-Carpathian Ukraine, an eastern province of prewar Czechoslovakia. This territory, inhabited by less than a million people, is strategically situated; its absorption allowed Russia to cross the Carpathian Mountains and to place herself in the middle between Poland, Czechoslovakia, Hungary and Rumania. This strategic asset is of no present particular importance only because the U.S.S.R. controls these four countries anyhow.

The author, a native of this area, does not conceal his nationalist Ukrainian interpretation of 1944-1945 events which he, however, honestly relates with the support of abundant documentation. He does not deny that the Soviet annexation was contrary to the previous pledges to respect pre-Munich Czechoslovak territorial integrity and was the first unpleasant surprise for trustful Czechs. He deplores the Sovietization of his native land and yet rejoices in the fact that it was united with other territories inhabited mostly by populations speaking Ukrainian; he finds comfort in the situation where all Ukrainian-speaking people have only one foreign master. He hopes that this will fortify Ukrainian national consciousness and will lead some day to their independence. Ukrainian history of this century does not permit any safe prophecies either way.

W. W. KULSKI

*The Diplomacy of Southeast Asia: 1945-1958.* By Russell H. Fifield. New York: Harper & Brothers, 1958. pp. xv, 584. Appendices. Index. \$7.50.

The diplomacy of Southeast Asia, as the author's treatment makes clear, is largely the diplomacy of each of the newly independent countries (the Philippines, Indonesia, Burma, Thailand, Vietnam, Laos, Cambodia, and Malaya). The setting is an area setting. All of the countries treated emerged out of a colonial background; the movement toward independence was stimulated by the similar treatment under Japanese occupation; and Japanese policy was based upon essentially area premises. The volume concludes with an area treatment of regionalism and regional participation in the United Nations. But even so, there is country treatment under the area or regional heads, as there is also in Chapter 3, "The Machinery of Statehood." That chapter is limited to a description of the machinery erected in each country for the conduct of foreign relations. Three fourths of the text consequently is specifically organized on a country basis. Southeast Asia is taken, quite properly, by the author as a geographical delimitation of the scope of his study, and the common background of colonialism as a major influence in the shaping of diplomatic relations.

In the treatment of the diplomacy of each country the author proceeds

from the time of establishment of independence at the expense, in some cases, of sufficient examination of the international aspects of the struggle for independence. "Domestic politics" in the case of each country "is considered in so far as it directly relates to foreign policy" (p. xiii). The author develops a more extensive relationship in the case of the Union of Burma than in that, for example, of Indonesia, where the relationship is at least equally direct and important. The treatment of diplomacy is more descriptive than analytical. The subject is, however, treated objectively and in detail. The volume is a substantial addition to the literature on Southeast Asia.

HAROLD M. VINACKE

*Constitutional Laws of the Commonwealth.* 3rd ed. Vol. I: *The Monarchies*. By Sir Ivor Jennings. New York: Oxford University Press. 1957. pp. xxiv, 496. \$8.00.

The Master of Trinity Hall, doyen of Cambridge University's "legal" college has been granted a double gift. He is a first-rate conversationalist with the additional good fortune, infrequently bestowed, of being able to write as he talks—with cogency and the grace of ease. The third edition of his *Constitutional Laws of the Commonwealth*, under present review, is a convincing demonstration of this dual talent at its best.

This edition, the first of two (or perhaps three) volumes, deals with those Commonwealth countries which acknowledge the Queen as sovereign, i.e., the Monarchies. Additional comment is provided, however, on the Republic of Ireland in its atypical association with the Commonwealth as a "non-foreign" country and, of special and timely interest, there are included the pertinent South African cases dealing with the colored franchise as they relate to the doctrine of *apartheid*.

The chapter, "Territories of the Commonwealth," provides a superb glimpse into the difficulties which beset an author dealing with such a swiftly developing subject. In an attempt to treat generally the canvass of the whole Commonwealth, with each country's common and yet differing development, the written record is perforce outrun by events themselves. Illustrating the British emphasis upon the philosophy of empiricism, that response to events by those whom Salvador de Madariaga calls, "men of action," the chapter quickly establishes the forswearing of "Empire" in favor of the dynamism of Commonwealth. The Commonwealth itself provides an experiment in which all students of politics and law should have a direct interest. In commenting upon the genius for adaptation and flexibility, Sir Ivor makes the point that "it is possible to imagine circumstances in which a territory which has never been a dominion of the Commonwealth would nevertheless be admitted to the Commonwealth." A provocative thought in the fluid present, and for a country in Britain's position in the Atlantic and Western European world!

The work of Sir Ivor not only succinctly and yet delightfully reviews

in small compass the highlights of growth from colonial status through dominionhood to independence, but provides with extreme clarity, well designed order, on a case basis, the intricate and varied supports in constitutional law which reinforce and strengthen without ever freezing a living institution.

RICHARD P. TAYLOR

*The Founding of the Federal Republic of Germany.* By John Ford Golay. Chicago: University of Chicago Press, 1958. pp. xii, 298. Index. \$5.00.

The history of the governmental organization of what is popularly known as West Germany is of more than marginal interest to international lawyers. It is closely intertwined with the story of the occupation of defeated Germany and of the alliance which brought about that defeat, and it has far-reaching implications for the political future of the Western world. The Federal Republic was constructed on the ruins of Hitler Germany and the remains of the wartime alliance of the victors. When it had become apparent that the four Powers were unable to agree on common policies for the conduct of the occupation, it was up to the three Western Powers to reach an agreement on the guiding principles for a new German constitution. On the foundation of the broad provisions of the London Agreement of 1948, the new "basic law" (the Germans could not bring themselves to call it a "constitution" in view of the exclusion of the Soviet zone) was drafted by a German committee within two weeks, debated and revised by a newly elected Parliamentary Council, and negotiated with the three Western governments.

In his positions as deputy American secretary of the Allied Secretariat in Berlin and Bonn (1948 to 1952) and as Secretary General of the Allied High Commission in Bonn (1952 to 1953), the author had a unique opportunity to follow the events that culminated in the approval of the Basic Law by the three Military Governors of the West on May 12, 1949. His own recollection is supported and supplemented by extensive documentation from Allied and German sources, and the reader is further aided by appendices containing such materials as an English text of the Basic Law, biographical data on leading politicians in the Parliamentary Council, and a good bibliography. Dean Golay discusses with great insight the characteristics of German "federalism," of which Carlo Schmid once said it was introduced to separate what had once been united, while everywhere else federalism implied the uniting of what was separated (Chapter II); he devotes separate chapters to the relationship between the Executive and the Parliament (Chapter III), the political parties and the electoral law (Chapter IV), the basic rights and judicial review (Chapter V). He concludes with an optimistic appraisal of "the political maturity of the German people."

M. MAGDALENA SCHOCH

*Sveriges Grundlagar och Tillhörande Författningar—Med Förklaringar.*

By Robert Malmgren. 7th ed. by Erik Fahlbeck and Halvar G. F. Sundberg. Stockholm: P. A. Norstedt & Söners Förlag, 1957. pp. viii, 262 and 268. Index.

This is the seventh edition of the best-known commentary on the Swedish Constitution and other fundamental laws, a work used by all Swedish students of public law and political science, and indispensable to anyone desirous of understanding the Government of Sweden. The reviewer spent several weeks with the second edition (1926) before going to Sweden for research on his doctoral dissertation three decades ago and can testify that no other background reading was as useful.

The late Professor Robert Malmgren (1875-1947) was Professor of Public Law at Lund University from 1911 to 1942 and published this book in 1921. Successive editions kept it up to date. The seventh edition by his successor at Lund, Professor Erik Fahlbeck, and the professor of public law at Uppsala, Halvar Sundberg, continues the pattern set by Malmgren and makes certain that *Sveriges Grundlagar* will maintain its position as the standard commentary on the Swedish Constitution. Its chief competitor, the commentary by Reuterskiöld, has not been kept alive and the present study now has a virtual monopoly.

The first volume consists of the extensively annotated texts of the four organic laws which together are the Constitution of Sweden, the oldest written Constitution still in force after that of the United States. In the second volume there are twenty-eight appendices, including subsidiary acts of organic character and other major statutes and documents relating to Swedish government, and the Convention of Human Rights and the Statute of the Nordic Council. Good examples are the Electoral Law (Vol. II, pp. 100-155, and the law outlining the public nature of official documents, Vol. II, pp. 190-218). Here, as in most cases, the annotations are extensive and most informative. Throughout both volumes, moreover, all significant pertinent literature is cited to support the notes to discussed sections and paragraphs. Altogether we have here the most complete and authoritative statement of Swedish constitutional law.

ERIC C. BELLQUIST

*Public Law Problems in India—A Survey Report.* Edited by Lawrence F. Ebb. Stanford: School of Law, Stanford University, 1957. pp. xii, 194. \$2.50.

This is the report of a five-weeks' conference held at Stanford Law School in the summer of 1957 among five Indian and four American lawyers, including judges and law professors. The conference, which was initiated by Stanford University with support of the Ford Foundation, sought to define and evaluate potentially productive research programs concerning Indian public law problems, especially those related to the

Bill of Rights and federalism, in which the Indian and the United States Constitutions present similar problems. Although Indian federalism, like that of Canada, lists powers of the States and leaves residuary powers to the central Government, the wide legislative supervisory and co-ordinating powers of the central Parliament and Government make India a much more centralized state than the United States. The book served as a basis for discussion at the first seminar under the Indian Law Institute which was held at Delhi in the autumn of 1958 on the subject of public administration with participation of a number of persons who were at the Stanford Conference.

The Stanford Conference discussions proceeded from a preliminary agenda suggesting potential research topics. From this discussion the most feasible topics were selected and made the subject of individual papers, which are published in this volume. The problems of judicial review of administrative proceedings, of freedom of speech and press, and of Federal-State relations are discussed, suggesting how comparative study of the laws of countries of different civilizations may bring to light "general principles of law" which, according to the Statute of the International Court of Justice, are sources of international law.

Particularly interesting to international lawyers is the chapter by Mr. Justice Mukharji of the Calcutta High Court on "The Constitution and International Relations" (page 117). The Indian Constitution is more detailed in this field than is the American. It includes directives of state policy not enforceable by the courts but "fundamental in the governance of the country" and "in the making of laws" (Article 37). These directives, among other things, enjoin the state to "promote international peace and security . . . to foster respect for international law and treaty obligations in the dealing of organized peoples with one another, and to encourage settlement of international disputes by arbitration" (Article 51). Treaties are not automatically law, but require supplemental legislation by the central Parliament which has full powers in this regard and also in regard to Indian participation in the United Nations and other international organizations. Problems concerning limitations of the treaty power deriving from the federal system and the Bill of Rights are similar to those of the United States, but less important because of the broader powers given to the central government in India.

The volume is a useful compendium of basic problems of public law and of judicial decisions and juristic writings on these problems both in India and the United States.

QUINCY WRIGHT

*L'Assemblée Algérienne.* By Ivo Rens. Paris: Éditions A. Pedone, 1957. pp. 285.

This excellent monograph studies the Algerian Assembly created by the ill-fated statute for Algeria which the French Parliament had adopted in 1947. In 1956, the Algerian Assembly was dissolved by the French Gov-



ernment. Here is Mr. Rens' judgment on the Assembly's accomplishments:

The dual college [i.e., the distinction between a predominantly European and a Moslem college, each one electing the same number of delegates to the Assembly despite the huge difference in the size of the two electorates], and above all the rigging of the elections, account for all the flaws of the Algerian Assembly, for its poor functioning, its legislative laziness, its shyness in budgetary and tax matters, its inability to carry out the reforms promised by the Statute, in short its global failure.

Many of the legal issues discussed in this book have died with the Assembly. Nevertheless, Mr. Rens' thorough, sober and sharp analysis of the political background, the powers and the behavior of the Assembly, contributes immensely to the reader's understanding of the rebellion which has torn Algeria apart since 1954, and of the attitude of the French settlers which has caused the fall of the Fourth Republic. For, as this book shows, Moslem nationalists were prevented from expressing themselves legally, and the Statute, far from achieving a compromise between the policies of assimilation (now renamed integration) and federalism, led to a troublesome increase of autonomy for the French population in Algeria only.

Few political tracts could be more devastating than this legal study.

STANLEY HOFFMANN

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ELEANOR H. FINCH

## OFFICIAL DOCUMENTS

### JAPAN-UNION OF SOVIET SOCIALIST REPUBLICS

#### CONVENTION CONCERNING THE HIGH SEAS FISHERIES OF THE NORTHWEST PACIFIC OCEAN

*Signed at Moscow, May 14, 1956; in force, December 12, 1956 \**

*(Unofficial Translation)*

The Governments of Japan and the Union of Soviet Socialist Republics,  
Considering the common interest of the Contracting Parties with respect to the development, on a rational basis, of the fisheries in the Northwest Pacific Ocean, and their mutual responsibility with respect to the condition of the fish and other marine living resources, as well as to the effective utilization of those resources,

Recognizing that it will serve the common interest of mankind, as well as the interests of the Contracting Parties to maintain the maximum sustained productivity of fisheries in the Northwest Pacific Ocean,

Considering that each of the Contracting Parties should assume an obligation, on a free and equal footing, to conserve and increase the above mentioned resources,

Recognizing that it is highly desirable to promote and co-ordinate the scientific studies of the Contracting Parties, the purpose of which is to maintain the maximum sustained productivity of fisheries of interest to the two Contracting Parties,

Have, therefore, decided to conclude this Convention, and for this purpose have appointed their respective representatives who have agreed as follows:

#### ARTICLE I

1. The area to which this Convention applies, hereinafter referred to as "the Convention area," shall be all waters, other than territorial waters, of the Northwest Pacific Ocean, including the Japan Sea, the Okhotsk Sea and the Bering Sea.

2. Nothing in this Convention shall be deemed to affect in any way the position of the Contracting Parties in regard to the limits of territorial sea or to the jurisdiction over fisheries.

#### ARTICLE II

1. The Contracting Parties in order to conserve and develop the fish and other marine living resources, hereinafter referred to as the "fishery

\* Reprinted from Japanese Annual of International Law, No. 1 (1957), pp. 119-124.

resources," agree to carry out in the Convention area, the co-ordinated measures specified in the Annex to this Convention.

2. The Annex attached hereto shall form an integral part of this Convention. All references to the "Convention" shall be understood as including the said Annex either in its present terms or as revised in accordance with the provisions of paragraph (a) of Article IV.

### ARTICLE III

1. In order to realize the objectives of this Convention, the Contracting Parties shall establish the Japan-Soviet Northwest Pacific Fisheries Commission, hereinafter referred to as "the Commission."

2. The Commission shall be composed of two national sections, each consisting of three members appointed by the governments of the respective Contracting Parties.

3. All resolutions, recommendations and other decisions of the Commission shall be made only by agreement between the national sections.

4. The Commission may decide upon and revise, as occasion may require, the rules for the conduct of its meetings.

5. The Commission shall meet at least once each year and at such other times as may be requested by one of the national sections. The date and place of the first meeting shall be determined by agreement between the Contracting Parties.

6. At its first meeting the Commission shall select a Chairman and Vice-Chairman from different national sections. The Chairman and Vice-Chairman shall hold office for a period of one year. The selection of a Chairman and Vice-Chairman from the national sections shall be made in such a manner as will yearly provide each Contracting Party in turn with representation in those offices.

7. The official languages of the Commission shall be Japanese and Russian.

8. The expenses incurred by a member of the Commission in connection with participation in the meetings of the Commission shall be paid by the appointing government. Joint expenses incurred by the Commission shall be paid by the Commission through contributions made by the Contracting Parties in the form and proportion recommended by the Commission and approved by the Contracting Parties.

### ARTICLE IV

The Commission shall perform the following functions:

(a) At the regular annual meeting, consider the appropriateness of co-ordinated measures being enforced at the time, and if necessary revise the Annex to this Convention. Such revision shall be determined on the basis of scientific findings.

(b) When it is required by the Annex to fix the total annual catch of a stock of fish, determine the total annual catch of such stock by the Contracting Parties and notify the said Parties.

(c) Determine the kind and scope of statistics and other reports to be submitted to the Commission by each of the Contracting Parties for carrying out the provisions of this Convention.

(d) For the purpose of studying the fishery resources, prepare and adjust co-ordinated scientific research programs and recommend them to the Contracting Parties.

(e) Submit annually to the Contracting Parties a report on the operations of the Commission.

(f) In addition to the functions stipulated above, make recommendations to the Contracting Parties with respect to the matter of conservation and increase of fishery resources in the Convention area.

#### ARTICLE V

The Contracting Parties agree, for the purpose of mutually exchanging experiences concerning the study and conservation of fishery resources and regulation of fisheries, to exchange men of learning and experience in fisheries. The exchange of such men shall be conducted by agreement from time to time between the two Parties.

#### ARTICLE VI

1. The Contracting Parties shall take appropriate and effective measures in order to carry out the provisions of this Convention.

2. When in receipt of the notification from the Commission concerning the total annual catch fixed for each of the Contracting Parties in accordance with paragraph (b) of Article IV, the Contracting Parties shall issue licenses or certificates to their fishing vessels and inform each other of all such licenses and certificates issued.

3. The licenses and certificates issued by the Contracting Parties shall be in both the Japanese and Russian languages, and the fishing vessels, when engaged in fishing operations, shall have on board their license or certificate without fail.

4. The Contracting Parties agree, for the purpose of rendering effective the provisions of this Convention, to enact and enforce necessary laws and regulations, with regard to their nationals, organizations and fishing vessels, with appropriate penalties against violations thereof and to submit to the Commission a report on any action taken by them with regard thereto.

#### ARTICLE VII

1. When authorized officials of either of the Contracting Parties have reasonable ground to believe that a fishing vessel of the other Party is actually violating the provisions of this Convention, such officials may board and search the vessel to ascertain whether the said provisions are being observed.

Such officials shall present credentials issued by their Government and written in both the Japanese and Russian languages, if requested by the master of the vessel.

2. If it becomes clear as a result of the search conducted by such officials that there is evidence that the fishing vessel or any person on board such vessel is violating the Convention, the said officials may seize such vessel or arrest such person.

In that case, the Contracting Party to which the officials belong shall notify as soon as possible the other Contracting Party to which such fishing vessel or person belongs of the arrest or seizure, and shall deliver such vessel or person as promptly as practicable to the authorized officials of the Contracting Party to which the vessel or person belongs at the place of arrest or seizure unless another place is agreed upon by the Contracting Parties. Provided, however, that when the Contracting Party which receives such notification cannot immediately accept delivery and requests of the other Contracting Party, the latter Party receiving the request, may keep such vessel or person under surveillance within its own territory, under the conditions agreed upon by the Contracting Parties.

3. Only the authorities of the Party to which the above-mentioned fishing vessel or person belongs have jurisdiction to try cases arising in connection with this article and impose penalties therefor. Written evidence and proof establishing the offense shall be furnished as promptly as possible to the Contracting Party having jurisdiction to try the case.

#### ARTICLE VIII

1. This Convention shall become effective from the date of entry into force of the Peace Treaty between Japan and the Union of Soviet Socialist Republics or from the date of restoration of diplomatic relations between the said countries.

2. After this Convention has remained in force for a period of ten years, either Contracting Party may give notice to the other Contracting Party of an intention to abrogate the said Convention, and it shall terminate one year after the date of receipt of the said notification by the latter Party.

IN WITNESS WHEREOF, the undersigned representatives have signed this Treaty.

DONE in duplicate, in the Japanese and Russian languages, both equally authentic, at Moscow, this fourteenth day of May, one thousand nine hundred and fifty-six.

BY AUTHORITY OF THE GOVERNMENT OF JAPAN:

ad referendum

I. Kono

K. Matsudaira

BY AUTHORITY OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS:

A. Ishkov

#### ANNEX

The Contracting Parties agree to regulate, within the Convention area, the fishing of the stocks of fish named below:

## 1. Salmon

Chum Salmon (*Oncorhynchus keta*)

Pink Salmon (*Oncorhynchus gorbuscha*)

Silver Salmon (*Oncorhynchus kisutch*)

Sockeye Salmon (*Oncorhynchus nerka*)

King Salmon (*Oncorhynchus tshawytscha*)

(a) The area wherein the fishing will be regulated shall be the Northwest Pacific Ocean (including the Okhotsk Sea and Bering Sea) bounded on the east and south by a line running southeast from Cape Navarin to intersection of 55° North Latitude and 175° West Longitude; thence south to intersection of 45° North Latitude and 175° West Longitude; thence west to intersection of 45° North Latitude and 155° East Longitude; thence southwest to Akiyuri Island; and the Japan Sea north of 45° North Latitude.

(b) With regard to the fishing season for 1956, sea-fishery with movable fishing gear shall be prohibited in the Convention area within forty nautical miles from the coastline of the islands belonging to either of the Contracting Parties and from the continental coast within the area stipulated in (a).

Based upon scientific data, such prohibited areas shall be re-examined by the Commission as soon as practicable.

These regulations prohibiting sea-fishery with movable fishing gear shall not apply to small Japanese fishing vessels in the waters adjacent to Hokkaido within the prohibited area.

(c) The total amount of catch shall be determined by the Commission.

The total amount of catch for the first year the Convention is in effect shall be determined at the first meeting of the Commission.

(d) With respect to mothership-type fishing operations, the catch per year (in raw fish weight) by each fishing vessel and investigation ship shall not exceed three hundred metric tons and one hundred and fifty metric tons respectively.

The total amount of catch by all the fishing vessels and investigation ships belonging to a mother ship shall not exceed the total catch fixed for such mother ship. Within the scope of such total catch the catch by each fishing vessel and investigation vessel may exceed to some degree the above amounts fixed for each fishing vessel and investigation vessel respectively.

(e) The fishing season for each year shall end on 10 August.

(f) The length of drifting nets set in the sea by a fishing vessel shall be as follows:

Not more than ten kilometres in the Okhotsk Sea; not more than twelve kilometres in the waters of the Pacific Ocean bounded on the east and south by the line connecting Cape Olyutorskiy, the intersection of 48° North Latitude and 170°25' East Longitude, and Akiyuri Island; not more than fifteen kilometres in the other areas.

The distance between the drifting nets set by a fishing vessel shall be that confirmed immediately after the setting, and the distance between one net and the nearest net shall, in any direction, be as follows:



Not less than twelve kilometres in the Okhotsk Sea area; not less than ten kilometres in the waters of the Pacific Ocean bounded on the east and south by the line connecting Cape Olyutorskiy, the intersection of 48° North Latitude and 170°25' East Longitude, and Akiyuri Island; not less than eight kilometres in the other areas.

These provisions, however, shall not apply to small fishing vessels operating in the waters south of 48° North Latitude and having their base of operations at a port in Japan.

With respect to meshes of a drifting net, the length from knot to knot shall be not less than fifty-five millimetres.

2. Herring (*Clupea pallasii*)

Fishing of small immature herring of less than twenty centimetres in length (from tip of snout to the end of vertebral column at the caudal fin) shall be prohibited.

Incidental catch of such small herrings, if not in large quantity, shall be allowed. The allowable extent of such catch shall be determined by the Commission.

3. Crabs

King Crabs (*Paralithodes camtschatica*)

(*Paralithodes platypus*)

(a) Fishing of female crab and immature crab whose carapace is less than thirteen centimetres in width shall be prohibited. The female crabs and the afore-mentioned immature crabs if caught in the nets shall be released back into the water immediately.

The incidental catch of female crabs and above-mentioned immature crabs, if not in large quantity shall be allowed. The allowable extent of such catch shall be determined by the Commission.

The Commission shall also determine the amount of incidental catch of female and above-mentioned immature crabs in a given area requiring suspension of fishing in that area.

(b) In consideration of conservation of the resources, as well as efficiency of operations, restrictions shall be placed upon the length of the row of crab nets, the distance between the nets arranged in a row, and the distance separating the several rows. The Commission shall determine the restrictions.

AGREEMENT FOR COOPERATION FOR THE RESCUE OF  
PERSONS IN DISTRESS AT SEA

*Signed at Moscow, May 14, 1956; in force, December 12, 1956 \**

*(Unofficial Translation)*

The Governments of Japan and the Union of Soviet Socialist Republics,  
Recognizing the need for making an arrangement to render possible co-

\* Reprinted from Japanese Annual of International Law, No. 1 (1957), pp. 124-127.

operation for giving prompt and effective assistance, irrespective of nationality, to persons in distress in the Japan Sea, the Okhotsk Sea, the Bering Sea, and in the waters of the Northwest Pacific Ocean adjacent to the coasts of Japan and the Union of Soviet Socialist Republics,

Have for this purpose appointed their respective representatives who have agreed as follows:

#### ARTICLE I

1. In case any vessel (the term "vessel" as used in this Agreement is understood to include fishing vessels) is in distress in the Japan Sea, the Okhotsk Sea, the Bering Sea or in the waters of the Northwest Pacific Ocean adjacent to the coasts of Japan and the Union of Soviet Socialist Republics (hereinafter referred to as "the Soviet Union"), the sea disaster rescue agencies of the Contracting Parties shall give necessary assistance, to the furthest extent possible, in rescuing persons on board such vessel.

2. When a sea disaster rescue agency of either Contracting Party receives a report of a vessel in distress at sea, the agency concerned shall take the rescue measures deemed most appropriate with respect to persons on board such vessel.

3. In case the place of disaster is located near the coast of the other Contracting Party, or when it is deemed necessary, the sea disaster rescue agency receiving the information of the disaster shall make plans for rescue operations after consultation with the sea disaster rescue agency of the other Contracting Party.

Such consultation shall be held invariably when the sea disaster rescue agency of one Contracting Party receives a report that a vessel belonging to the other Contracting Party is in distress at sea.

#### ARTICLE II

The rescue operations within the territorial sea of Japan or of the Soviet Union shall be conducted in accordance with the laws and regulations of the country concerned.

#### ARTICLE III

1. The wireless stations of the sea disaster rescue agencies of Japan and the Soviet Union shall receive the distress signals sent in frequencies of 500 kilocycles (600 metres) and 2,182 kilocycles (137.5 metres) in compliance with the international regulations concerning transmission and receipt of distress signals.

2. Wireless contact between the sea disaster rescue agencies of Japan and the Soviet Union shall be made through Station JNL with respect to the rescue agency of Japan and Station URH with respect to the rescue agency of the Soviet Union.

In this event, call signals shall be made in the frequency of 500 kilocycles, and subsequent transmission in the case of Station JNL shall be in frequen-

cies of 472 kilocycles, or 3,212.5 kilocycles at night and 6,386.5 kilocycles during the day, and in the case of Station URH in frequencies of 457 kilocycles, or 3,270 kilocycles at night and 6,365 kilocycles during the day. When call signals are made in frequency of 500 kilocycles and if reliable wireless contact cannot be made at a certain time of the day or night, sea disaster rescue agencies of the Contracting Parties may agree to make the call signals at such times in the other frequencies stipulated in this Convention.

3. The ships belonging to the sea disaster rescue agencies while conducting rescue operations shall maintain wireless contact with each other, as well as with the vessel in distress through Station JNL and Station URH respectively, and if necessary may make direct contact in frequencies of 500 kilocycles or 2,182 kilocycles.

4. The wireless communications mentioned in 1, 2, and 3 above shall be made in international code or when possible in the ordinary English language.

#### ARTICLE IV

1. The sea disaster rescue agency of either Contracting Party that commences rescue operations first for the purpose of rendering assistance, may when necessary for completion of the operations request the co-operation of the rescue agency of the other Contracting Party, in accordance with the provisions of Article III.

2. The sea disaster rescue agency in receipt of the request mentioned above shall as far as practicable despatch means of rescue to the reported place of disaster for the purpose of rescue operations.

#### ARTICLE V

The Contracting Parties undertake to give detailed instructions concerning enforcement of the provisions of this Agreement to their respective sea disaster rescue agencies.

#### ARTICLE VI

The provisions of this Agreement shall not be deemed to be in conflict with the Convention for the Unification of Certain Rules respecting Assistance and Salvage at Sea signed at Brussels on 23 September 1910 and the International Convention for the Safety of Life at Sea, 1948, signed at London on 10 June 1948.

#### ARTICLE VII

1. This Agreement shall become effective from the date of entry into force of the Peace Treaty between Japan and the Union of Soviet Socialist Republics or from the date of restoration of diplomatic relations between the said countries, and remain in force for a period of three years.

2. If neither of the Contracting Parties announces the abrogation of this Agreement at least one year before the above-mentioned period expires, it

shall continue in force for another three years, and it shall continue to remain in force for additional periods of three years each as long as neither of the Contracting Parties announces the abrogation of this Agreement at least one year before the expiration of each extended period of three years.

IN WITNESS WHEREOF, the undersigned representatives have signed this Convention.

DONE in duplicate, in the Japanese and Russian languages, both equally authentic, at Moscow, this fourteenth day of May, one thousand nine hundred fifty six.

BY AUTHORITY OF THE GOVERNMENT OF JAPAN

ad referendum

I. Kono

K. Matsudaira

BY AUTHORITY OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST  
REPUBLICS

A. Ishkov

EXCHANGES OF NOTES

Moscow, 14 May 1956

Excellency,

I have the honour to refer to Article II of the Agreement between Japan and the Union of Soviet Socialist Republics for Cooperation for the Rescue of Persons in Distress at Sea, signed today in Moscow, and to state that according to the views of the Japanese Government the provisions of the said Article shall not be deemed to affect in any way the position of the Contracting Parties with respect to the question of the limits of territorial sea.

Accept, Excellency, the assurances of my highest consideration.

Ichiro Kono

His Excellency

Mr. A. A. Ishkov

Minister for Fisheries

The Union of Soviet Socialist Republics.

Moscow, 14 May 1956

Excellency,

I have the honour to acknowledge the receipt of your Excellency's note of this date stating as follows:

"I have the honour to refer to Article II of the Agreement between Japan and the Union of Soviet Socialist Republics for Cooperation for the Rescue of Persons in Distress at Sea, signed today in Moscow, and to state that according to the views of the Japanese Government the provisions of the said Article shall not be deemed to affect in any way the position of the Contracting Parties with respect to the question of the limits of territorial sea."

I have further the honour to state that the above are also the views of the Government of the Union of Soviet Socialist Republics.

Accept, Excellency, the assurances of my highest consideration.

A. Ishkov

His Excellency

Mr. I. Kono

Forestry Minister for Japan.

Moscow, 14 May 1956

Excellency,

I have the honour to refer to the Convention concerning the High Seas Fisheries of the Northwest Pacific Ocean, and the Agreement for Cooperation for the Rescue of Persons in Distress at Sea, between Japan and the Union of Soviet Socialist Republics, both signed today in Moscow, and to communicate to Your Excellency that the approval of the Diet is required to put the said Convention and Agreement into force with respect to Japan.

Accept, Excellency, the assurances of my highest consideration.

Ichiro Kono

His Excellency

Mr. A. A. Ishkov

Minister for Fisheries

The Union of Soviet Socialist Republics.

#### COMMUNIQUE CONCERNING THE RESULTS OF NEGOTIATIONS REGARDING FISHERIES AND RESCUE OF PERSONS IN DISTRESS AT SEA BETWEEN JAPAN AND THE UNION OF SOVIET SOCIALIST REPUBLICS

Negotiations were conducted in Moscow 29 April to 14 May between the representatives of Japan and the Union of Soviet Socialist Republics with respect to the problems of fisheries and co-operation regarding rescue of persons in distress at sea in the Northwest Pacific Ocean.

Mr. I. Kono, Minister for Agriculture and Forestry, and Mr. A. Ishkov, Minister for Fisheries, headed respectively the delegations for Japan and the Union of Soviet Socialist Republics.

In the course of negotiations, the representatives discussed in detail the various problems in connection with regulation of fisheries in the Northwest Pacific Ocean, and recognized the need for co-operative measures in order to maintain the maximum sustained productivity of fisheries including salmon in the Far East.

As the result of the negotiations conducted in the spirit of mutual understanding and sincerity, the Convention concerning the High Seas Fisheries of the Northwest Pacific Ocean and the Agreement for Cooperation for the Rescue of Persons in Distress at Sea were signed on 14 May 1956.

These agreements are expected to become effective from the date of entry

into force of the Peace Treaty between Japan and the Union of Soviet Socialist Republics, or from the date of restoration of diplomatic relations between the two countries.

In this connection, views on the question of normalizing Japan-Soviet relations were exchanged between Messrs. Kono and Ishkov. They agreed that in order to make effective as soon as possible the Convention and the Agreement, it was necessary to reopen at the earliest possible date and at the latest prior to 31 July the negotiations for normalizing relations between Japan and the Union of Soviet Socialist Republics.

REPRESENTATIVE OF THE GOVERNMENT OF JAPAN

I. Kono

REPRESENTATIVE OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST  
REPUBLICS

A. Ishkov

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\* Deceased September 27, 1959.



## PACTA SUNT SERVANDA

BY HANS WEHBERG

*Professor of International Law, Graduate Institute of International  
Studies, Geneva; Secretary General of the Institute  
of International Law*

Few rules for the ordering of Society have such a deep moral and religious influence as the principle of the sanctity of contracts: *Pacta sunt servanda*. In ancient times, this principle was developed in the East by the Chaldeans, the Egyptians and the Chinese in a noteworthy way. According to the view of these peoples, the national gods of each party took part in the formation of the contract. The gods were, so to speak, the guarantors of the contract and they threatened to intervene against the party guilty of a breach of contract. So it came to be that the making of a contract was bound up in solemn religious formulas<sup>1</sup> and that a cult of contracts actually developed.<sup>2</sup>

For the Islamic peoples, the principle, *Pacta sunt servanda*, has also a religious basis: "Muslims must abide by their stipulations." This is clearly expressed by the Koran in many places, for example, where it is said: "Be you true to the obligations which you have undertaken. . . . Your obligations which you have taken in the sight of Allah. . . . For Allah is your Witness."<sup>3</sup>

With the peoples of the Mediterranean area, the common interest in a regulated commerce was added to the religious motive. The juridical sense of the Romans recognized that a well-regulated trade was possible only if contracts were kept. Then, as earlier, contracts were considered as being under Divine protection. But their psychological basis then was, above all, the necessity of a legal regulation of international contractual relations.<sup>4</sup>

Christianity exercised a great influence on the sanctity of contracts. Its basic idea demanded that one's word be kept, as is clearly expressed in the Gospel according to St. Matthew, in particular, where it is said, at Chapter 5, Verses 33 to 37, at the end: "But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." Later, the Fathers of the Church set forth in detail the notion of the sanctity of contracts. Thus St. Augustine (354-430), for example, taught that one must

<sup>1</sup> Cf. Baron Michel de Taube, "L'inviolabilité des traités" 32 Hague Academy Recueil des Cours 299 *et seq.* (1930, II).

<sup>2</sup> Robert Redslob, *Histoire des Grands Principes du Droit des Gens* 107 (Paris, 1923).

<sup>3</sup> Cf. C. Wilfred Jenks, *The Common Law of Mankind* 144 and the bibliography set out therein (London, 1958).

<sup>4</sup> Cf. Michel de Taube, *loc. cit.* 321 *et seq.*

keep one's word even with one's enemies. The same idea is to be found in the *Decretum Gratiani*.<sup>5</sup>

In the Middle Ages, after the Empire of Charles the Great was dissolved, when the unity of the will of the state was broken, the principle of vassalage acquired a decisive meaning. The feudal system involved a chain of contracts, voluntarily entered into by lords and vassals, and the existence of such contracts alone prevented anarchy. The moral basis of feudalism may be found in the *miles christianus*. The Christian knight was required above all to be true to his given word.<sup>6</sup> At the same time the study of Roman law was strengthening the concept of an obligation to perform contracts.

The Renaissance and the Reformation followed. The idea of the "Reason of State" was a basic one in the theories of Machiavelli (1469-1527). It is true that he adhered unreservedly to the "general value of religion, morality and law."<sup>7</sup> Nevertheless his political thought was influenced by the idea of necessity. He asserted that the Prince could put himself above law and justice, should this be necessary for the state. To be sure, Machiavelli said that the Prince ought, if he could, to follow the paths of goodness; but he was justified in doing wrong in cases of necessity. In order to protect the interests of the state, explained Machiavelli, the Prince must be ready to act "against loyalty, against charity, against humanity and against religion."

This was understandably grist to the mill of the adherents of power politics, who have always relied upon Machiavelli's teaching in order to justify their viewpoint. However, the direct influence that Machiavelli exercised upon contemporary thinking, especially in the field of international law, should not be overestimated. The fact that Machiavelli, in *Il Principe* (first published in 1532) had broken with Christian ethics and taken up ancient heathen ideas prevented the spread of his teaching. Immediately afterwards, the minds of men were occupied to the highest degree with the religious contest which divided the Christian world, and "the ancient and heathen State idealism of Machiavelli was no longer understood by the people of the time of the Counter-Reformation, even by the free-thinkers, who continued the secular spirit of the Renaissance."<sup>8</sup> Even the founder of the modern theory of sovereignty, Bodin—of whom more will be said below—can be described as an opponent of Machiavelli, as was shown in particular by Friedrich Meinecke.

It is certain, however, that Machiavelli's views were helpful to those who admitted exceptions to the sanctity of contracts. Thomas Aquinas (1225-1274), who on principle demanded that contracts be performed even with regard to enemies, had also said that, if the circumstances existing

<sup>5</sup> Second section, Ch. 23, qu. 1, c. 3.

<sup>6</sup> Cf. Michel de Taube, *loc. cit.* 337 *et seq.*

<sup>7</sup> Cf. Friedrich Meinecke, *Die Idee der Staatsräson* 31 ff., especially 50 ff. (Munich-Berlin, 1924); Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis*, Vol. I, p. 241 ff. (Freiburg-Munich, 1958).

<sup>8</sup> Friedrich Meinecke, *op. cit.* 56 ff.

in reference to persons or objects at the time of making the contract had changed, non-performance of the contract was excusable.<sup>9</sup> It is in this way that the doctrine of *clausula rebus sic stantibus* developed. According to the majority of writers, this doctrine is regarded as justified today, however, only when the circumstances existing at the time of entering into contract have changed to such an extent that either contracting party has the right to demand the revision of the contract—a right which must be exercised in good faith. On the other hand, a unilateral right of termination or alteration does not exist. We must limit ourselves here to this general remark on the *clausula rebus sic stantibus*, for its discussion would go beyond the scope of this article.

Even before Grotius, Jean Bodin (1530–1596) developed his famous theory of sovereignty. In his major work *De la République* (1577), he defined national sovereignty as the highest authority, independent of state laws, with respect to the citizens and subjects of the state (*summa in cives ac subditos legibusque soluta potestas*). He added that no one could bind himself through his own laws and that no law was so sacred that it could not be changed under the pressure of necessity. Nothing could be discreditable, he said, which was connected with the welfare of the state.<sup>10</sup> It would seem easy to draw therefrom the conclusion that international agreements need not be kept if their performance is no longer in the interest of the state. However, such a conclusion would be unwarranted. The following, at least, appears to be clear: Bodin set up his theory of sovereignty in order to build up the complete autonomy of the French state as against the three Powers which, in the Middle Ages, threatened its independence, the Church, the Roman Empire, and the feudal lords.<sup>11</sup> Far from wishing to deny that the sovereign is subject to legal rules, Bodin stated expressly that the Princes “are all bound by God’s law and also by the law of nature.” The Prince must, above all, keep his word, he said, for “fidelity and loyalty are the very bases of all justice. Not only the State, but the whole human community, is held together by them.” Contracts concluded with foreign countries, therefore, must also be faithfully performed. Even the danger of destruction cannot release the state from its contractual obligations.

In the opinion of Jellinek, this theory of Bodin, and the political theories of the 16th, 17th and 18th centuries, are illogical. Jellinek wished to restrict, “in conformity with the spirit of the times,” the sanctity of contracts for states, according to Bodin’s concept of sovereignty, to such contracts “which established a lasting situation (*e.g.*, treaties of peace or of cession) or which provided for a short period of performance by the State with the means at its disposal.”<sup>12</sup> He thought that a lasting

<sup>9</sup> S. Thöl., 2, 2, q. 140. Cf. also Michel de Taube, *loc. cit.* 360 *et seq.*

<sup>10</sup> See here and below, among others, Hermann Heller, *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts* 14 ff. (Berlin and Leipzig, 1927); Friedrich Meinecke, *op. cit.* 70 ff.; Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* 14 ff. (Tübingen, 1923).

<sup>11</sup> Cf. especially Georg Jellinek, *Allgemeine Staatslehre* 440 ff. (3rd ed., Berlin, 1914).

<sup>12</sup> Georg Jellinek, *op. cit.* 740.

restriction of the legislative and administrative powers of the state, as is frequently found in modern contracts, would amount to "an unacceptable surrender of sovereignty." If, however, Bodin's thought is adapted to its contemporaneous world setting, where there were no unions, nor any supra-national organizations, then it appears that Bodin's theory included all the international contracts which could be made at the time, and that his principle of the sanctity of contracts was not limited to a special kind of convention.

It is true that Bodin formulated exceptions to the rule, for instance "in cases where what you have promised is by nature unfair or cannot be performed." Such exceptions gave the supporters of power politics an opportunity for extensive interpretation.<sup>13</sup> This is why Grotius found it advisable to argue, against Bodin's view, that "the King himself cannot reverse a position previously established in the civil law or annul a contract or release himself from his oath," if he has made it as head of state.<sup>14</sup> These remarks show that Bodin's doctrine has scarcely been disadvantageous to international law and in particular to the sanctity of contracts. Unlike Hegel's theory in the 19th century, that of Bodin did not misguide the science of international law. Already Franciscus Vitoria (1483-1546),<sup>15</sup> and Francisco Suárez (1548-1617),<sup>16</sup> among other predecessors of Grotius, had laid much stress on the sanctity of contracts.

In the 17th century, a new danger arose for the principle of sanctity of contracts from two great philosophers, Hobbes and Spinoza, the exponents of the doctrine of *raison d'Etat*. Thomas Hobbes (1588-1679), the English philosopher of utilitarianism, expressed the idea, in particular in his *Leviathan*, that the holder of state power had an almost unlimited power. He considered as decisive not the principles of justice, but those of wisdom. Nevertheless, he recognized as natural law the principle that

agreements are to be kept. The concept of wrong arises out of the non-performance of a contract, the promisor being therefore in contradiction with himself.

However, also according to Hobbes, agreements need not be kept if the security of the state so requires.<sup>17</sup>

The idea of the *raison d'Etat* was expressed even more favorably by the Dutch philosopher, Spinoza (1632-1677). In his *Tractatus Theologico-politicus* (1670), he said that

no holder of State power can adhere to the sanctity of contracts to the detriment of his own country, without committing a crime.

The words "to the detriment of his country" should be noted. It follows that the sanctity of contracts depends upon whether the contract is beneficial to one's own state. This is undoubtedly a rejection of the principle

<sup>13</sup> Friedrich Meinecke, *op. cit.* 80.

<sup>14</sup> Hugo Grotius, *De Jure belli ac pacis*, Liber II, cap. 14, No. 1.

<sup>15</sup> Vitoria, *De potestate civili*, 21; Ernst Reibstein, *Völkerrecht*, Vol. I, p. 287.

<sup>16</sup> Suárez, *De legibus ac Deo legislatore*, II, cap. XVIII, No. 19.

<sup>17</sup> Compare especially Friedrich Meinecke, *op. cit.* 273.

*Pacta sunt servanda.* Therefore, Spinoza can in fact be described as a forerunner of Hegel.

The followers of Grotius in the 17th and 18th centuries were unanimously in favor of the sanctity of contracts. The views of Samuel Pufendorf (1632-1694) and of Cornelius van Bynkershoek (1673-1743) are especially noteworthy in this connection. In his book, *De jure naturae et gentium* (1672), the former described as one of the inviolable rules of natural law that each man must keep his word without breaking it.<sup>18</sup> The latter expressed the opinion that, without the principle of good faith and that of the binding force of contracts, international law would be entirely destroyed.<sup>19</sup>

The principle of sanctity of contracts was brought out in strong relief by Emer de Vattel (1714-1767) in his famous *Droit des Gens* (1757). He devoted to this question a special section of his book, under the title "Obligation to Keep Contracts."<sup>20</sup> He pointed out that nations and their leaders must hold fast to their oaths and their contracts, since no security and no commerce would otherwise be possible between nations. He mentioned on several occasions what he called the "*foi des traités*" (faith of treaties). Vattel meant here something more, as was shown by Ernst Reibstein,<sup>21</sup> than the mere sanctity of contracts between the contracting parties. He had the same thing in mind as Abbé de Mably (1709-1785), who, in his *Droit public de l'Europe* (1748), referred to the trust that all Powers should and must create through the establishment of an objective legal order, even though limited to single states.

As regards the application of the *clausula rebus sic stantibus*, Vattel, it should further be pointed out, urged the greatest caution: it would be a shameful misuse of the clause—in his opinion—if a contracting party took advantage of any change in the circumstances to release himself from his obligations. Nothing would then be left upon which one could rely.<sup>22</sup>

Johann Jacob Moser (1701-1785), the founder of the positivist school of international law, explained, in his *Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten* (1763),<sup>23</sup> that contracts could only be canceled "with the consent of all interested parties."

In the age of Napoleon also the science of international law remained true to this principle. Reference should first be made here to Georg Friedrich von Martens (1756-1821) who explained, in his *Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet*<sup>24</sup> (1796):

<sup>18</sup> Samuel Pufendorf, *De jure naturae et gentium*, Book II, chap. III, § 23; Book III, chaps. III, IV, §§ 1, 2.

<sup>19</sup> Cornelius van Bynkershoek, *Quaestionum juris publici libri duo* (1737), II, cap. 10.

<sup>20</sup> Emer de Vattel, *Droit des Gens*, Book II, chap. XII, § 163.

<sup>21</sup> Ernst Reibstein, "Die Dialektik der souveränen Gleichheit bei Vattel," 19 *Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht* 629 (1958).

<sup>22</sup> Emer de Vattel, *op. cit.* Book II, chap. XVII, § 296; also 1 Reibstein, *Völkerrecht* 594.

<sup>23</sup> *Op. cit.* 574.

<sup>24</sup> *Op. cit.* 59.

a valid and binding contract creates, for nations and individuals alike, the complete right to demand from the other party the performance of the contract, so long as the contracting party, on his side, has performed satisfactorily his obligations.

The remarks of Johann Ludwig Klüber (1762–1837) are also characteristic in this respect; in his *Europäisches Völkerrecht* (1821),<sup>25</sup> he devoted to the "sanctity of contracts" a special chapter in which he emphasized that the performance without breach of international contracts was a principle common to all nations and was required by the very purpose of the state.

In the succeeding years the German philosopher, Georg Friedrich Wilhelm Hegel (1770–1831), exercised a strong influence on the thinking of the 19th century on international law. For him the law was a product of the will. The will of the nation was the carrier of the law. Contracts could be valid only so long as they contributed to the welfare of the state. Hegel placed the will of the state as the central point of all his observations.<sup>26</sup> The influence of his theory on the German, Italian, English and French doctrine of international law has been clearly shown by Verdross.<sup>27</sup> The objectionable manner in which the German scholar, August Wilhelm Heffter (1796–1880), expressed himself on the sanctity of contracts in his otherwise excellent book, *Das Europäische Völkerrecht der Gegenwart* (1844), a book which was translated into many languages and had eight editions, is worth noting. While pointing out that the expression, *Pacta sunt servanda*, was a foremost principle of international law, he limited the scope of the principle as follows:

one can scarcely disagree with the view that a contract in itself creates a right only through the union of wills (*duorum vel plurium in idem consensus*) and thus only for so long as this union exists.<sup>28</sup>

This observation prompted the editor of the last two editions of the work, F. Heinrich Geffcken, to add:

but nevertheless for so long as the will of the contracting parties has bound them, unless there exists a special reason to justify a withdrawal from the contract.<sup>29</sup>

Writers on international law could not for long fail to perceive that international law was being undermined, if one based contracts on the will of the state. They therefore tried to find a basis which would leave unaltered the principle of sanctity of contracts, in spite of a continued adherence to the will of the state as a foundation of international law.

<sup>25</sup> *Europäisches Völkerrecht* 234, 235.

<sup>26</sup> Alfred Verdross, *Die Einheit des rechtlichen Weltbildes* 4 ff.; Friedrich Meinecke, *op. cit.* 434 ff.

<sup>27</sup> Alfred Verdross, *op. cit.* 6 ff.

<sup>28</sup> August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* 144 (Berlin, 1844).

<sup>29</sup> August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart* 183, 184 (8th ed. revised by F. Heinrich Geffcken, Berlin, 1888).

Thus Georg Jellinek (1851-1911), whose influence on the science of international law cannot be overestimated, rested the validity of international contracts on the self-imposed obligation of states:

The State can release itself of any self-imposed restraint, but only in legal forms and in creating new limitations. The restraint, but not the particular limitation, is permanent.<sup>30</sup>

It is, however, clear that the state, if its will is decisive in the last analysis, can release itself from a self-imposed obligation. If there is no higher will which compels the state to keep its word, then there is no sufficient basis given to the contract which obligates the state to observe it. For this reason, the theory of Jellinek is generally rejected today, and rightly so.

Another attempt was made by Heinrich Triepel (1868-1946) to reconcile the doctrine of the will of the state with the rule, *Pacta sunt servanda*, in his classical work, *Völkerrecht und Landesrecht*. (1899). Rejecting Jellinek's theory of self-imposed obligation, he sought to show that the source of contracts was the common will of the contracting parties, "which arises through interaction with the will of other States."<sup>31</sup> However, this attempt to found the validity of an international contract upon the will of the contracting parties must also be described as a failure. For here also the binding character of a contract is based, not on a higher law, but on the will of the states, even if on the will of a majority of states. Moreover, the hypothesis of a "common will" is a mere fiction. It should be added that Triepel limited the application of his theory to agreements in the sense of law-making treaties ("*traités-lois*"). Above all, however, only a law which stands above the will of the state can create the binding power of contracts.

Later on, the theory was abandoned that the validity of contracts, and of international law in general, rested on the national will of one or all of the contracting parties. Another basis was sought for the principle *Pacta sunt servanda*. Thus Dionisio Anzilotti (1867-1950) described the principle of the sanctity of contracts as a hypothetical basic norm, which can be assumed but not proven.<sup>32</sup> For Anzilotti the rule *Pacta sunt servanda* is the basic norm of all international law. It is clear, however, that this cannot explain the validity of customary law. Above all, the validity of contracts cannot rest upon a mere postulate. Anzilotti's attempt shows, however, the great value attached by this prominent author and his followers to the principle of *Pacta sunt servanda* as an integral part of international law.

<sup>30</sup> Georg Jellinek, *Allgemeine Staatslehre* 482 (3rd ed.).

<sup>31</sup> Heinrich Triepel, *Völkerrecht und Landesrecht* 79 (Leipzig, 1899).

<sup>32</sup> D. Anzilotti, *Lehrbuch des Völkerrechts*, Vol. I, pp. 38 ff., 49 ff. (Berlin and Leipzig, 1929); in the same sense see also Karl Strupp, *Grundzüge des positiven Völkerrechts* 11 (5th ed., Bonn and Cologne, 1932). Cf. also Hans Kelsen, 14 *Hague Academy Recueil des Cours* 299 *et seq.* (1926, IV); Charles Rousseau, *Principes généraux du Droit international public*, Vol. I, p. 359 *et seq.* (Paris, 1944).

The newer theory of international law, whether it is regarded as positivist or not, adheres to the validity of the phrase *Pacta sunt servanda*. This is hardly surprising, since any other view would amount to denying the existence of international law in general. However, the law of nations is built less upon customary law than upon contracts essentially. If a contract, validly concluded, were not binding, then international law would be deprived of a decisive foundation and a society of states would not longer be possible. International law, and with it also the sanctity of contracts, results by a natural necessity from the inevitability of social intercourse. The binding force of contracts is an obligation which exists, not only *vis-à-vis* the contracting parties, but also *vis-à-vis* the international community as a whole.<sup>33</sup> In the system of international law, which stands over states, the sanctity of contracts is not to be rationalized away.

We shall concern ourselves no further with the general foundations of international law, as such a discussion would go beyond the framework of the present study. It is important to ascertain, however, upon what legal sources the maxim *Pacta sunt servanda* rests, according to the international law now in force.

For those who believe that the "general principles of law" form a third source of international law, which is not limited to the jurisdictional system of the International Court of Justice in The Hague, the principle of the sanctity of contracts is such a general legal principle.<sup>34</sup> It is found in *foro domestico*, as we have seen, in all countries. It is one of the most important general principles of law for the relations between nations. Without the powerful instrument of the contract, no international law is possible.<sup>35</sup> As this writer is an adherent of the application, carefully adapted and taking into account social necessity, of natural law to international relationships, the idea that the sanctity of contracts rests on a general principle of law seems especially evident.<sup>36</sup>

This principle is, however, also a part of customary law. Certainly, the phrase *Pacta sunt servanda*, in the first instance, had a religious origin,

<sup>33</sup> See also Jules Basdevant, 58 Hague Academy Recueil des Cours 643 (1936, IV).

<sup>34</sup> Concurring among others: Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* 105 *et seq.*, 112 *et seq.* (London, 1953); Georg Dahm, *Völkerrecht*, Vol. I, p. 158 (Stuttgart, 1958); Sir Gerald Fitzmaurice, in *Symbolae Verzijl*, p. 158 (The Hague, 1958); Friedr. August Freiherr von der Heydte, *Völkerrecht*, Vol. I, p. 67 (Cologne, 1958); Jean Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht* 64 (Kiel, 1928); Alfred Verdross, *Völkerrecht* 23 (3rd ed., Vienna, 1955); see 18 *Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht* 641, 648 (1958).

<sup>35</sup> Cf. Charles De Visscher, *Théories et Réalités en Droit International public* 324 (Paris, 1953): "... treaties still remain the most powerful instrument for progress and for the diffusion of international law." Cf. also above, p. 299.

<sup>36</sup> The Arbitration Tribunal in the Matter of P.T.T. vs. R.C.A. has emphasized in its opinion of April 1, 1932, the phrase *Pacta sunt servanda* as a general principle of law. See *Recueil général, périodique et critique des décisions, conventions et lois relatives au droit international public et privé* (La Pradelle) (1938) 2.3; Charles Rousseau, *Principes généraux du Droit international public* 360.



as was pointed out in the first part of this paper. With time, however, it was integrated into international law, and it can now be described as a part of customary law.<sup>37</sup> The usage (*consuetudo*) exists—that is to say, the application, always repeated, of the principle (in spite of many breaches of the same)—in the life of individuals and nations alike. One could even speak of a “use from time immemorial,” if this were a necessary condition of custom, which is, however, not the case.<sup>38</sup> Likewise the *opinio juris sive necessitatis* is given. For governments have always taken the view that the principle corresponded to their conviction.

No one will deny that many breaches of contract have taken place in the course of history. The fact that, in spite of this, the principle of the sanctity of international contracts preserved its validity is indeed remarkable. Its breach has always been regarded as a wrong which entitles the wronged party to demand compensation. It must be admitted, in this connection, that the reparation can only be viewed as an incomplete compensation for the wrong. For the moral wrong in a breach of contract is so immense that the material amends cannot possibly give the wronged party a true reparation.

Numerous declarations have been made by statesmen, in the course of centuries, to emphasize the obligation to observe the sanctity of contracts.<sup>39</sup> We shall content ourselves here with mentioning two examples: Lord Russell, British Foreign Minister, in a dispatch dated December 23, 1860, to the British Ambassador in China, Earl James Bruce Elgin, said that the universal notions of justice and humanity teach even the worst barbarians among human beings, that, if an agreement has been made, the law demands its observance.<sup>40</sup> Later the American Secretary of State, Cordell Hull, on July 16, 1937, in a speech on international affairs, said of American foreign policy:

We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations.<sup>41</sup>

<sup>37</sup> So particularly Jules Basdevant, *loc. cit.* 642; Paul Guggenheim, *Traité de droit international public*, Vol. I, p. 67 (Geneva, 1953); Hans Kelsen, finally, in *Grundprobleme des Internationalen Rechts. Festschrift für Jean Spiropoulos*, p. 263 (Bonn, 1957); J. de Louter, *Le Droit international public positif*, Vol. I, p. 471 (Oxford, 1920); 1 Oppenheim-Lauterpacht, *International Law* 881 (8th ed., London, 1955); John B. Whitton, 49 *Hague Academy Recueil des Cours* 217 *et seq.*, 239 (1934, III); Josef L. Kunz, “The Meaning and the Range of the Norm *Pacta Sunt Servanda*,” 39 *A.J.I.L.* 180-197 (1945).

<sup>38</sup> Judge D. Negulesco required a “usage immémorial” in his dissenting opinion to the decision of the Permanent Court of International Justice in the case of the European Danube Commission, *Advisory Opinion*, No. 14, p. 105.

<sup>39</sup> See many examples in A. F. Frangulis, *Théorie et Pratique des traités internationaux* 94, 95 (Paris, 1934), and in Viktor Bruns, *Fontes juris gentium*, Ser. B, Sec. I, Vol. I, Pars I, pp. 742 *et seq.*, Vol. II, Pars 2, p. 199 *et seq.*

<sup>40</sup> See A. F. Frangulis, *op. cit.* 94, also quoted by Jules Basdevant, *loc. cit.* 641, note 2.

<sup>41</sup> 5 Hackworth, *Digest of International Law* 164 (Washington, 1943).

General declarations of many states in favor of the sanctity of contracts can also be mentioned. One of the most famous is the statement made by the Powers in the case of the neutralization of the Black Sea, when Russia, on October 19-31, 1870, suddenly repudiated her obligation, under the Paris Peace of 1856, to keep in the neutralized Black Sea henceforth only a fixed number of warships of a fixed tonnage. In the London Protocol of January 17, 1871, it was said that the representatives of North Germany, Austro-Hungary, Great Britain, Italy, Russia and Turkey, having met in a conference, recognized as a necessary principle of international law that no Power can repudiate the obligations of a contract nor change its provisions without having obtained first the consent of the other contracting parties by a peaceful understanding.<sup>42</sup> Further, one can read in a communiqué of the Atlantic Council of December 16, 1958, in response to the Russian withdrawal from the provisions of the Inter-Allied Agreement on Berlin, that

no State has the right, by itself, to free itself unilaterally from its contractual obligations. The Council declares that such a procedure destroys the mutual trust between nations which represents one of the foundations of peace.<sup>43</sup>

Moreover, the treaties which emphasize especially the sanctity of contracts are extraordinarily numerous. Here, also, a few examples will suffice. The preamble of the Covenant of the League of Nations characterizes as an important fundamental principle, in order to promote international co-operation and to achieve international peace and security, the rule of "scrupulous respect for all treaty obligations in the dealings of organized peoples with one another."<sup>44</sup> In the preamble of the Charter of the United Nations one finds likewise, "respect for the obligations arising from treaties and other sources of international law." Not less important is the reference in Article 5 of the Charter of the Organization of American States that international order is based, among other things, on the faithful fulfillment of the obligations arising from treaties and from other sources of international law.

Thus, it is easily understandable that no arbitral tribunal has ever rejected the rule *Pacta sunt servanda*, or even thrown doubt on it.<sup>45</sup> On the other hand, cases are numerous in which international arbitration tribunals have expressly emphasized and recognized the rule.<sup>46</sup> Here also we will limit ourselves to a few examples.

<sup>42</sup> See A. F. Frangulis, *op. cit.* 95.

<sup>43</sup> *Neue Zürcher Zeitung*, Dec. 17, 1958, Noon Ed.; *cf.* 40 Dept. of State Bulletin 4 (1959).

<sup>44</sup> The Council of the League of Nations, in its Resolution of April 16, 1935, cited this when, contrary to the provisions of the Versailles Peace Treaty, Hitler reintroduced universal military training in Germany. *League of Nations Official Journal*, May, 1935, p. 551. See further declarations on contracts in the time of the League of Nations in Herbert W. Briggs, *The Law of Nations* 869 (2nd ed., London, 1953); Jules Basdevant, *loc. cit.* 641; Arnold Duncan McNair, *The Law of Treaties* 351 *et seq.* (Oxford, 1938).

<sup>45</sup> *Law of Treaties. Draft Convention, with Comment*, prepared by the Research in International Law of the Harvard Law School, 29 A.J.I.L. Supp. 977 (1935).

<sup>46</sup> See for this A. F. Frangulis, *ibid.* 115 *et seq.*; John B. Whittton, *loc. cit.* 236 *et seq.*

In his decision of April 7, 1875, the U. S. Ambassador in Santiago, as sole arbitrator in the dispute between Chile and Peru, held:

It is a principle well established in international law that a treaty containing all elements of validity cannot be modified except by the same authority and according to the same procedure as those which have given birth to it.<sup>47</sup>

In the case of Ch. Adr. van Bokkelen, between the United States and Haiti, the arbitrator, A. Porter Morse, in his decision of December 4, 1888, stated:

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.<sup>48</sup>

In the Newfoundland controversy between the United States and Great Britain, the Permanent Court of Arbitration in The Hague held, in its award of September 7, 1910:

Every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations.<sup>49</sup>

In its first Advisory Opinion on July 31, 1922, on the designation of the workers' delegate to the International Labor Conference, the Permanent Court of International Justice emphasized that a contractual obligation was not merely "a mere moral obligation" but was an "obligation by which, in law, the parties to the treaty are bound to one another."<sup>50</sup>

Later on, the International Court of Justice, in its Advisory Opinion of May 28, 1951, on Reservations to the Genocide Convention, stated that "none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention."<sup>51</sup>

In his statement following the Judgment of the International Court of Justice of November 28, 1958, in the case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v. Sweden*), the Soviet Judge, Mr. Kojevnikov, expressly based his opinion on the principle, *Pacta sunt servanda*;<sup>52</sup> the Mexican Judge, Mr. Córdova, in his dissenting opinion, referred to the rule as "a time-honoured and basic principle,"<sup>53</sup> and he was obviously, on *this* point, in agreement with the Judgment of the majority of the Court.

<sup>47</sup> Translated from La Fontaine, *Pasicrisie Internationale* 165 (Bern, 1902).

<sup>48</sup> 2 Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party 1807, 1849-1850* (Washington, 1898).

<sup>49</sup> See the decision in James Brown Scott, *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague 500* (Boston, 1912).

<sup>50</sup> Publications of the Permanent Court of International Justice, Ser. B, No. 1, p. 19.

<sup>51</sup> [1951] I.C.J. Rep. 21.

<sup>52</sup> [1958] *ibid.* 72.

<sup>53</sup> *Ibid.* 141.

We have described above the rule of *Pacta sunt servanda* as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies. Whether one regards, with Verdross,<sup>54</sup> the contracts of a state with a foreign company for the purpose of granting a concession as being quasi-international law agreements, or whether one ascribes to them another character, the principle of the sanctity of contracts must always be applied.

As has been pointed above, the principle of sanctity of contracts is an essential condition of the life of any social community. The life of the international community is based not only on relations between states, but also, to an ever-increasing degree, on relations between states and foreign corporations or foreign individuals. No economic relations between states and foreign corporations can exist without the principle *Pacta sunt servanda*. This has never been disputed in practice. The best proof that the principle also applies in such a case is the following fact: it has long been suggested that disputes between states and foreign companies (or foreign individuals) should be submitted to international adjudication. Such a course would be meaningless if the principle *Pacta sunt servanda* were not applicable also to that kind of relations. How would it be possible to suggest the creation of such an International Court of Justice if contracts between a state and a foreign company were not binding? The conclusion is thus inescapable that in each case, as Verdross has shown,<sup>55</sup> such contracts are subject to the general principle of law: *Pacta sunt servanda*.

<sup>54</sup> 18 Zeitschrift für ausländisches öffentliches Recht u. Völkerrecht 638 ff. (1958).

<sup>55</sup> *Ibid.* 640, 648.

## THE ISRAELI-SOVIET OIL ARBITRATION

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The Israeli-Soviet oil arbitration in Moscow has evoked world-wide criticism for not being up to the standards of a fair and impartial proceeding.<sup>1</sup> Not only do the results of the award, dated July 3, 1958, appear to be unsatisfactory,<sup>2</sup> but the award also does not sufficiently deal with the legal questions submitted to the tribunal.<sup>3</sup> The latter thereby missed the opportunity of contributing to the development of an important legal aspect of international transactions, namely, the application of the *force majeure* clause. This note will be primarily concerned with that point, as well as with some international law aspects arising out of the arbitration.<sup>4</sup>

### THE FACTS

*Sojuznefteexport*, the Soviet oil export combine, had been selling fuel oil f.o.b. Black Sea ports to two Israeli companies, the Jordan Investments, Ltd. and Delek Israel Fuel Corporation, Ltd., since 1953. A contract dated November 1, 1955, was extended on May 29, 1956, to cover the entire year 1956. On July 17, 1956, another contract was made for the sale of 650,000 tons of fuel oil for delivery in 1957 and 1958. The seller applied to the Ministry of Foreign Trade in Moscow on August 4, 1956, for an export license. After Israeli troops had invaded the Sinai Peninsula in late October, 1956, the export combine, on November 6, 1956, informed the Israeli companies that the Ministry of Foreign Trade had canceled export licenses for the May 29, 1956, contract and that licenses for deliveries in 1957 and 1958 under the July 17, 1956, contract would not be granted. The combine also stated that "in accordance with the provisions of the contracts concerning force majeure paragraph seven the

<sup>1</sup> For references to articles in leading newspapers, see Martin Domke, "Arbitration of State Trading Relations," 24 *Law and Contemporary Problems* 317, 323, note 54, and 324, note 57 (1959).

<sup>2</sup> L. J. Blom-Cooper, "Arbitration in Moscow," 25 *Solicitor* 325 (London, 1958); David M. Sassoon, "The Soviet-Israel Oil Arbitration," *Journal of Business Law*, 1959, p. 132 (London), and editorial, *ibid.* 116.

<sup>3</sup> Cf. Samuel Pizar, "The Communist System of Foreign-Trade Adjudication," 72 *Harvard Law Review* 1409, 1442, note 98 (1959): "The award is disappointingly summary in its scope and analysis."

<sup>4</sup> At a meeting of the American Foreign Law Association in New York on Jan. 29, 1959, the facts and legal issues of the Israeli-Soviet oil arbitration were presented by Martin Domke and Stephen M. Schwebel, followed by a discussion in which Harold J. Berman and John N. Hazard participated.

said contracts are being cancelled." The *force majeure* clause reads as follows:

Force majeure. Neither of the parties shall be liable for any damage or non-compliance with the terms of this contract or any part of these terms, if this damage of non-compliance is due to one or more of the following events preventing one or the other party from performing his duties under the contract in whole or in part: natural disasters, fire, flood, war-like acts of any kind, blockades, strikes on the vessel carrying goods under this contract, acts or demands of the Government or other authoritative agency of the country under whose flag the chartered tanker belongs (but excluding the Government and authoritative agencies of the State of Israel), due to any other cause of whatever nature beyond the control of the non-performing party.<sup>5</sup>

The Israeli companies challenged the application of the *force majeure* clause; the export combine reasserted its position and rejected compensation for damages. As part of the loss which had occurred as a result of purchases at higher prices and increased freight rates, covering 135,000 metric tons of fuel, the Jordan Investments, Ltd., a subsidiary of the government-controlled Palestine Economic Corporation, Ltd., claimed damages in the amount of \$2,396,440.69.

#### THE ARBITRATION PROCEEDINGS

After lengthy correspondence, arbitration was initiated by the buyer on October 25, 1957, before the Foreign Trade Arbitration Commission.<sup>6</sup> The law professors, Pavel E. Orlovsky (Chairman) and Dimitri N. Genkin, and Dimitri D. Nesterov, Head of the All Union Chamber of Commerce, were selected from the fifteen members of the Commission (all Soviet citizens) to arbitrate the dispute. After thirteen hearings, the claim was dismissed on June 19, 1958, and on July 3, 1958, the award was rendered with "reasons."<sup>7</sup>

<sup>5</sup> For a recent survey of *force majeure* clauses, see Sidney Jay Sheinberg, "The Force Majeure Clause, a Tool for Mitigating the Effect of the Determinable Fee Concept of the Modern Oil and Gas Lease," 6 U. C. L. A. Law Review 269, 294-297 (1959).

<sup>6</sup> The arbitration clause reads as follows: "Any disputes which may arise out of the fulfillment of the present contract or in connection with it are to be settled by the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce in Moscow in conformity with the rules of said Commission. The decisions of said Commission are to be final and binding upon both parties." On the use of arbitration clauses in foreign trade contracts with Communist countries, cf. Othmar Mayenfisch, *La Clause Attributive de Jurisdiction et la Clause Arbitrale dans les Contrats de Vente à Caractère International* (Thèse, Fribourg, Switzerland, 1957), Ch. II, sec. 5: *L'arbitrage pour le commerce extérieure dans les Etats d'obédience communiste*, p. 83, and also Handbook of National and International Institutions Active in the Field of International Commercial Arbitration, Economic Commission for Europe, Committee on the Development of Trade, Ad Hoc Working Group on Arbitration, Trade/W[orking] P[arty] 1/15. REV. 1, of Dec. 3, 1958, p. 93.

<sup>7</sup> Contrary to American practice in commercial arbitration, the award has to be in written form "accompanied by the motives" on which it is based, Art. 26(2) of the amended Rules of Procedure of Jan. 21, 1949, U.N. Economic Commission for Asia and the Far East, Conference on Trade Promotion, Doc. Trade/61, of Oct. 10, 1951, p. 5.

For a translation of the full text of the award, see p. 800 below. The award also

The tribunal was widely criticized on procedural grounds, since it rejected the buyer's request for admission of testimony by officers of the seller as to the steps the latter had undertaken to save the contract, specifically with respect to obtaining export licenses; and for further testimony by officers of the Ministry of Foreign Trade as to the administrative procedures employed in granting and canceling export licenses. No rationale for rejecting such testimony was set forth in the award. Indeed, the award did not even mention the request for such testimony. This refusal to admit a party's evidence on important factual issues appears all the more unusual, since Article 21 of the Rules of Procedure of the Commission provides that "each of the parties must prove those circumstances which it refers to as grounds for its claims or objections." However, the means of verifying and appraising the evidence is left to the discretion of the arbitrators.<sup>8</sup>

## THE LAW

### THE DUTY TO OBTAIN EXPORT LICENSES

The May 29, 1956, contract concluded on the territory of the U.S.S.R. was subject to Soviet law. This was asserted by the seller and was not disputed by the buyer.<sup>9</sup> The buyer relied on the general principle of commercial law, also recognized in Soviet law, that the seller bears the risk of obtaining export licenses, unless the contract provides otherwise. Since the contract was silent with respect to export licenses, the seller had an absolute obligation to obtain them. In addition the contract did not provide for the seller's release from his obligation in the event a license was refused. The seller, however, argued that the granting of export licenses by the Ministry of Foreign Trade was indispensable for any export, and that the Ministry's refusal on November 5, 1956, and its

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provided for payment by the Israeli company of the full arbitration costs of \$12,000, one-half of one percent of the amount of about \$2,400,000. Sec. 10 of the Decree of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. on the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission of June 17, 1932 (Statute Book of the U.S.S.R., 1932, No. 48, Art. 31—English translation in the Document mentioned above, p. 4), provides that the fee "shall not exceed one per cent. of the sum in dispute." It may be noted that the costs in the United States, *e.g.*, under the Rules of the American Arbitration Association, would have amounted to about half of the sum, namely \$6,250, under the fee schedule of Sec. 42 of the Rules, providing for only one-tenth of one percent for amounts over \$200,000.

<sup>8</sup> Rule 22, which rule does not leave "the admissibility of evidence" to the arbitration board's discretion, as Pisar states, note 3 above, p. 1439.

<sup>9</sup> The law of the seller's state is generally applied in English and American courts "to the entirety of rights and duties flowing from the (f.o.b.) contract." 3 Ernst Rabel, *The Conflict of Laws* 60 (1950). "In practice the interpretation of the legal incidents of c.i.f. and f.o.b. contracts in Soviet tribunals runs parallel to the more or less uniform interpretation given to such contracts in courts elsewhere." Samuel Pisar, "Soviet Conflict of Laws in International Commercial Transactions," 70 *Harvard Law Review* 593, 628 (1957), and for cases decided by the Foreign Trade Arbitration Commission, *ibid.* 636.

"prohibition" of further performance made execution of the contract "impossible."

The award (sub. 5) rather casually refuted seller's duty to obtain an export license. It stated that no such provision for binding the seller was contained in the contract, "not even any mention of such obligation to obtain such licenses." This reasoning is indeed inadequate. The assertion of seller's absolute duty was predicated on the contract's silence on this very point. Nothing in the contract exempted the seller from obtaining licenses.

True, a recent American case, *Banking & Trading Corporation v. Reconstruction Finance Corporation*,<sup>10</sup> dealing with the sale of Indonesian rubber, stated that "the usual rule under f.o.b. ocean vessel contract is that the buyer is to obtain export permits and pay export duties."<sup>11</sup> However, this very opinion cited<sup>12</sup> the warning against generalization in these matters set forth in the recent English case, *A. V. Pound & Co. v. M. W. Hardy & Co.*,<sup>13</sup> dealing with Portuguese export regulations. There it was said:

The observations, if general, must be confined to cases where both parties are within the jurisdiction of the licensing authority. I do not say the conclusion is necessarily different, if they are not, but different considerations arise. Even so, I think this is an area in which it is impossible to lay down general rules.

On this topic, the effect of frustration of contract, a similar approach under American law<sup>14</sup> was enunciated: "We cannot lay down one simple and all-controlling rule. . . . The problem is that of allocating, in the most generally satisfactory way, the risks of harm and disappointment that result from supervening events." At the very least, the issue of responsibility for proper licensing is not only relevant and important, but should be

<sup>10</sup> 147 F. Supp. 193, 208 (S.D.N.Y. 1956), aff'd 257 F.2d 765 (2d Cir. 1958), dismissing the claim on the ground that the conclusion of a final contract was not proven.

<sup>11</sup> Such a "usual rule" may be found in the Revised American Foreign Trade Definitions; 1941 (adopted by the Chamber of Commerce of the United States of America, the National Council of American Importers and the National Foreign Trade Council and still in use by both exporters and importers, without further revision), whereby (II D4): "seller must . . . render the buyer, at the buyer's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which the buyer may require either for purposes of exportation, or of importation at destination."

<sup>12</sup> At p. 208, note 14, with reference to further American cases, concerning the Amtorg Trading Corp., a Soviet Government-owned New York corporation. See also *L. N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694 (1949), certiorari denied, 339 U. S. 914 (1950); Leo M. Drachler, "Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality," 3 New York Law Forum 50 (1957), and Hans Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," 58 Columbia Law Review 287 (1958). Cf. also note, "F.A.S. Clauses in American and Comparative Law," 32 N.Y.U. Law Review 1247, 1258 (1957).

<sup>13</sup> [1956] A.O. 588; Note, "Failure to Obtain Export License" (on the decision of the Court of Appeal, [1955] 1 All E. R. 666), by J. K. Grodecki, 18 Modern Law Review 405 (1955).

<sup>14</sup> 6 Corbin on Contracts § 1322, p. 256 (1951).



decided on the facts and law peculiar to each dispute. An example of this approach is found in *Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials)*,<sup>15</sup> where it was held that if the parties had not specifically made the contract "subject to any Brazilian export license," "the buyers might have contended that the sellers undertook absolutely to obtain a license and ship the goods, and that it would be no excuse for the seller to say that they could not get a license." Even with this warning against generalization, it may fairly be assumed that this usage prevails in most international f.o.b. sales contracts.<sup>16</sup> INCOTERMS of the International Chamber of Commerce<sup>17</sup> state that the f.o.b. seller must "at his own risk and expense obtain an export license or other governmental authorization necessary for the export of the goods."<sup>18</sup>

In any event, it was the buyer's contention that the seller did not comply with the requirements of Article 118 of the Civil Code of the Russian Socialist Federated Soviet Republic, which discharges a party from responsibility for non-performance due to a cause beyond his control, i.e., one which he could not in any way avert.<sup>19</sup> It was alleged that the seller did nothing to overcome the refusal of the Ministry either by appeal or other steps. This obligation has been recognized, e.g., in *Peter Cassidy Seed Co. v. Ossustukku Kauppa I.L.*,<sup>20</sup> an English case involving Finnish export licenses, where it was held that when nothing is said in the contract about the duty to obtain an export license and when an absolute obligation of the seller cannot be assumed, the latter is at least obligated to use his best efforts to procure the license, since "it is usually, indeed, it is

<sup>15</sup> [1952] 2 All E.R. 497. For further references see Martin Domke, "Foreign Trade Restrictions and Arbitration," 9 *Arbitration Journal* (n.s.) 89, 94, notes 28-32 (1954).

For a recent case where seller (U. S. Government) had guaranteed that "permission to export the property [wire] has been granted by the Iraqi Government," see *Hyman-Michaels Company v. United States*, 140 F. Supp. 784 (Ct. Cl., 1956).

<sup>16</sup> Cf. Clive N. Schmitthoff, *The Export Trade* 21 (3rd ed., London, 1958); Paul H. Silverstone, "The Export Control Act of 1949: Extraterritorial Enforcement," 107 *U. Pa. Law Review* 331, 360 (1959).

<sup>17</sup> "Incoterms 1953" (International Rules for the Interpretation of Trade Terms) (Paris, 1953), p. 24, par. 3.

<sup>18</sup> For similar issues arising out of the closure of the Suez Canal in 1956, see the conflicting decisions in *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.*, [1958] 3 All E.R. 115, 58 A. J. I. L. 188 (1958); *Tsakiroglou & Co., Ltd. v. Noble Thorl G.m.b.H.*, [1959] 1 All E.R. 45, 53 A.J.I.L. 696 (1959); Notes in *Journal of Business Law* 1959, p. 88, and 22 *Modern Law Review* 81 (1959); and J. G. R. Griggs, *Frustration in Relation to Contracts of Affreightment* (Gothenburg, Sweden, 1959).

<sup>19</sup> "Unless otherwise provided by law or contract, the debtor shall be relieved from liability for non-performance, if he proves that impossibility of performance resulted from circumstances which he could not prevent, or that it came about owing to intentional design or negligence of the creditor." Transl. in 2 *Gsovski, Soviet Civil Law* 107 (1948).

<sup>20</sup> [1957] 2 All E. R. 484. The duty of parties to collaborate in obtaining licenses was also considered in *Kyprianou v. Cyprus Textiles*, (1958) 2 *Lloyd's L. Rep.* 60, Note, *Journal of Business Law* 1959, p. 59.

probably fair to say almost invariably, the latter class of warranty, which is implied."<sup>21</sup>

In the instant case the contract had been approved by the Ministry of Foreign Trade. Throughout earlier dealings between the same parties an export license was always necessary. At the very least, it was the seller's duty to exercise all efforts to procure such a license. It appears that the seller, after receiving the Ministry's notice of November 5, 1956, did not make any effort to obtain a license and thus save the contract. This is all the more striking, since delivery under the July 17, 1956, contract was not to be commenced until 1957, then in monthly installments over a period of two years. "Yet immediately after receipt of the Ministry's communication, the sellers purported to cancel the agreement. They did not appeal against it or object to it; in fact, they never even attempted to inquire into it—could they, then, be said to have discharged this duty?"<sup>22</sup> It is obvious that difficulty of appeal proceedings and the improbability of success do not discharge a party from its obligation to act.<sup>23</sup> The award (sub. 6) makes allusion to the prevailing political situation arising from Israel's "aggression" against Egypt<sup>24</sup> to the effect that the seller had no reason for an appeal "considering the factual conditions governing the case." Here, again, the brief "reasoning" of the award appears to beg the question, since each party has a contract responsibility and the duty to save the contract. Indeed, Soviet civil law strongly maintains the concept of *Pacta sunt servanda*.<sup>25</sup>

#### IMPOSSIBILITY OF PERFORMANCE

The buyer further argued that, under Article 119 of the R.S.F.S.R. Civil Code, nothing less than "objective impossibility" would excuse

<sup>21</sup> "English commercial law is often regarded by international business as a kind of *jus gentium* of international commerce to which resort can be had if it is undesirable or inappropriate to refer to a national system of law," Schmitthoff, "Modern Trends in English Commercial Law," *Tidskrift av Juridiska Föreningen i Finland*, 1957, p. 349, at 356.

<sup>22</sup> Sassoon, note 2 above, p. 138.

<sup>23</sup> This issue is related to the concept of "exhaustion of local remedies" when an effective relief appears to be impossible under the circumstances. Cf. Art. 19 of the Convention on the International Responsibility of States for Injuries to Aliens (Preliminary Draft with Explanatory Notes), Harvard Law School, May 1, 1959, p. 98.

<sup>24</sup> The "aggression" was stated as the reason for Soviet action in a note of the Soviet Government to the Israeli Government which was published in *Izvestia* on Feb. 6, 1957, and was introduced in the arbitration proceedings. The award refers to this situation in the objections of the seller (No. 3): "the situation prevailing at the beginning of November 1956 and created by aggression against Egypt," and in the reasons (No. 6): "in considering the factual conditions governing this case." Cf. also *New York Times*, Jan. 24, 1959: "During the Suez crisis, Moscow cancelled its contract to deliver oil to Israel."

<sup>25</sup> M. M. Agarkov [President of the Chair of Civil Law of the Moscow State University], "The Debtor's Discharge from Liability when Performance is Impossible," 29 *Journal of Comp. Leg. and Int. Law* (3d ser.) Part III, p. 9 (1947).

performance of the contract,<sup>26</sup> so that oil could have been delivered at another Black Sea port, such as Constanza in Rumania. It is a recognized principle in the commercial law of many countries as well as that of the Soviet Union (witness Article 119) that "objective impossibility" does not apply to fungible (generic) goods, such as fuel oil. Here, the award states (sub. 4) that in view of the general prohibition of performance by the Ministry, the seller was not only prevented from supplying fuel oil of Soviet origin "but also fuel oil of any other country as well."

#### THE *Force Majeure* CLAUSE

Refusal to grant export licenses is not enumerated in the *force majeure* clause as a grounds for exemption from liability. Therefore, the buyer argued that the general principles of contract construction would apply. One of these principles holds that, where there is an enumeration, that which is not listed was intended to be excluded.

This important aspect is likewise summarily dealt with. The award sets forth that such cause (refusal of license) is not mentioned "in the *force majeure* conditions as specified therein" (clause 7), an undisputed fact which otherwise should have disposed of the whole controversy between the parties. But the award, in merely stating that the denial of licenses by the Ministry "being absolutely binding upon the Corporation [the seller] does in fact constitute such circumstances releasing the latter from liability," considers the refusal of licenses to be covered by the words "any other cause beyond the control of the non-performing party."

The wording of the *force majeure* clause in the f.o.b. contract does not include restrictions created by the Soviet Government, since the clause expressly mentions only one case of government restriction, and that involved the government under whose flag the ship is registered. This would specifically exclude any restrictive action by the state of Israel.<sup>27</sup> Indeed, one may question whether the *force majeure* clause in the instant case could have released the seller from any obligation. The purpose of the clause is to cover circumstances which the parties at the time of concluding the contract could not foresee. Impossibility of export for lack of a license, may be a case of *force majeure* if the necessity for such licensing was unknown to the parties. But the need for licensing was not a new development which first came to light only on November 5, 1956, when the Ministry of Foreign Trade refused to grant licenses and prohibited further export. On the contrary, since the beginning of the

<sup>26</sup> "In any event, impossibility of performance shall not relieve the debtor from liability: (a) where the subject of the obligation is defined by generic characteristics and delivery of property of the same kind has not become objectively impossible; (b) where persons charged by operation of law or by orders from the debtor, with performance of the obligation have, by intentional design or negligence caused the circumstance which rendered performance impossible or failed to avert it." Transl. in Gsovski, *op. cit.* 109.

<sup>27</sup> "There was no need to mention Russia in this context for, the sale being a strict f.o.b. sale, it was the buyer's duty to provide the vessel, and the seller could never be liable for failure to do so." Sassoon, note 2 above, p. 136, note 6.

contractual relationship, licensing of exports had been a necessity. If the seller wanted to discharge himself of any obligation under the contract, in the event of refusal of a license, he should have provided for such contingency in the contract. The mere insertion of a *force majeure* clause does not cover such a contingency known to both parties from the beginning of their contractual relationship.<sup>28</sup>

However, it may well be argued that the buyer should have insisted that the seller expressly undertake the obligation to secure an export license and bear the risk of not obtaining it. In any event, this was not the contract situation on risks,<sup>29</sup> for "if they [risks] had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed."<sup>30</sup>

#### THE MINISTRY'S PROHIBITION OF FURTHER PERFORMANCE

The buyer argued that the Ministry had no right to prohibit the further performance of the contract. Under Soviet law, the Ministry of Foreign Trade is authorized to prohibit only prospective contracts and not existing contracts which, in any event, had been previously approved. It was alleged that the contract can only be prohibited in extraordinary circumstances, when the importing country discriminates against Soviet trade, and then only by a special decree of the Council of Ministers granting such authority to the Ministry of Foreign Trade. Not a single word of the award deals with this important issue.

The buyer's argument that the seller unilaterally had dissolved the contract, was refuted by the award (No. 3) as "groundless," since under Article 129 of the R.S.F.S.R. Civil Code<sup>31</sup> the contract "ceased to exist by the very fact of impossibility of implementation," and "must be regarded as having ceased to exist as of November 5, 1956," the date of the Ministry's communication to the seller. The award therefore accepts the argument presented by the seller, that it did not cancel the contract at all but that the contract ceased to operate by reason of Soviet law. This blunt statement is hardly sufficient to evade contract responsibility. Nor does the award, making the denial by the Ministry of licenses and

<sup>28</sup> Frédéric Eisemann, "Keine Haftung des FOB-Verkäufers fuer die Beschaffung der Ausfuhrgenehmigung nach sowjetischem Recht?" 15 Verkehr 9, 10 (Vienna, Austria, 1959).

<sup>29</sup> North German Lloyd v. Guaranty Trust Company of New York, 244 U. S. 122 (1917).

<sup>30</sup> Cf. annotation by de Winter on the decision of the Dutch Supreme Court (Hoge Raad), of Jan. 15, 1954, Nederlandsche Jurisprudentie 1954, No. 251, dealing with the lack of a Dutch foreign exchange license, in 1 Netherlands International Law Review 437 (1954): "A plea based on *force majeure* can only exonerate a party in default from his liability to make compensation for damages when he was not able to foresee the situation of *force majeure* incurred and when he can not be deemed to bear the risk of its occurrence, or, in other words, that only in such cases the notion of *force majeure* can be applied."

<sup>31</sup> "An obligation shall terminate either in full or in part . . . (e) by impossibility of performance for which the debtor cannot be held liable." Gsovski, *op. cit.* 110.

prohibition of further performance "absolutely binding" upon the seller, discuss the question whether the action of the Ministry was *ultra vires*<sup>32</sup> or whether it would only create an administrative directive which, if submitted, would hardly make performance illegal.

It is difficult to see how a private communication—not even a published decree—from a superior official, could have the effect of declaring the performance illegal, especially since no authority was quoted showing that the Ministry was vested with the legal power to annul subsisting agreements.<sup>33</sup>

The award merely assumes that such communication of the Ministry was covered by the *force majeure* clause, without giving any reasons for such a holding.

One of the disappointing aspects of the award lies in the fact that it does not deal at all with the important legal aspects raised by the buyer and supported by a number of legal opinions of internationally recognized authorities submitted in the arbitration proceedings.<sup>34</sup> At the very least, the question of *ultra vires* action of the Ministry of Foreign Trade required consideration. This is not an issue of the application of the "act of state" concept, whereby a foreign court will not sit as a judge over the acts of another state.<sup>35</sup> The Foreign Trade Arbitration Commission is a domestic (Soviet) body with the authority to determine the issues between the disputant parties by virtue of their contractual agreement to give exclusive jurisdiction to that arbitral body.

Irrespective of whether the non-granting of export licenses was a foreseeable event and, as stated above, not covered by the *force majeure* clause, the effect of the prohibition of further performance depended in the first instance on the legality of such prohibition. Therefore, Soviet administrative practice was pertinent. Proof of this practice was sub-

<sup>32</sup> An editorial in the (London) Journal of Business Law, 1959, p. 117, which reproaches the Foreign Trade Arbitration Commission for not having closely examined the viewpoint of *ultra vires* action of the Ministry, said: "Apparently the Commission considered it as inconceivable that the manager of the sellers should question the administrative powers of the Ministry to issue the prohibition."

<sup>33</sup> Sassoon, note 2 above, p. 136. The argument that the seller had not informed the buyer of the prohibition by the Ministry but had only relied on the inability to obtain export licenses was refuted in the award (No. 7), that the telegram of Nov. 6, 1956, notified "that the agreement was voided which implied a ban against implementation of same." This, however, appears not to be warranted by the express wording of the notification "cancelled" and not "prohibited."

<sup>34</sup> In a legal opinion by Professor Dr. Hans Doelle, Director of the Max Planck Institute for Foreign and Private International Law, Hamburg, of Dec. 13, 1957, it was further said (p. 5): "The denial or revocation of an export license in an individual case under the circumstances is not based on a general regulation executed equally against everybody but rather an act issued for reasons of opportunity in an individual case or in individual cases for the issuance of which an organ of state participating in the trade has no answer."

<sup>35</sup> Cf. the report of the Committee on International Law of the Association of the Bar of the City of New York: "A Reconsideration of the Act of State Doctrine in the United States Courts," adopted by the Annual Meeting of the Association on May 12, 1959.

mitted by the buyer and not admitted in evidence by the Commission. No *ultra vires* action by the Ministry is mentioned in the award.<sup>86</sup>

#### IDENTITY OF THE OIL EXPORT COMBINE AND THE MINISTRY OF FOREIGN TRADE

On principle, the buyer argued that the seller could not come forward with the contention that any action of the Ministry constituted a cause of *force majeure*, because both the combine and the Ministry were organs of one and the same state, the U.S.S.R., and thereby arms of the same government.

Under Article 14 of the R.S.F.S.R. Civil Code, the combine is a public corporation, a separate legal entity.<sup>87</sup> It has been noted that "Soviet government corporations have developed as independent juridical entities to manage property owned by the state. They are not non-entities. Each has its own Charter, its own trade name, its own capital, its own balance sheet and profit and loss statement,"<sup>88</sup> and

In a socialized state it would seem to be distinctly to the advantage of the state to separate its political character from its business functions in order that economic relations may be carried on without the frictions and prestige consideration.<sup>89</sup>

Therefore, continued the award, identification of the seller with the Ministry "lacks any foundation." A recent editorial correctly notes that the Israeli buyers were "on weak ground when contending the identity of seller and Minister of Foreign Trade."<sup>40</sup>

It is true that the Foreign Trade Arbitration Commission held on previous occasions that both export and import combines were independent legal entities.<sup>41</sup> This, however, does not solve the question of independence in fact, in view of the state monopoly of trade, and the Ministry's general supervision of all economic activities.<sup>42</sup> However, the concept of "piercing

<sup>86</sup> The question of responsibility under international law of the Soviet Government for its prohibition of performance of a contractual right of an alien corporation was, of course, not a matter for the Commission. The dispute was between the two parties to the contract, and only those issues had to be considered by the Commission.

<sup>87</sup> On the doctrine of the juridical person in Soviet law, see Harold J. Berman, "Commercial Contracts in Soviet Law," 35 California Law Review 191, 196 (1947).

<sup>88</sup> John N. Hazard, "Soviet Government Corporations," 41 Mich. Law Review, 850, 871 (1943). See, however, Hazard in *The Public Corporation* (ed. Wolfgang Friedmann) 559, questioning "whether the Soviet state corporations are independent legal personalities or, being part of the state, are only treated as such."

<sup>89</sup> Philip C. Jessup, *A Modern Law of Nations* 20 (1948).

<sup>40</sup> *Journal of Business Law*, 1959, p. 116.

<sup>41</sup> Cases cited in *Pisar*, note 9 above, pp. 543-544.

<sup>42</sup> Art. 14 of the Soviet Constitution places foreign commerce under control and direction of the Union. See Harold J. Berman, "The Legal Framework of Trade between Planned and Market Economies: The Soviet-American Example," an article adapted from the author's General Report to the UNESCO Conference on Legal Aspects of Trade between Planned and Free Economies, Rome, February, 1958, 24 *Law and Contemporary Problems*, No. 3 (Summer, 1959); also 1959 Proceedings, American

the corporate veil" advanced in the economic warfare of the postwar period,<sup>43</sup> is not appropriate in this instance.

Such legal autonomy is a basic principle of the entire Soviet system of foreign trade; to reject it would be to require the Soviet state to conduct all its foreign trade in its own name—a solution which would probably create more difficulties for non-Soviet traders than it would solve.<sup>44</sup>

It is true that similar situations of "piercing the corporate veil" arose when government-owned or controlled corporations were sued before foreign courts and immunity from such jurisdiction was invoked.<sup>45</sup> Here, however, no immunity is involved nor has it ever been claimed by Soviet corporations.<sup>46</sup> The very establishment of separate corporations for combines of foreign trade, with the express provision for their being subject to suits, make unfeasible an application of the "piercing the corporate veil" concept.

#### CONCLUSION AS TO THE ARBITRATION PROCEEDINGS

The elimination of the issue of identity between combine and Ministry of Trade of course does not solve the real problem: the close relationship and preponderant influence of the Ministry, not only on the seller but also on the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce. However, one must keep in mind that this is a feature of state-trading countries of the Communist *bloc* and will in all probability remain. In spite of its statutory creation as a separate and autonomous arbitration tribunal, the Foreign Trade Arbitration Commission is clearly a state-organized institution which has to be considered not so much as an arbitral tribunal but rather in the nature of a state court in the specialized field of foreign trade. Foreign traders who agree to its competence for exclusively settling their future disputes with Soviet

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Society of International Law 274. On the UNESCO conference, see John N. Hazard, "Commercial Discrimination and International Law," 52 A.J.I.L. 495 (1958).

<sup>43</sup> For reference, see Martin Domke, "Piercing the Corporate Veil in the Law of Economic Warfare," 1955 Wis. Law Review 77; Raoul Berger, "'Disregarding the Corporate Entity' for Stockholders' Benefit," 55 Columbia Law Review 808 (1955).

<sup>44</sup> Berman, note 42 above, note 34a.

<sup>45</sup> Note, "Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations," 50 Yale Law Journal 1088 (1954); Michael Brandon, "Sovereign Immunity of Government-owned Corporations and Ships," 39 Cornell Law Quarterly 425 (1954); F. A. Mann, "The Immunity of Foreign Governments in Trade," in Report of International Law Conference held at Niblett Hall, June, 1956, p. 29 (London, David Davies Memorial Institute of International Studies); K. W. Wedderburn, "Sovereign Immunity of Foreign Public Corporations," 6 Int. and Comp. Law Quarterly 801 (1957); Comment, "Immunity of Foreign Government Instrumentalities," 25 University of Chicago Law Review 176 (1957); Olive M. Schmitthoff, "The Claim of Sovereign Immunity in the Law of International Trade," 7 Int. and Comp. Law Quarterly 452, 463 (1958).

<sup>46</sup> Bernard Fensterwald, Jr., "Sovereign Immunity and Soviet State Trading," 63 Harvard Law Review 614, 627 (1950).

corporations are nevertheless bound by their own contractual agreement,<sup>47</sup> as has been held by the New York Court of Appeals in *Amtorg Trading Corp. v. Camden Fibre Mills, Inc.*,<sup>48</sup> and by the Swiss Federal Tribunal in *Linga v. Baumgartner & Co., A.G.*<sup>49</sup>

The deliberations of the United Nations Conference on International Commercial Arbitration devoted the entire plenary session of May 28, 1958, to a debate whether to include in the definition of "arbitral awards" those rendered by state arbitral tribunals in countries with planned economies.<sup>50</sup> Article 1(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, provides that

The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.<sup>51</sup>

Moreover, Soviet corporations, in their trade arrangements with foreign parties, do not always insist on arbitration before the Foreign Trade Arbitration Commission in Moscow. Submission to foreign arbitral set-ups are not infrequent and their incidence may grow in the future, partly because of the world-wide criticism of the Israeli-Soviet oil arbitration.<sup>52</sup> Recent agreements of a Soviet agency with an American and an Italian corporation for the construction of textile plants in Russia provide for arbitration in New York<sup>53</sup> and under a Swedish<sup>54</sup> set-up, respectively.<sup>55</sup>

<sup>47</sup> With the right of being represented also by "foreign citizens." Rule 20.

<sup>48</sup> 304 N.Y. 519, 109 N.E.2d 606 (1952).

<sup>49</sup> 84 Entscheidungen des Schweizerischen Bundesgerichts, Pt. I, No. 7, p. 39 (1958), granting execution of an award rendered by the Arbitration Court of the Chamber of Commerce of Czechoslovakia. This 1958 decision of the highest Swiss tribunal overrules for all purposes the holding of the Zürich Superior Court of Nov. 11, 1954, in *Stankoimport v. Swisstool*, published in *Mayenfisch*, note 6 above, p. 87, which denied the enforcement of a Moscow award for lack of impartiality of the Soviet arbitrators. For a detailed discussion of the *Amtorg* and *Linga* cases, see *Domke*, note 1 above, p. 325, and *Samuel Pisar*, "Treatment of Communist Foreign Trade Arbitration in Western Courts," in *International Trade Arbitration: A Road to World-Wide Cooperation* 101 (ed. by *Martin Domke*, 1958), and note 3 above.

<sup>50</sup> *Martin Domke*, "The United Nations Conference on International Commercial Arbitration," 53 A.J.I.L. 414, 416 (1959).

<sup>51</sup> *Ibid.* 420; cf. also the Trade Agreement between the U.S.S.R. and Canada, of Feb. 29, 1956, Table of Bilateral Conventions Relating to the Enforcement of Arbitral Awards and the Organization of Commercial Arbitration Procedure (U.N. Pub. Sales No. 1957.II E/Mim. 18), p. 8.

<sup>52</sup> This may become all the more true in view of the Soviet Union drive for increased trade also with the United States; cf. the speech of First Deputy Premier *Frol R. Kozlov* at the opening of the Soviet exhibition in New York, *New York Times*, June 30, 1959, p. 16, col. 5.

<sup>53</sup> In that arbitration clause, the dispute shall be settled by arbitration in New York City under the Rules of the American Arbitration Association. Each party shall appoint an arbitrator, but "neither of the parties shall be required to choose an arbitrator whose name shall appear on the panel of the American Arbitration Association." If the two arbitrators do not agree upon the selection of a third arbitrator within two months, the third arbitrator shall be appointed by the Executive Secretary of the General Agreement on Tariffs and Trade.

<sup>54</sup> Here, in case a party fails to appoint its arbitrator within 14 days (from receipt



## CONCLUSION AS TO THE AWARD

The issue under consideration in the arbitration proceedings was not a determination whether the Soviet Government's prohibition of the performance of the contract was justified or not. That was indeed in the exercise of its sovereign power, dictated by their own peculiar political reasons. The only question was whether the seller was, under the contract, obligated to pay damages for non-performance; in other words, whether the *force majeure* clause discharged the seller from such obligation. It was stated above that, contrary to the award, the clause did not justify such discharge, inasmuch as it did not provide for this contingency, although it was readily foreseeable. In view of the fact that licenses were necessary at the time of the conclusion of the contract and the seller had always obtained them, the shifting of the risk (upon the buyer) could have been expressly stated under the *force majeure* exemption from liability. As has been noted,<sup>56</sup> the award is

highly unsatisfactory in so far as it allows a state enterprise, by invoking a blatantly political act of its government, to evade with impunity its contractual obligation to a damaged foreign party.

It is one thing to say that obviously in a Communist country political considerations of an important nature, such as those evoked by the Suez crisis, make withdrawal of trade for political reasons somewhat foreseeable. However, the liability of the "independent" seller for damages is an entirely different matter which cannot be so easily eliminated from serious considerations of law and commercial practice as the award suggests. This is all the more deplorable in view of the general standing of the Foreign Trade Arbitration Commission and in view of the fact that

the Soviet law and practice regarding F.O.B. and similar contracts . . . and in general the entire range of commercial techniques of international trade, does not differ in its general outlines from that of Germany, France, Italy, England, the United States, and other countries which have inherited the "law merchant."<sup>57</sup>

Moreover, a most recent arbitration agreement of a Soviet agency with an Italian corporation for the construction of a plant in Russia containing a Swedish arbitration set-up (see note 55) provides that the (majority)

of notification of arbitration), the President of the Chamber of Commerce of Stockholm shall appoint the arbitrator. In case of disagreement of both arbitrators on the selection of a chairman (within four weeks after the appointment of the second arbitrator), the same President shall appoint the chairman.

<sup>56</sup> In the famous Lena Goldfields Arbitration, the agreement of April 30, 1925, provided also for a Swedish arbitration set-up in a detailed arbitration clause, reprinted in the Memorandum on Soviet Doctrine and Practice with respect to Arbitral Procedure, U.N. Doc. A/CN.4/36, of Nov. 21, 1950, p. 18. Cf. Arthur Nussbaum, "The Arbitration between Lena Goldfields, Ltd. and the Soviet Government," 36 Cornell Law Quarterly 31 (1950).

<sup>57</sup> Pisar, note 3 above, p. 1433.

<sup>58</sup> Note 34 above.

award shall be "on the basis and in the terms of the present conditions relating to the order and in accordance with the general principles governing legal principles. The Board of Arbitration may furthermore avail itself of the commercial usages practiced internationally."

The arbitration proceedings, in the refusal of the tribunal to allow the presentation of pertinent evidence, and the award, in its rather disappointing brief reasoning, without any reference to supporting legal sources, evoked unfavorable criticism. The hearings were widely attended by foreign diplomatic officers and the foreign press. Harold J. Berman reported:

A large amount of pressure concerning the case was brought to bear on the Soviet government by traders from many countries, which ultimately may have produced the opposite effect from that which was intended.<sup>58</sup>

Comfort can hardly be derived from the fact that this was undoubtedly an extraordinary situation which the Soviet Government may have used to impress Arab countries with the prohibition of oil deliveries to Israel. Nevertheless, contracts must be fulfilled according to their terms or damages paid for the non-performance. Only then can international trade be promoted, an aim which the Soviet Union too has proffered to be willing to attain.

#### ANNEX

##### AWARD \*

rendered by the Foreign Trade Arbitration Commission on the Claim filed by the JORDAN INVESTMENTS, LIMITED, an Israeli company, against the All-Union Foreign Trade Corporation—Vsesojuznoje Objedinenijje SOJUZNEFTEXPORT of Moscow, U.S.S.R., for payment of (U.S.) \$2,396,440.69.

The Foreign Trade Arbitration Commission consisting of P. E. Orlovsky as Umpire and M. V. Nesterov and D. M. Genkin, Arbitrators, having considered at public hearings (held on December 2, December 4 and December 11, 1957, and March 7, March 10, March 12, March 17 and June 12, and June 13, June 16, June 17, June 18 and June 19, 1958) the claim filed by JORDAN INVESTMENTS, LIMITED, an Israeli company hereinafter referred to as the "Company," against Vsesojuznoje Objedinenijje SOJUZNEFTEXPORT of Moscow, U.S.S.R., hereinafter referred to as the "Corporation," for payment of U. S. \$2,396,440.69 and having considered the arguments made by D. M. Schlossberg, Z. Argaman and G. T. Cheburakhin, representatives for Plaintiff and by V. S. Podsdniakov, representative for Defendant, rendered this Award on June 19, 1958.

<sup>58</sup> Berman, note 42 above, p. 20.

\* The translation from the Russian text has been adapted to conform to Anglo-American usage in international commercial arbitration.

## THE FACTS

In accordance with a contract concluded on July 17, 1956, in Moscow between the Company and the Corporation, the Corporation undertook to furnish the Company, during the years 1957 and 1958 with 650 tons of heavy fuel oil F.O.B. Black Sea ports.

On August 4, 1956, the Corporation applied to the U.S.S.R. Ministry of Foreign Trade, hereinafter referred to as the "Ministry," for an export license.

On November 5, 1956, the Ministry by letter advised the Corporation that the licenses applied for in accordance with the above contract dated July 17, 1956, would not be granted and that performance of the said contract was prohibited.

On November 6, 1956, the Corporation informed the Company that the Ministry had advised the Corporation to the effect that export licenses for shipment of fuel oil during the years 1957 and 1958 as per the terms of the the contract dated July 17, 1956, would not be issued and that accordingly pursuant to the *Force Majeure clause* (Paragraph 7 of the Contract), said contract was thereby canceled.

In reply to the Corporation's telegram of November 6, 1956, the Company, in its telegram of November 12, 1956, declared that in the Company's opinion Paragraph 7 of the contract did not provide grounds for canceling the contract and that the Company therefore reserved all rights and would hold the Corporation liable for damages.

On November 16, 1956, the Corporation wired the Company in reply to the Company's wire of November 12, 1956, and again stressed the fact that the situation as it had developed constituted a case of *force majeure*, thus freeing the Corporation from all liability in accordance with Par. 7 of the said contract.

In the course of the subsequent correspondence, the Corporation declined the Company's claim for damages and for deliveries in accordance with the contract. In a letter dated June 13, 1957, the Corporation pointed out that the contract of July 17, 1956, had terminated due to circumstances beyond the Corporation's control and that the Corporation had advised the Company to such effect in due time.

On October 25, 1957, the Company filed a complaint against the Corporation before the Foreign Trade Arbitration Commission of the Chamber of Commerce of the U.S.S.R.

In its complaint the Company charged that the Corporation had unilaterally and illegally canceled the contract of July 17, 1956, and that as a result of such violation of the said contract by the Corporation, the Company had been compelled to purchase fuel oil elsewhere in substitution for the quantities which the Corporation had undertaken to furnish in accordance with the above contract and that, furthermore, the Company had been compelled to conclude charter parties for the shipping of the fuel oils thus purchased. In this connection, the Company claimed damages in the amount of U.S. \$2,396,440.69 and demanded payment of the said

amount by the Corporation. The Company further sought to establish its right to compensation for additional losses and damages in excess of the above amount, which the Company had incurred or might incur due to the violation of the said contract, and finally the Company asked that the Corporation be compelled to pay the Company all costs and expenses in the arbitration proceedings.

In its brief filed with the Foreign Trade Arbitration Commission in reply to the above complaint, the Corporation stated that it did not recognize the Company's claims and considered them completely groundless. The Corporation pointed out that performance of the contract had become impossible as a result of the ban imposed by the Ministry. Therefore, in accordance with Article 118 and Paragraph D of Article 129 of the Civil Code of the R.S.F.S.R. [Russian Socialist Federated Soviet Republic], the obligation of the Corporation to supply fuel oil to the Company should be considered as having completely ceased to exist. Accordingly and by virtue of Par. 7 of the contract, the Corporation asked to be released from any liability.

In the course of consideration of this matter by the Foreign Trade Arbitration Commission, the Company advanced the following arguments in substantiation of its claims:

(1) With respect to the obligation of the Corporation in its capacity as the seller:

(a) the Corporation, as the seller, had the absolute obligation to obtain the proper export license;

(b) the contract of July 17, 1956, contained no provision releasing the Corporation from liability in the event of non-issuance of an export license.

(2) With reference to the nature of the events cited by the Corporation:

(a) the Ministry had no right to prohibit performance of the concluded contract. Such prohibition could be accomplished only by a Government decision;

(b) the Corporation has failed to prove the objective impossibility of performing the contract of July 17, 1956, which defines the subject matter of the commitment undertaken by its general description (heavy fuel oil). In such cases, according to Plaintiff, only impossibility of performance would release liability for non-fulfillment, in accordance with Article 119, Part I, of the Civil Code of the R.S.F.S.R. The contract provides for the supply of heavy fuel oil F.O.B. Black Sea ports. If the Corporation failed to obtain a license for shipment of such heavy fuel oil out of the Soviet Union, it could have shipped, say, out of the Rumanian port of Constanza or any other non-Soviet Black Sea port;

(c) the Corporation is not entitled to interpret the prohibition of performance of the contract as per the Ministry's letter of November 5, 1956, as a case of "force majeure," since both the Corporation and the Ministry are organs of the same State.

(3) The Corporation has failed to comply with the requirements of Article 118, Civil Code of the R.S.F.S.R., since it had failed to take any steps towards elimination of the said obstacles to the performance of the contract (it has not appealed the Ministry's action).

Moreover, the Corporation had failed to inform the Company of the fact that performance of the contract had been prohibited.

Objecting against the complaint, the Corporation made the following points:

(1) Par. 7 of the contract providing for release from liability in case of non-performance contemplated all circumstances beyond the control of the non-performing party, including the denial of export licenses.

(2) The Corporation applied to the Ministry for the proper export license, in accordance with customarily established practice. However, this does not imply that the Corporation undertakes the absolute obligation to secure such licenses, if no such obligation has been expressly stipulated in the contract.

(3) The prohibition by the Ministry made it impossible for the Corporation to perform the contract of July 17, 1956. In this case, such inability to perform could neither be anticipated nor could it be prevented through the efforts of the Corporation. Therefore, in accordance with Article 118 of the Civil Code of the R.S.F.S.R. and also Par. 7 of the said contract, the Corporation must be released from any and all liability towards the Company. In this connection, the Corporation stresses the situation prevailing at the beginning of November, 1956, and created by aggression against Egypt, in view of which conditions the said license was denied to the Corporation and performance of the contract was prohibited.

(4) The Corporation is an economic organization, a legal person and a body autonomous in business transactions. At the same time, pursuant to law, the Corporation is unconditionally subject to the directives of the Ministry which, in accordance with the Constitution of the U.S.S.R., has authority over foreign trade.

(5) Article 119 of the Civil Law Code of the R.S.F.S.R. is not applicable to the present case, since the Ministry's prohibition of performance of the said contract created for the Corporation the impossibility of performance.

(6) The statement by the Company to the effect that the Corporation allegedly had failed to notify the Company of the prohibition against performance of the contract is groundless. The words "Licenses will not be granted" contained in the telegram of November 6, 1956, explained that performance of the contract had been prohibited.

(7) Also groundless is the Company's charge that the Corporation had "unilaterally and illegally" voided the contract. The said contract had ceased to be in force as of November 5, 1956, in accordance with Articles 118 and 129, Par. D of the Civil Code of the R.S.F.S.R.

(8) The Corporation immediately notified the Company of the pertinent events, thus affording the Company the possibility of avoiding damages which might have otherwise been suffered.

Accordingly, the Corporation has requested that the Company's complaint be dismissed on the above grounds.

## REASONS FOR AWARD

As shown by the facts in the case, the dispute between the litigating parties revolves around the question as to whether the Corporation should be released from liability for failure to perform the said contract in view of the Ministry's refusal to issue the licenses applied for and the Ministry's ban against performance of the said contract.

In resolving this question, the Foreign Trade Arbitration Commission to whom the parties by mutual consent had referred the present dispute, was guided by the following considerations:

(1) In accordance with Article 118 of the Civil Code of the R.S.F.S.R. applicable to the present litigation, a party is free from liability for performance of a contract if this results from a cause which could not be prevented by the obligated party. Article 118 of the Civil Code of the R.S.F.S.R. is of a non-mandatory character, that is, it allows the parties to define in their contract the terms under which such release from liability for non-performance should apply.

Paragraph 7 of the contract of July 17, 1956, provides for such release from liability for failure to fulfill the terms of this contract, if such would be caused not only by "*force majeure*" conditions as specified therein (natural disaster, fire, floods, war actions of all types, blockades, strikes aboard ships carrying the merchandise in question, acts or demands on the part of the Government or other authoritative administrative organs of the state under whose flag the pertinent tanker was sailing), but also by any other cause beyond the control of the non-performing party. Such interpretation of Paragraph 7 of the contract of July 17, 1956, is specifically corroborated by the fact that in the text of the contract of July 17, 1956, executed in the English language, the wording of the paragraph dealing with "*force majeure*" conditions was left unchanged in the form of the previous agreements drafted between the parties in 1955, the Russian text of which, signed by both parties, provides in the concluding words of the paragraph dealing with "*force majeure*" for such release from liability if non-performance should result from any cause beyond the control of the liable party.

Denial of the licenses and prohibition of performance of the contract of July 17, 1956, on the part of the Ministry, being absolutely binding upon the Corporation, does in fact constitute such circumstances releasing the latter from liability.

(2) By virtue of Article 19 of the Civil Code of the R.S.F.S.R. and of its own by-laws, the Corporation is a self-accounting economic organization, an independent subject of the law, i.e., a legal person conducting transactions on its own behalf and consummating its own will in the form of legally binding relationships. The Corporation is not an organ of State administration. Therefore, the Company's endeavor to identify the Corporation with the Ministry lacks any foundation.

(3) The Company's allegations that the Corporation had unilaterally dissolved the contract is groundless. According to Article 129 of the Civil Code of the R.S.F.S.R., the contract ceased to exist because of the very fact

of impossibility of performance. Therefore, the contract of July 17, 1956, must be regarded as having ceased to exist as of November 5, 1956, that is, from the date of the Ministry's refusal to grant the pertinent license and its prohibition of performance of the contract.

(4) The Company's argument to the effect that in the present case reference must be made to Article 119, Part I, of the Civil Code of the R.S.F.S.R. and that no objective impossibility to perform the contract existed by which the Corporation might be freed from liability, likewise cannot be taken into consideration. By its letter of November 5, 1956, the Ministry not merely refused issuance of the pertinent licenses, but moreover did generally enjoin the Corporation from implementing the contract of July 17, 1956. Accordingly, the Corporation was not only prevented from supplying fuel oil of Soviet origin as per the contract of July 17, 1956, but also fuel oil of any other country as well. Therefore, there was created with respect to the Corporation an objective impossibility to perform the said contract.

(5) The Company's allegation to the effect that the Corporation allegedly had undertaken an absolute commitment to obtain the pertinent export licenses does not agree with the terms of the contract of July 17, 1956, wherein there are contained not only no provisions for any warranty on the part of the Corporation to obtain such export licenses, but not even any mention of such obligation to obtain such licenses.

(6) Likewise without foundation are the Company's allegations that the Corporation in failing to appeal against the Ministry's actions had failed to fulfill its obligations as per the contract. In considering the factual conditions governing this case, it must be recognized that the Corporation had no grounds for an appeal against the Ministry's refusal to issue the license and its prohibition of an implementation of the contract.

(7) By its telegram of November 6, 1956, the Corporation had notified the Company to the effect that no export license would be granted and that the agreement was voided—which implied a ban against performance of same.

In view of the above considerations, the Foreign Trade Arbitration Commission has decided as follows:

#### OPERATIVE PART OF THE AWARD

(1) The complaint filed by JORDAN INVESTMENTS, LIMITED, an Israeli company, *versus* the SOJUZNEFTEEXPORT Corporation of the U.S.S.R. for damages amounting to U.S. \$2,396,440.69 is hereby dismissed.

(2) The arbitration fee in this shall be fixed at  $\frac{1}{2}$  of 1% of the amount of the claim, i.e., the sum of U.S. \$11,980.80, to be paid by Plaintiff.

The advance sum deposited by Plaintiff at the time of filing of this complaint shall be applied to payment of the above fee to the Foreign Trade Arbitration Commission.

(3) Both parties are hereby directed to pay their own expenses and costs in connection with this action.

This award is final and not subject to appeal.

This operative part of the Award was announced to the parties herein on June 19, 1958.

The present Award, arrived at as above, was drawn up and signed in Moscow on July 3, 1958, in 3 original copies, one of which is to be filed in the archives of the Foreign Trade Arbitration Commission, one to be forwarded to Plaintiff and one to Defendant.

(*signed*) The Umpire: P. Orlovsky

The Arbitrators: M. Nesterov—D. Genkin



# THE UNITED NATIONS ARBITRATION CONVENTION AND UNITED STATES POLICY

BY ALLEN SULTAN

*University of Chicago*

## I

The United Nations Conference on International Commercial Arbitration convened from the 20th of May until the 10th of June, 1958, at the Organization's Headquarters in New York. Early in the general debate, the United States Representative, Mr. Beale, stated that his Government was

aware that it was necessary to improve both the law and the practice of arbitration if it was desired that that institution should play its part properly in the settlement of disputes arising out of international trade.

Consequently, he continued, his Government's participation proved "that the United States realized the full benefit which countries could derive from swift and inexpensive settlement in an atmosphere of good will of private disputes arising out of international trade."<sup>1</sup>

Notwithstanding these comments, considerable doubt seems to exist as to whether the United States will participate in the completed convention. In an attempt to explore this paradoxical situation, this paper shall briefly sketch the development of arbitration as a settlement procedure in private law; outline the genesis of the ECOSOC Convention; review United States policy and practice with respect to the problem; analyze various official, quasi-official, and non-official positions attempting to justify non-participation in the convention; and discuss the desirability of such participation, and its implications on United States foreign policy—including the problem of economic assistance, and, consequently, the effect of non-participation on the American taxpayer.

## II

It has been inferred "from etymology that an arbiter was originally one who had to investigate on the spot."<sup>2</sup> Certainly arbitration as a settlement procedure "to put an end to litigation"<sup>3</sup> appears early in the law of the West. Under Roman law not only could an action for an imposed penalty arise from arbitration,<sup>4</sup> but arbitration could be demanded by a

<sup>1</sup> U.N. Doc. E/Conf. 26/SR. 2, Sept. 12, 1958, p. 8.

<sup>2</sup> W. W. Buckland, *A Text Book of Roman Law* 614, note 13.

<sup>3</sup> Digest, 4.8.1.

<sup>4</sup> *Ibid.* 4.8.2.

defendant in a dispute over possession or quasi-possession of an object.<sup>5</sup> Moreover, under the Roman system of jurisprudence, as today, the arbitration was often predicated upon an agreement that a specific individual resolve the controversy;<sup>6</sup> once he agreed to serve, he was under legal compulsion to do so.<sup>7</sup>

Arbitration was known to both Canon law and old Germanic law. However, with the advent of territorial concepts of sovereignty, endorsed by the Peace of Westphalia of 1648, the newly found power evinced a jealousy of ordinary courts towards the arbitral process. Consequently, its use, to any substantial degree, did not reappear in complete freedom until the 1877 enactment in Germany of the Code of Civil Procedure.<sup>8</sup> In France the arbitral process was limited by Article 1006 of the Code of Civil Procedure; however, a law of December 31, 1925, granted more freedom to the settlement procedure. Indeed, it has been said that "France . . . was the last of the nations to adopt arbitration of an organized commercial nature."<sup>9</sup>

In the common law the arbitral process at first appeared to be still-born. A dictum by Lord Coke in *Vynior's Case* (1609) established the doctrine that a party may countermand an agreement to arbitrate, since "a man cannot by his act make such authority, power, or warrant not countermandable which is by the law and of its nature countermandable."<sup>10</sup> The effect of this doctrine of revocability was at first mitigated by the use of bonds to insure faithful performance;<sup>11</sup> this practice was, however, terminated by the Statute of Fines and Penalties. In 1746, the King's Bench attempted to rationalize the perpetuation of this harsh doctrine with the theory that the arbitration agreement "ousts the jurisdiction of the court."<sup>12</sup> It has been suggested, however, that this jealousy was due to the fact that judicial remuneration was determined by the volume of business before the courts.<sup>13</sup>

<sup>5</sup> Gaius, *Elements of Roman Law* 496. In such a case a *formula arbitraria* is delivered to the *iudex* commanding the defendant to restore or produce the object, or face condemnation in its simple value. This demand by the defendant must be timely (*i.e.*, before he leaves the court of the praetor) and "a subsequent demand will not be granted." (P. 497.)

<sup>6</sup> Digest, 4.8.45: "in an agreement to arbitrate, it is stated that the award shall be made by a certain person, this cannot be extended to others."

<sup>7</sup> Digest, 4.8.11.1, 4.8.11.4; Buckland, *op. cit.* 531: "If parties agreed to accept an arbiter in a dispute, and he accepted the responsibility, *however informally*, and the parties had undertaken to obey the decision, the Praetor would compel the arbitrator to act, apart from certain grounds of excuse."

<sup>8</sup> Ernest G. Lorenzen, "Commercial Arbitration—International and Interstate Aspects," 43 *Yale Law Journal* 721 (1933).

<sup>9</sup> Heinrich Kronstein, "Business Arbitration—Instrument of Private Government," 54 *ibid.* 52 (1944).

<sup>10</sup> Lorenzen, *loc. cit.* 716. For Lord Coke's decision, see 6 K.B. 595, 597 (8 Co. 80a, 81b).

<sup>11</sup> The damages for breach were nominal upon the theory that there is no actual damage in being compelled to face the King's justice. *Ibid.* 717.

<sup>12</sup> *Kill v. Hollister* (1746), 24 K.B. 532 (1 Wills K.B. 129).

<sup>13</sup> Lorenzen, *loc. cit.* 717.

Abuse of discretion breeds corrective legislation; commencing with the year 1698, Parliament attempted to fill the gap with a succession of statutes, and the Arbitration Act of 1889<sup>14</sup> finally led to the complete effectiveness of arbitration agreements.

Since similar legal systems seem to produce similar experiences, the United States reception of the common law doctrines once again placed the burden of satisfying social necessity upon the legislature. At first this was only partially fulfilled, since the early statutes established detailed prerequisites, and since Pennsylvania was the only jurisdiction that validated agreements to arbitrate future as well as present disputes.<sup>15</sup> At this writing, sixteen jurisdictions have not followed Pennsylvania's example.<sup>16</sup>

In contrast to the languor of United States municipal law, by 1945 one authority was able to declare that "the laws of most of the important international trading countries, except the Central and South American, recognize the validity of an agreement relating to . . . arbitration."<sup>17</sup> With the official recognition by the forum of an award made within its jurisdiction, a winning party to an international commercial arbitration often faces the conflict-of-laws problem of enforcement of that award in a foreign jurisdiction where his opponent maintains assets and/or is domiciled.<sup>18</sup>

### III

Multilateral treaties on commercial arbitration began under the patronage of the League of Nations.<sup>19</sup> On September 24, 1923, a Protocol on Arbitration Clauses<sup>20</sup> was opened for signature at Geneva.<sup>21</sup> This agreement, which came into force on July 28, 1924, was ratified by thirteen states,<sup>22</sup> and was subsequently acceded to by sixteen additional sovereign Powers.<sup>23</sup>

<sup>14</sup> 35 & 52 Viet c. 49 (1889).

<sup>15</sup> For Pennsylvania's limitations upon the validity of agreements to arbitrate future disputes, see Lorenzen, *loc. cit.* 719.

<sup>16</sup> See "Commercial Arbitration and the Conflict of Laws," Note, 56 Columbia Law Review 904, at note 11 (1956). At p. 913, the commentator concludes that "It is one of the paradoxes of arbitration law that the forum will use the law of rendition to determine the validity of the award, but will use its own law to judge the enforceability of an executory agreement to arbitrate."

<sup>17</sup> Morris S. Rosenthal, "Arbitration in the Settlement of International Trade Disputes," 11 Law and Contemporary Practice 810 (1945-1946).

<sup>18</sup> This term, in contrast to its usual conflict-of-laws meaning, is herein used to designate awards made in jurisdictions other than those contained in the continental United States and its territories.

<sup>19</sup> Arthur Nussbaum, "Treaties on Commercial Arbitration—A Test of International Private Law Legislation," 56 Harvard Law Review 221 (1942-1943).

<sup>20</sup> Hereinafter referred to as "Protocol."

<sup>21</sup> 27 League of Nations Treaty Series 158 (No. 678); 20 A.J.I.L. Supp. 194 (1926); 2 Hudson, International Legislation 1062 ff. (Wash., D. C., 1931).

<sup>22</sup> Belgium, Brazil, British Empire, France, Germany, Greece, Italy, Japan, Lithuania, Monaco, Panama, Rumania and Uruguay.

<sup>23</sup> In chronological order: Spain, The Netherlands, Finland, Denmark, Norway, Switzerland, Latvia, Salvador, Chile, The Netherlands three territories, Paraguay, Austria, Siam, Poland, New Zealand, and Danzig.

The Protocol recognized the validity of the submission to the jurisdiction of any of the signatories by parties to an arbitration agreement,<sup>24</sup> and proclaimed that arbitration procedure is governed by the will of the parties *and* the law of the country in which it takes place. In addition, each contracting state undertook "to insure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles."<sup>25</sup> This execution was to be initiated upon the application of one of the parties to an award. However, the Protocol also stated that such references would not "prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative."<sup>26</sup>

Shortly after the conclusion of the Protocol, the Convention on the Execution of Foreign Arbitral Awards<sup>27</sup> was opened for signature at Geneva, also under the auspices of the League of Nations. This treaty, initiated by the International Chamber of Commerce,<sup>28</sup> entered into force on July 25, 1929. Legally binding twenty-four states,<sup>29</sup> it supplemented the Protocol, since parties to the later agreement automatically acceded to the former one.<sup>30</sup> This was deemed necessary, since the Geneva Convention applied only to agreements "covered by the Protocol."

Under the Geneva Convention, awards made in the territory *and* between persons subject to the jurisdiction of one of the signatories were to be "enforced in accordance with the rules of procedure of the territory where the award is relied upon."<sup>31</sup> The award, to be valid, had to be final, on subject matter capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon, and not contrary to the public policy or the principles of law of that country.<sup>32</sup> Under

<sup>24</sup> The signatories were given the option to limit this duty of recognition to agreements that are considered "commercial" under their municipal legislation. This option has been maintained in the ECOSOC Convention, U.N. Doc. E/Conf. 26/81 Rev. 1, Art. I (8).

<sup>25</sup> Art. 3. *Loc. cit.* note 21 above.

<sup>26</sup> Art. 4, *ibid.*: "The tribunals of the contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article I applies and including an Arbitration Agreement . . . which is valid . . . and capable of being carried into effect, shall refer the Parties . . . to the decision of the Arbitrators." (Emphasis added.)

<sup>27</sup> 92 League of Nations Treaty Series 302 (No. 2096); 27 A.J.I.L. Supp. 1 (1933); 3 Hudson, *op. cit.* 2153 ff. Hereinafter referred to as "Geneva Convention."

<sup>28</sup> U.N. Doc. E/2822, Annex II, p. 4.

<sup>29</sup> U.N. Doc. E/2704, par. 13. The claim is also made that 30 states ratified the Protocol in comparison to 29 listed in notes 22 and 23 above. According to Hudson, note 27 above, the following states ratified: Austria, Albania, Belgium, Brazil, Great Britain, New Zealand, India, Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Iraq, Italy, Japan, Luxembourg, Monaco, The Netherlands, Norway, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand and Israel (1951). Eleven have signed but not yet ratified: Bolivia, Chile, Latvia, Liechtenstein, Lithuania, Nicaragua, Panama, Paraguay, Peru, Salvador and Uruguay.

<sup>30</sup> Ernest G. Lorenzen, "Commercial Arbitration—Enforcement of Foreign Awards," 45 Yale Law Journal 64 (1935).

<sup>31</sup> Art. 1.

<sup>32</sup> Art. 2 established additional conditions of validity: (a) the award must not have been annulled in the forum of award; (b) the parties must have received due notice and

Article 4 of the Geneva Convention, the burden of proof was placed on the complaining party.

Representing a significant advance in the cause of international commerce, the League of Nations treaties effected important improvements in the laws pertaining to arbitration. On the international level, the Geneva Convention, under its fifth article, absorbed the dozen existing bilateral treaties "in so far as they provided for the enforcement of foreign arbitral awards."<sup>33</sup> On the municipal level, some nations, such as Switzerland, automatically changed their laws when they ratified, while others, like India, enacted implementing legislation. France, Poland, and Sweden incorporated principles of one or both of the treaties into their general law.<sup>34</sup>

Notwithstanding these positive results, many commentators voiced criticism about certain provisions of the agreements. Principal among these were (1) the diversity of citizenship clause;<sup>35</sup> (2) the reservation on commercial matters;<sup>36</sup> and (3) the surrender of the validity of the arbitration agreement to the conflict-of-laws rule of the forum of enforcement ("under the law applicable thereto").<sup>37</sup> Indeed, a 1945 survey indicated that "a slight majority of the cases relating to the Geneva treaties denied the petitioners their protection."<sup>38</sup> Also, one should not overlook the fact that no Western Hemisphere nation participated in or ratified the Geneva Convention, and, of those nations that did, some of the conditions of ratification

are sufficiently complicated to raise grave doubt as to whether or not an arbitration award would be enforced by the courts. Of all of the countries that ratified the Geneva Convention of 1927, England probably had the most liberal laws toward enforcing arbitration awards without retrying the cases in the courts.<sup>39</sup>

These shortcomings forced experts to conclude that "the time is not ripe for the promotion of international arbitration in commercial matters

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representation; (c) the arbitration must have dealt with differences contemplated by the parties; (d) and it must have settled all such differences. Should these conditions not be met, conditional acceptance or postponement of either recognition or enforcement was permitted.

<sup>33</sup> Pieter Sanders, *International Commercial Arbitration* 31 (Paris, 1956).

<sup>34</sup> Nussbaum, *loc. cit.* 222-223; Martin Domke, "On the Enforcement Abroad of American Arbitration Awards," 17 *Law and Contemporary Problems* 547 (1952).

<sup>35</sup> Lorenzen, *loc. cit.* 64 (1935): "The [Geneva] convention extends only to submission agreements falling within the Protocol, which applies to agreements between parties of different contracting states, but not to submission agreements between nationals of the same contracting state for arbitration in some other contracting state."

<sup>36</sup> Note 24 above.

<sup>37</sup> Sanders, *op. cit.* 31: "enforcement [under the Geneva Convention] can only take place after the intervention of a judicial authority who will grant leave for enforcement only after examining the award. This examination . . . is largely similar to [ . . . that] of national arbitral awards," and enforcement of a foreign award may be refused for the same reasons for which a national award may be set aside.

<sup>38</sup> Nussbaum, *loc. cit.* 229-230, and cases cited therein.

<sup>39</sup> Rosenthal, *loc. cit.* 821-822.

by means of multilateral treaties,"<sup>40</sup> to see in their failure "an historic refutation" of the use of multilateral treaties in private international law, and even to view them as a general appraisal of the methods and accomplishments of the League.<sup>41</sup>

At the 1951 Lisbon Congress of the International Chamber of Commerce, the business community criticized the Geneva Convention as "no longer [. . . meeting] modern economic requirements." They appointed a Committee on International Commercial Arbitration which met on March 13, 1953, and subsequently submitted a draft convention to governments through the United Nations for their consideration, with the view that "the adoption of such a convention would greatly increase the efficiency of international commercial arbitration, by insuring a rapid enforcement of arbitral awards rendered in accordance with the will of the parties."<sup>42</sup>

Although the International Chamber of Commerce Committee realized that "a commercial agreement . . . will always be linked up with a given national system of laws," it was nevertheless felt that

the fact that an award settling a dispute arising in connection with this agreement will produce its effects in different countries, makes it essential that it should be enforced in all these countries in the same way. The development of international trade depends on this.

This result, the Committee felt, could only be achieved in the field of conflict of laws by complete recognition of the principle of autonomy of the will.<sup>43</sup> Its draft, therefore, suggested that awards should be recognized when they involve parties subject to the jurisdiction of different states or legal relationships on territories of different states, and that dilatory tactics should not be permitted.<sup>44</sup>

On April 6, 1954, the U.N. Economic and Social Council, at its Seventeenth Session, established "an *ad hoc* committee composed of representatives of eight member states . . . to study the matter . . . and to report its con-

<sup>40</sup> Lorenzen, *loc. cit.* 67. With a touch of prophecy, the Yale Law School professor continued: "The best means . . . at present would appear to be bilateral treaties between countries having the same procedural background . . . as between countries having widely different legal institutions or modes of procedure, useful results would seem to be obtainable only if the treaty include also *rules for arbitral procedure*." (Emphasis added.)

<sup>41</sup> Nussbaum, *loc. cit.* 244.

<sup>42</sup> International Chamber of Commerce, "Enforcement of International Arbitral Awards," Report and Preliminary Draft Convention, p. 6, circulated by the U.N. Secretary General as Doc. E/C. 2/373 (brochure 174); see also Doc. E/C. 2/373/Add. 1, pp. 2, 3.

<sup>43</sup> U.N. Doc. E/C. 2/373, p. 7. The Committee realized that "Legal circles have until recently shown a marked opposition to recognizing autonomy of the will as a valid source of private international law which, being ideally the science of conflict of laws, presupposes that all legal relationships are subject to some national law." Nevertheless, it understood clearly, as did Professor Lorenzen, that "it would be hard to imagine the sense of frontier and of sovereignty disappearing . . . without the simultaneous establishment of international forms of procedure along similar lines." See also U.N. Doc. E/C. 2/373, Add. 1, pp. 2, 3.

<sup>44</sup> This would be realized by the deletion of the last two paragraphs of Art. 2 and all of Art. 8 of the Geneva Convention. Doc. E/C. 2/373 Add. 1, p. 3.

clusions to the Council, submitting . . . if it seems fit, a draft convention."<sup>45</sup> The Committee on the Enforcement of International Arbitral Awards held thirteen meetings from the first to the fifteenth of March, 1955, at the United Nations Headquarters in New York.<sup>46</sup> It was aided in its work by comments on the International Chamber of Commerce draft<sup>47</sup> provided by seven governments<sup>48</sup> in reply to a general request by the Council.<sup>49</sup> In its report, which was made thirteen days after its last meeting, "the Committee concluded it would be desirable to establish a new convention which [. . . would go] further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards."<sup>50</sup> Using the ICC Preliminary Draft "as a working paper for its deliberations," it adopted, at its last meeting, a Draft Convention on the Recognition and Enforcement of Arbitral Awards.<sup>51</sup>

In less than two months, on May 19, 1955, the Nineteenth Council Session was discussing the report of its Committee. The representative of The Netherlands voiced the consensus of the group that

an international arrangement in the form of a convention under which parties to international commercial transactions would be assured of the maximum protection of their interests in a foreign country would undoubtedly be of great value to the development of international trade.<sup>52</sup>

This agreement in principle with the views of the International Chamber of Commerce, expressed at its Lisbon Congress, and of its Committee, motivated the Council to swift action. The next day a Norwegian resolution, amended by Venezuela,<sup>53</sup> requested the Secretary General to circulate the report and draft convention of the Committee to both Member and non-Member states

for their consideration and comments with respect to the text of the convention and the desirability of convening a conference to conclude a convention and also to ascertain whether they are prepared to participate in such a conference.

<sup>45</sup> ECOSOC Res. 520 (XVII), April 6, 1954. The Member States were Australia, Belgium, Ecuador, Egypt, Great Britain, India, Sweden, and the U.S.S.R. The representatives of Great Britain and Pakistan in the Economic and Social Council suggested a six-month interval before the Committee met to enable governments to instruct their representatives. Economic and Social Council, 17th Sess., Official Records, 763rd Meeting, April 6, 1954, paras. 4, 5.

<sup>46</sup> U.N. Doc. E/2704, paras. 4, 16.

<sup>47</sup> U.N. Doc. E/AC 42/1.

<sup>48</sup> Greece, India, Lebanon, Luxembourg, The Philippines, Sweden, and Yugoslavia.

<sup>49</sup> ECOSOC Res. 570 (XIX), May 20, 1955.

<sup>50</sup> U.N. Doc. E/2704, March 28, 1955, par. 14.

<sup>51</sup> *Ibid.*, par. 16. The vote was 7 to 0, with one abstention. The U.S.S.R.'s abstention resulted from its objection to certain articles of the draft. ECOSOC, 19th Sess., Official Records, 852nd Meeting, May 19, 1955, par. 17. For these objections, see *ibid.*, paras. 18-21.

<sup>52</sup> ECOSOC, 19th Sess., Official Records, 852nd Meeting, May 19, 1955, par. 7.

<sup>53</sup> *Ibid.*, paras. 6, 29, 80.

The Secretary General was also asked to transmit them to interested non-governmental organizations, and to "prepare a report containing the[se] comments . . . together with such observations as he may have, for submission to the Council at its twenty-first session."<sup>54</sup>

By July 16, 1956, twenty-eight governments and six non-governmental organizations<sup>55</sup> had replied to the Secretary General's invitation for comment.<sup>56</sup> Twenty-one governments expressed a desire to "conclude a convention on the recognition and enforcement of foreign arbitral awards,"<sup>57</sup> three governments commented on the draft convention without indicating their position regarding a conference,<sup>58</sup> one favored a draft but not a conference,<sup>59</sup> and three, including the United States, indicated their unwillingness to participate in a conference, should one be called.<sup>60</sup>

The Secretary General, in a Memorandum to the Economic and Social Council, suggested that the Council consider the desirability of convening a conference to conclude a convention. Should this be done, he continued, the "conference should use the draft Convention as a working basis, taking into account the comments and suggestions made by Governments and non-governmental organizations."<sup>61</sup> Although wide disagreement existed over its scope, he felt it would afford a working base for the conference since there were no objections "to the draft Convention as a whole."<sup>62</sup>

On May 3, 1956, a Greek, Netherlands, and Norwegian-sponsored resolution, calling for a conference, was before the Twenty-First Session of the Economic and Social Council.<sup>63</sup> By a vote of sixteen to none, with two abstentions,<sup>64</sup> the Council approved the three-Power proposal, thereby call-

<sup>54</sup> ECOSOC Res. 570 (XIX), May 20, 1955. This was basically the action suggested by the Committee. Cf. Res. 570 (XIX) with Doc. E/2704, par. 70.

<sup>55</sup> Chamber of Commerce of the United States, International Chamber of Commerce, International Institute for the Unification of Private Law, International Law Association, Société Belge d'Etudes et d'Expansion, and the Society of Comparative Legislation.

<sup>56</sup> They are compiled by the Secretary General in his report to the Council. U.N. Doc. E/2822, Corr. 1 and Add. 1-6.

<sup>57</sup> Austria, Belgium, Brazil, Ceylon, Denmark, Greece, Hungary, India, Israel, Japan, Norway, The Philippines, Republic of Korea, Sweden, Switzerland, The Netherlands, U.S.S.R. and Yugoslavia. *Ibid.* Great Britain added the condition that it would attend only if a "substantial number" of other governments would also attend. *Ibid.*, Add. 4, par. 2. Czechoslovakia agreed to attend during the Council's discussion of the report, making a total of 22. ECOSOC, 21st Sess., Official Records, 932nd Meeting, May 3, 1956, par. 22. See also General Assembly, 11th Sess., Official Records, Supp. No. 3, par. 395.

<sup>58</sup> China, Egypt, and Mexico.

<sup>59</sup> Lebanon.

<sup>60</sup> Canada, and also the Union of South Africa.

<sup>61</sup> U.N. Doc. E/2840, par. 4.

<sup>62</sup> *Ibid.*: "In their comments some governments [. . . feel] that the draft Convention still contains too many limitations and restrictions, while others have indicated that in their opinion the draft Convention goes too far in some respects."

<sup>63</sup> ECOSOC, 21st Sess., Official Records, 923rd Meeting, May 3, 1956, par. 16.

<sup>64</sup> Canada and the United States.



ing a conference<sup>65</sup> under the authority granted to it by the General Assembly.<sup>66</sup> It also requested the Secretary General

to ask . . . organizations active in the field of international commercial arbitration to submit brief reports on the progress of their activities on this subject, together with any comments or suggestions they may have; [and] to submit to the conference a consolidated report . . . together with such observations as he may have.<sup>67</sup>

In accordance with the suggestion of the Secretary General,<sup>68</sup> endorsed by the representative of Great Britain,<sup>69</sup> the conference was held during the first half of 1958 at United Nations Headquarters in New York. Presided over by H. E. M.C.W.A. Schurmann of The Netherlands, the meetings were attended by representatives of forty-five governments—including the United States and the Soviet Union—as well as observers from three inter-governmental and ten non-governmental organizations.<sup>70</sup> The Conference had been well anticipated by United Nations officials, for it was aided in its work by three documents prepared by the Secretary General and his staff: a note on the commentary to the draft,<sup>71</sup> a Report on the Activities of Non-Governmental and Inter-Governmental Organizations in the Field of International Commercial Arbitration,<sup>72</sup> and Draft Rules of Procedure for the Conference.<sup>73</sup>

In the Final Act, adopting the convention as approved by its Drafting Committee the previous day,<sup>74</sup> the Conference made numerous suggestions. Most significantly, it requested that, in order to further the work that they had just completed, there be a greater "diffusion" of knowledge about arbitration; that there be a "broadening" of facilities for arbitration; that there be an increase in the furnishing of technical assistance to those nations wishing to develop their arbitral legislation and institutions; that

<sup>65</sup> ECOSOC Res. 604 (XXI), May 3, 1956, Part 1.

<sup>66</sup> General Assembly Res. 366 (IV), Dec. 3, 1949.

<sup>67</sup> ECOSOC Res. 604 (XXI), May 3, 1956, Part 2.

<sup>68</sup> U.N. Doc. E/L 715/Add. 1, par. 2.

<sup>69</sup> ECOSOC, 21st Sess., Official Records, 923rd Meeting, May 3, 1956, par. 34.

<sup>70</sup> U.N. Doc. E/CONF.26/9/Rev. 1, paras. 3, 4, 6, 8.

<sup>71</sup> U.N. Doc. E/CONF. 26/2. Among the valuable suggestions contained in the document which were subsequently adopted by the Conference are: (a) that awards made in the forum of enforcement but not considered domestic and, therefore, subject to enforcement in that forum, should be encompassed within the Convention (paras. 3-4); (b) that all foreign awards be recognized, with provision for reciprocity limiting such recognition to other signatories (par. 6); (c) that the procedure of enforcement should not be more onerous than that demanded for domestic awards (par. 8); (d) that full re-examination of an award by the forum of enforcement should not be permitted, particularly if it deals with the substance of the decision (par. 9); (e) that the complete control over the regularity of an award be exercised by competent authorities of the forum of enforcement (par. 16); and (f) that, "If the award satisfies the conditions set forth in the Convention, a request for its enforcement would be granted without requiring a proof that no further opportunities for appeal or annulment proceedings against the award exist in the country where it was rendered." (Par. 18.)

<sup>72</sup> U.N. Doc. E/CONF. 26/4.

<sup>73</sup> U.N. Doc. E/CONF. 26/5.

<sup>74</sup> U.N. Doc. E/CONF. 26/8.

there be an encouragement of regional study groups; and that there be a greater uniformity of national laws, perhaps by means of model statutes.<sup>75</sup>

The advantages of the new convention over its predecessors were outlined by the President of the Conference at the close of the meetings. In Mr. Schurmann's view,

... it was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.<sup>76</sup>

The Report and Final Act of the Committee constituted the eighth agenda item of the Twenty-Seventh Session of the Economic and Social Council, convened in Mexico City on April 27, 1959.

#### IV

The laws of the United States have of late recognized the validity of arbitration agreements.<sup>77</sup> Both the Federal Code<sup>78</sup> and those of a considerable number of States,<sup>79</sup> including the leading commercial State, New York,<sup>80</sup> have extended such recognition to agreements involving future as well as present disputes. In addition, provisions for stay,<sup>81</sup> motions to vacate<sup>82</sup> and to confirm the award<sup>83</sup> are provided for, as are court orders directing the parties to proceed, should one fail to comply with the provisions of the agreement.<sup>84</sup>

The principle determining the enforcement of foreign arbitration awards—as well as American awards for which enforcement is sought abroad—"is derived mainly from the concepts which prevail for the enforcement of foreign judicial decisions," in that it may be based either upon treaty

<sup>75</sup> U.N. Doc. E/CONF. 26/9/Rev. 1. For text of convention and comments thereon, see note by Martin Domke, 53 A.J.I.L. 414 (1959).

<sup>76</sup> U.N. Doc. E/CONF. 26/SB.25, p. 2.

<sup>77</sup> See p. 809 above; *Wilco v. Swan et al.*, 346 U.S. 247, 74 Sup. Ct. 182 (1953); also Stanley Mosk, "The Lawyer and Commercial Arbitration: The Modern Law," 39 A.B.A. Journal 194 (1953).

<sup>78</sup> U. S. Code, Title 9, Sec. 2, July 30, 1947.

<sup>79</sup> Page 809 above. Cf. J. J. Czyzak and C. H. Sullivan, "American Arbitration Law and the United Nations Convention," 13 Arbitration Journal 202 (1958). For the view that "only one third of the jurisdictions yet have relatively adequate modern arbitration laws," see also Herman Walker, Jr., "Commercial Arbitration in United States Treaties," 11 Arbitration Journal 83 (1956).

<sup>80</sup> N.Y. Civil Practice Act, Sec. 1448 (N.Y.C.P.A., Sec. 1448).

<sup>81</sup> *Ibid.*, Sec. 1463; 9 U.S.C., Sec. 3, July 30, 1947.

<sup>82</sup> N.Y.C.P.A., Sec. 1462; 9 U.S.C., Sec. 10, July 30, 1947.

<sup>83</sup> N.Y.C.P.A., Sec. 1461; 9 U.S.C., Sec. 9, July 30, 1947.

<sup>84</sup> N.Y.C.P.A., Sec. 1450; 9 U.S.C., Sec. 4, as amended, Sept. 3, 1954.

relations, or, in its absence, upon "conditions of comity of nations."<sup>85</sup> Inherent in the latter basis is the concept of reciprocity—rendering to foreign awards "the same force as is granted to awards of the country in which enforcement is sought."<sup>86</sup> However, since "the statutes of various countries usually do not provide for the execution of foreign, but only domestic, awards," it is not easy to ascertain "the status of law and practice" in the area.<sup>87</sup>

The leading case in New York<sup>88</sup> seems to establish a very "liberal" rule of policy.

Besides holding as a general rule that, where a foreign tribunal has once assumed jurisdiction and made an award, the decision must not be disturbed by any court, the opinion seems to adopt the view that two American firms, and by logical inference either an American firm and a foreign firm or two foreign firms, may in their mutual dealings free themselves from the restrictions of American law and the jurisdiction of American courts to which they would otherwise have been subject; that the acts of an arbitration tribunal are valid providing they are valid under the law of the "situs" of that tribunal; and that the decision of a foreign tribunal is binding on the parties even if one of the parties did not appear in the proceedings before the tribunal, provided that this was in accordance with the law of the "situs."<sup>89</sup>

Since the acquisition of jurisdiction set up by the New York Court of Appeals as a condition precedent to the enforcement of the award can easily be obtained by a properly drawn arbitration clause,<sup>90</sup> the case does seem to establish a broad rule. However, the case involved the provisions of the British Act of 1889, *the statute of a common law jurisdiction*, and the court narrowed the decision to the particular facts, i.e., the liability of an intentionally absent party to an award made in "due compliance" with the law.<sup>91</sup>

In spite of this phrasing by New York's highest tribunal, the attitude of most State and Federal courts in upholding agreements to arbitrate has been so favorable<sup>92</sup> that some commentators feel that dependence upon such policy by the forum presents a sounder approach than the creation

<sup>85</sup> Domke, *loc. cit.* note 34, p. 546; *Hilton v. Guyot*, 159 U.S. 113, 165 Sup. Ct. 139, 40 L. Ed. 95 (1895). See also Herbert F. Goodrich, *Conflict of Laws*, Secs. 7, 73, 207 (St. Paul, 1949); Elliott E. Cheatham et al., *Conflict of Laws* 342 ff. (Brooklyn, N.Y., 1957), and Sanders, *op. cit.* 211 (per Mr. Domke).

<sup>86</sup> Domke, *loc. cit.* 546.

<sup>87</sup> *Ibid.* 545.

<sup>88</sup> *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706, 73 A.L.R. 1453 (1931).

<sup>89</sup> Kronstein, *loc. cit.* 46-47. See also 56 Columbia Law Review 911: "The language of *Gilbert v. Burnstine* . . . expressed a strong policy of furthering the development of the arbitral procedure by all possible means. . . ."

<sup>90</sup> Rosenthal, *loc. cit.* 823.

<sup>91</sup> The court, per O'Brien, J., held (174 N.E. 709) "that there was an implied submission to the terms of the act itself, and to any rules or procedural machinery adopted by competent authority in aid of its provisions."

<sup>92</sup> *Mittelman v. Spies*, 129 N.Y.S. 2d. 822 (1954); *Farr v. Cia*, 243 F.2d 342 (1957), rehearing denied April 23, 1957, which follows the reasoning of the *Gilbert* case, although it is not controlling on the court.

of international obligations.<sup>93</sup> Such dependence, however, does not guarantee against the uncertainty of decision in a hitherto untested forum. In addition, the ever-present danger that this present policy may be reversed is intensified in this instance; for such liberality on the part of the courts may, when viewed with respect to recent bilateral agreements discussed below, come to be considered an encroachment upon the President's control of international relations,<sup>94</sup> or, perhaps, upon an area of Federal jurisdiction.<sup>95</sup> Since private international commerce can best flourish in the atmosphere of certainty and predictability created by binding international agreements, dependence upon the policy of the forum should, at best, constitute but a secondary guarantee that valid legal contract obligations will be respected.

A second "principle" often directed against United States participation in the United Nations Convention is that of the separation of State and Federal judicial authority inherent in our Federal system. Thus, the United States representative in the Nineteenth Session of the Economic and Social Council (Mr. Hotchkis), while voicing his Government's approval of arbitration as the "most effective and economical means of deciding international trade disputes,"<sup>96</sup> said that the United States would abstain from voting for the resolution requesting the circulation of the draft convention.<sup>97</sup> He added that, although his Government was

desirous of promoting the effectiveness of international arbitration [..] it was unlikely to participate in an international conference in view of its long-standing position in such matters, based in part upon the relationship between the Federal Government and the states.<sup>98</sup>

This position was reiterated a year later when the Council decided to assemble a conference.<sup>99</sup>

The defect in this position is obvious in the light of Federal Constitutional authority over foreign commerce. Nevertheless, some commentators have wrongly suggested that the United States "could adhere to the convention on a limited basis by recognizing its commitment to arbitration cognizable under the Federal [Arbitration] Act."<sup>100</sup> Notwithstanding the phrasing of Mr. Chief Justice John Marshall in the decision of *Gibbons v. Ogden*—the principal "commerce clause" case—which may lead to this

<sup>93</sup> Domke, *loc. cit.* 547-548; Rosenthal, *loc. cit.* 823: "The Gilbert case and subsequent cases which have followed it have probably done more within the United States for the enforcement of arbitration awards rendered by foreign arbitration tribunals than the Geneva Convention of 1927 did for the states which ratified it." See also Martin Domke, "Enforcement of Foreign Arbitration Awards in the United States," 13 *Arbitration Journal* 94-97 (1958).

<sup>94</sup> *U. S. v. Pink*, 315 U.S. 203, 62 Sup. Ct. 552, 86 L.Ed. 796 (1942).

<sup>95</sup> *Missouri v. Holland*, 252 U.S. 416, 40 Sup. Ct. 382, 64 L.Ed. 641 (1920).

<sup>96</sup> ECOSOC, 19th Sess., Official Records, 852nd Meeting, May 19, 1955, par. 12.

<sup>97</sup> *Ibid.*, par. 13.

<sup>98</sup> *Ibid.*, par. 12, italics added. Canada followed suit, holding that, being a federal state, "commercial arbitration was within the jurisdiction of the provincial courts." *Ibid.*, par. 48.

<sup>99</sup> ECOSOC, 21st Sess., Official Records, 923rd Meeting, May 8, 1956, par. 30.

<sup>100</sup> Czyzak and Sullivan, *loc. cit.* 203.

conclusion,<sup>101</sup> subsequent leading decisions clearly indicate that "it is the effect upon commerce . . . which is the criterion" when one determines the reach of the Federal authority over interstate and foreign commerce.<sup>102</sup> Consequently, one is disposed to agree with Professor Quincy Wright who maintains the more accurate conclusion to be: "a treaty to enforce international commercial arbitration awards would directly concern the conditions of foreign commerce, entirely under federal control."<sup>103</sup>

A further difficulty deterring United States participation, it has been argued, is the creation of "obligations that may be inconsistent with particular details of state law or judicial procedure,"<sup>104</sup> or that the United States "lacks a sufficient domestic legal basis in the arbitral statutes of the various States of the Union for an advanced international convention."<sup>105</sup> However, Article XI of the United Nations Convention provides special conditions for federal or non-unitary states, whereby the federal authority's obligation extends in this respect only to the favorable recommendation of the articles of the convention to the "appropriate authorities of constituent states . . . at the earliest possible moment."<sup>106</sup> Indeed, this provision is not unknown to United States authorities; similar stipulations had been incorporated into many of its bilateral agreements to be discussed below. In fact, some, going further, advance full faith and credit to the foreign award. Given this knowledge, the United States position in the Nineteenth and Twenty-First Sessions of the Economic and Social Council appears to be rather disconcerting.

A final reason that has been advanced against participation in the multi-lateral agreement is the protection of the American businessman. This argument can be formulated in the following manner: The American businessman, usually with the advice and/or active participation of his attorney, enters into contractual relations with a foreign party. Incorporated in the agreement is a clause for the arbitration of some or all subsequent disputes, that may develop under the terms of the contract—again, probably with the advice and/or active participation of counsel. "Protection" is then demanded for the American businessman faced with a subse-

<sup>101</sup> 9 Wheat. 1, 6 L. Ed. 23 (1824): "It is obvious, that the government of the Union, in the exercise of its express powers . . . of regulating commerce with foreign nations . . . may use means that may also be employed by a State, in the exercise of its acknowledged powers. . . ."

<sup>102</sup> National Labor Relations Board *v.* Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893 (1937): "It is a familiar principle that acts which directly burden or obstruct . . . foreign commerce, or its free flow, are within the reach of congressional power . . ." (per Mr. Chief Justice Hughes). See also his decision in Santa Cruz Fruit Packing Co. *v.* National Labor Relations Board, 303 U.S. 453, 58 Sup. Ct. 657 (1938): "The power of Congress extends . . . to the protection of . . . interstate commerce from burdens, obstructions, and interruptions, whatever may be their source."

<sup>103</sup> Quincy Wright, "Arbitration as a Symbol of Internationalism," International Trade Arbitration 10 (New York, 1958).

<sup>104</sup> Czyzak and Sullivan, *loc. cit.* 202-203.

<sup>105</sup> Domke, note in 53 A.J.L.L. 419 (1959).

<sup>106</sup> U.N. Doc. E/CONF. 26/81/Rev. 1.

quent valid award against him. It was a situation similar in principle which led Judge Learned Hand to remark that:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid.<sup>107</sup>

Notwithstanding these arguments, the decision of the United States is not to sign the United Nations Convention. This attitude is in accord with its policy of non-participation in multilateral agreements of this nature. It did not sign either of the League treaties or any of the three concluded by Western Hemisphere nations.<sup>108</sup> However, notwithstanding statements to the contrary,<sup>109</sup> the United States delegate to the Nineteenth Session of the Council correctly stated that his Government had entered bilateral treaties containing enforcement provisions.<sup>110</sup> Recent study shows that such provisions occur in fourteen treaties signed to date.<sup>111</sup>

Although the treaties leave the problem of arbitrability to be decided under the laws of the forum of the award, they all demand that diversity of nationality—not domicile or residence—exist between the parties.<sup>112</sup> This condition satisfied, the scope of obligation undertaken by the signatories varies so as to suggest an increasingly liberal policy by the United States towards nations whose legal standards are comparable to its own, regardless of whether they adhere to the "civil" or "common law" pattern.<sup>113</sup>

To date, the agreements, which are contained in general treaties of friendship commerce and navigation, seem to fall into four categories. The first type, concluded with China in 1946, does little more than follow the League's Protocol in recognizing the validity of arbitration, and lacks a rule on the matter of foreign enforcement.<sup>114</sup> The first treaty to establish such a rule, and there a very limited one, was the 1950 treaty with

<sup>107</sup> *American Almond Products Co. v. Consolidated Pecan Sales Co. Inc.*, 144 F. 2d. 448, 451.

<sup>108</sup> Domke, *loc. cit.* 546-547. The Western Hemisphere treaties are the Montevideo Treaty of International Procedural Law, Feb. 12, 1889; Code of International Private Law, Feb. 20, 1928; and the Treaty of International Procedural Law, March 19, 1940.

<sup>109</sup> Domke, *loc. cit.* 540. When the author wrote in 1952, treaties had been concluded with China (1946), Ireland (1950), Colombia, Denmark, Greece, Israel, and Italy (all 1951). See S. A. Bayitch, "Treaty Law of Private Arbitration," 10 *Arbitration Journal* 190, note 5 (1955).

<sup>110</sup> ECOSOC, 19th Sess., Official Records, 852nd Meeting, May 19, 1955, par. 12. Also Walker, *loc. cit.* 68-69.

<sup>111</sup> They are with China, Colombia, Denmark, Federal Republic of Germany, Greece, Haiti, Ireland, Iran, Israel, Italy, Japan, Korea, The Netherlands and Nicaragua. See also Bayitch, *loc. cit.* 190, note 5.

<sup>112</sup> Bayitch, *loc. cit.* 139.

<sup>113</sup> *Cf.* treaties with Haiti and Iran (1955), Korea and Nicaragua (1956), Japan (1953) and Germany (1954). Walker, *loc. cit.* 72, note 13; p. 73, notes 16 and 19.

<sup>114</sup> Department of State, *Treaties and Other International Acts (T.I.A.S.)*, No. 1871, Art. VI, par. 4, Nov. 4, 1946. See also Bayitch, *loc. cit.* 188; Walker, *loc. cit.* 70-71.

Ireland, which provides that the forum of enforcement may not refuse enforcement because the arbitration was held abroad, or because one or more of the arbitrators are not nationals of that forum.<sup>115</sup> Prohibition of these defenses represents the extent of commitment in this area in subsequent treaties with Colombia,<sup>116</sup> Denmark,<sup>117</sup> Haiti,<sup>118</sup> Israel,<sup>119</sup> Italy,<sup>120</sup> Korea,<sup>121</sup> and Nicaragua.<sup>122</sup> It also appears—in condensed form—in a Treaty of Amity, Economic Relations and Consular Rights signed with Iran.<sup>123</sup>

Of a far greater significance is the formulation which presently appears in treaties with Germany,<sup>124</sup> Greece,<sup>125</sup> and Japan.<sup>126</sup> It grants full faith and credit<sup>127</sup> in the forum of enforcement to awards rendered conclusive in enforcement proceedings in the forum of the award. There are two general reservations, however: that such enforceability should not be contrary to the public policy of the forum of enforcement, and that awards rendered “outside the United States of America [. . . shall receive] the same measure of recognition” in the forum of enforcement as an award rendered in a sister state.<sup>128</sup>

The latest development forms part of a 1956 pact with The Netherlands in that it grants a *quid pro quo* to the Dutch: in exchange for the uncertainty that is inherent in our Federal system, they are extended the protections of the Geneva Convention.<sup>129</sup> Since Article I (e) of that convention established the public policy limitation,<sup>130</sup> and since common-law courts will always consider such a defense, it remains inherently part of the treaty. Indeed, one can argue with candor that it should rightly so persist.

It has correctly been stated that the approach of this latest agreement “is the most positive formulation yet appearing in any treaty entered into by the United States.”<sup>131</sup> Moreover, the United States created for itself the

<sup>115</sup> T.I.A.S., No. 2155, Jan. 21, 1950.

<sup>116</sup> See Walker, *loc. cit.* 71-72.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> T.I.A.S., No. 2948, Art. V (2), Aug. 23, 1951.

<sup>120</sup> Supplementary Agreement of 1951, Art. VI: Walker, *loc. cit.* 72, note 13.

<sup>121</sup> T.I.A.S., No. 3947, Art. V (2), Nov. 28, 1956.

<sup>122</sup> T.I.A.S., No. 4024, Art. V (2), Jan. 21, 1956.

<sup>123</sup> Walker, *loc. cit.* 73.

<sup>124</sup> T.I.A.S., No. 3593, Art. VI (2), Oct. 29, 1954.

<sup>125</sup> T.I.A.S., No. 3057, Art. VI (2), Aug. 3/Dec. 26, 1951.

<sup>126</sup> T.I.A.S., No. 2863, Art. IV (2), April 2, 1953.

<sup>127</sup> The term is used in the conflict-of-laws sense, and not the “non-technical” use of the term in the 1946 treaty with the Republic of China. See Bayitch, *loc. cit.* 194, note 18.

<sup>128</sup> Walker, *loc. cit.* 72-73; Bayitch, *loc. cit.* 193, and note 14: “It may be added at this point that this provision applies to state as well as federal courts, the latter having concurrent jurisdiction in matters of treaty law, provided other jurisdictional requirements are met.”

<sup>129</sup> T.I.A.S., No. 3942, Art. V 2b (2), March 27, 1956: “as regards enforcement in the Kingdom of the Netherlands, such awards shall be dealt with in the same way as awards referred to in the Convention . . . concluded at Geneva on September 26, 1927.”

<sup>130</sup> 3 Hudson, *op. cit.* 2156.

<sup>131</sup> Walker, *loc. cit.* 73.

advantage of more favorable treatment should the other party to a treaty adhere to the more liberal ECOSOC Convention and, therefore, be bound by its legal succession to the Geneva Convention.<sup>132</sup>

# V

Arbitration has fought a long and difficult battle to gain recognition in the law. Commentators followed the courts in active hostility toward such recognition.<sup>133</sup> Multilateral attempts at recognition and enforcement of foreign awards under the League of Nations proved to be only half-inspiring at best. A new attempt to satisfy this pressing need of international commerce is met with mixed attitudes.<sup>134</sup>

The United States, one of a small minority of nations that refuses to support the convention now that it has become a reality, is supported by commentators who argue that participation in a multilateral treaty is not desirable, due to the limitation of both the Federal system and the *procedural restrictions of Federal law*.<sup>135</sup> To substantiate their position,<sup>136</sup> they point to liberal court attitudes<sup>137</sup> and existing bilateral agreements as a superior approach to participation in a convention imbued with "Continental European conceptions."<sup>138</sup> Fearing the creation "of special privileges for the alien," they protest against the rewriting of domestic policy.<sup>139</sup> They argue that the "progressive spread of bilateral treaties . . . can in time cumulate into a considerable multinational total."<sup>140</sup>

<sup>132</sup> U.N. Doc. E/CONF. 26/81/Rev. 1, Art. VII (2). For the view that the friendship, commerce and navigation treaties have not produced their intended results, see the remarks of Professor Richard N. Gardner, Regional Meeting, American Society of International Law, U.N. Headquarters, March 4, 1959.

<sup>133</sup> Kronstein, *loc. cit.* 68. The author concludes that modern arbitration is "an instrument of cartels and monopolistic trade associations," as well as being "incompatible with general concepts of positive law," and that it attacks "in principle, the practical mandates of the Constitution." See also Philip G. Phillips, "The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding," 46 *Harvard Law Review* 1258 (1933).

<sup>134</sup> In its comments on the ECOSOC draft, Great Britain claimed that "there appears . . . to be no demand from commercial interests in the United Kingdom for the conclusion of a new Convention. [ . . . It is not ] a pressing problem and existing arrangements appear to be working reasonably well." U.N. Doc. E/2822/Add. 4, p. 3.

<sup>135</sup> Notwithstanding instances where these problems have been rectified by subsequent legislation, thereby implementing treaty obligations (see note 84 above). This point is still advanced as a basis for non-participation in the ECOSOC Convention. Walker, *loc. cit.* 83; Czyzak and Sullivan, *loc. cit.* 202-203.

<sup>136</sup> Domke, *loc. cit.* 547-548.

<sup>137</sup> *Ibid.* 550, 552, citing recent New York cases where "foreign arbitration awards were recognized as valid titles and summarily enforced": (1) *Condeshove-Kalergi v. Dueterle*, 36 N.Y.S. 2d 318 (1942); (2) *Stern v. Friedman*, N.Y.L.J., Feb. 21, 1945, p. 691, col. 7 (N. Y. City Ct.); (3) *H. P. Drewry, S.A.R.L. v. Onassia*, 179 Misc. 578, 39 N.Y.S. 2d 688; *aff'd*, 266 App. Div. 292, 42 N.Y.S. 2d 74; *aff'd* 291 N.Y. 779, 53 N.E. 2d 243 (1944).

<sup>138</sup> Domke, *loc. cit.* 547, 548.

<sup>139</sup> Walker, *loc. cit.* 83.

<sup>140</sup> *Ibid.* 84.



In essence they argue for slowness, for in slowness there is safety; for the go-it-alone philosophy when a valid alternative exists, because international co-operation may, at times, prove inconvenient; and for maintaining existing methods because new approaches demand new thinking. Meanwhile, the official United States position which, by pleading Federalism, sets an example for our northern neighbor,<sup>141</sup> is contradicted by official practice when such practice is viewed with respect to accommodating provisions of the convention.

It is felt that such defenses would be devoid of much substance if there existed a uniform law on arbitration procedure. Perhaps it was this realization, as well as their familiarization with other aspects of the problem, that prompted the *ad hoc* Committee to call this need to the Council's attention.<sup>142</sup> Certainly the Secretary General, in his Memorandum of March 20, 1955, to the Council, recognized that should the convention be signed, arbitration would persist as an unresolved problem of international commerce.<sup>143</sup> Consequently, assuming the success of the ECOSOC Convention, the next task is the realization of a "convention laying down general rules of procedure to be observed in *all* arbitration proceedings . . . [Its] adoption by states would *ipso facto* eliminate many of the procedural devices commonly resorted to for the purpose of resisting applications for an enforcement order."<sup>144</sup>

Pursuant to this need, the International Law Commission prepared a Draft on Arbitral Procedure at its Fifth Session; by June 15, 1956, fourteen governments had responded<sup>145</sup> to an Assembly request by offering comments on the Commission's text.<sup>146</sup> A subsequent draft by the Commission<sup>147</sup> was discussed by the Thirteenth General Assembly from the 2nd

<sup>141</sup> Canada joined the United States in abstaining from the vote convening the 1958 Conference: "Canada was a federal State, and commercial arbitration was within the jurisdiction of the provincial Courts. The federal Government, therefore, could not support the holding of a conference on its own initiative and would probably be unable to participate in it." See ECOSOC, 21st Sess., Official Records, 923rd Meeting, May 3, 1956, par. 48.

<sup>142</sup> U.N. Doc. E/2704, par. 69, and note 2 thereto.

<sup>143</sup> U.N. Doc. E/2840, par. 5: "The recognition of foreign arbitral awards is but an aspect of international commercial arbitration [ . . . The] development of arbitration as a means to settle international commercial disputes between persons has been hampered mainly by the existing differences in the legislation of various countries on the subject of arbitration procedures and the effect of arbitration, the lack of uniformity in the rules of arbitral tribunals, and the complications deriving from the conflict of laws in this area." To buttress his position, he called the Council's attention to no less than eight organizations and two United Nations Commissions interested in developing uniform arbitration laws. In addition, member governments and non-governmental organizations have been sensitive to the problem.

<sup>144</sup> U.N. Doc. E/2822, A II, p. 3 (emphasis added).

<sup>145</sup> General Assembly, 11th Sess., Official Records, Supp. No. 1, p. 97.

<sup>146</sup> General Assembly Res. 797 (VIII), Dec. 7, 1953. Subsequently the Sixth Committee (Legal) of the General Assembly discussed and commented upon the Draft at its Eighth and Tenth Sessions.

<sup>147</sup> General Assembly, 13th Sess., Official Records, Supp. No. 9 (A/3859), par. 22; 53 A.J.I.L. 239 (1959).

to the 23rd of October, 1958.<sup>148</sup> Over strong opposition from the Soviet bloc of Members,<sup>149</sup> the Assembly directed, *inter alia*, that the draft be brought "to the attention of Member States for their consideration and use."<sup>150</sup> It also invited governments to send their comments on the draft to the Secretary General, with the view to facilitating future United Nations review of the problem.<sup>151</sup>

It is hoped that these rules will "inspire States in the drawing up of provisions for inclusion in . . . special arbitration agreements."<sup>152</sup> Consequently, there exists considerable expectation that the two conventions, which will be mutually beneficial,<sup>153</sup> and will lead to the internationalization of arbitration proceedings and the rules of procedure applicable thereto,

would tend to remove arbitral awards from the sphere of national laws on procedure—usually far too rigid to meet the wishes of international commerce—and to place them . . . under an international organ concerned with verifying their *prima facie* validity.<sup>154</sup>

It has recently been pointed out that the goals of international commercial arbitration do not vary from the general objectives of society—prosperity, security, human freedom, and justice.<sup>155</sup> In furthering these objectives and, consequently, the trade that is predicated upon them, we are strengthening our own system of free economy, mitigating the need for economic assistance from public sources, furthering our national policy of full co-operation and participation in United Nations activities whenever possible, and fostering our traditional reliance upon arbitration as a practical means for the peaceful settlement of disputes.<sup>156</sup> It is, perhaps, for these reasons that some American businessmen have expressed the desire that the ECOSOC Convention be recommended "to nations throughout the world and quickly ratified by most."<sup>157</sup>

[Certainly], the advancement of international economic relations is of greater importance now than ever before in human history. International economic and social cooperation has its world-wide framework today in article 55 of the Charter.<sup>158</sup>

<sup>148</sup> General Assembly, 13th Sess., 6th Committee, Official Records, 554th–567th Meetings, Oct. 2–23, 1958.

<sup>149</sup> See, for example, General Assembly, 13th Sess., 6th Committee, Official Records, 554th Meeting, Oct. 2, 1958, pars. 8–9; 559th Meeting, Oct. 13, 1958, par. 13; U.K. position at 555th Meeting, Oct. 6, 1958, par. 3; U. S. position, 559th Meeting, Oct. 13, 1958.

<sup>150</sup> General Assembly Res. 1262 (XIII), Nov. 14, 1958.

<sup>151</sup> U.N. Doc. A/3983, par. 2.

<sup>152</sup> U.N. Doc. E/2822, A II, pp. 4–5.

<sup>153</sup> See comments of the International Institute for the Unification of Private Law. U.N. Doc. E/2822, A II.

<sup>154</sup> *Ibid.*, A II, pp. 4–5.

<sup>155</sup> Richard N. Gardner, "Economic and Political Implications of International Commercial Arbitration," *International Trade Arbitration*, *op. cit.* 15.

<sup>156</sup> Wright, *loc. cit.* 14.

<sup>157</sup> Morris S. Rosenthal, "A Businessman Looks at Arbitration," *International Trade Arbitration*, *op. cit.* 31.

<sup>158</sup> Rosenthal, *loc. cit.* 45.

There may come a day, envisioned by some, when international contracts contributing to economic development will have to be negotiated through international organizations which will be responsible for their administration.<sup>159</sup> Until then, working with the machinery which is presently available, we must realize that the non-recognition of arbitration awards, when placed in the hands of the well-established principle of reciprocity, becomes a double-edged sword, capable of destroying as well as "protecting" the interests of United States nationals, as well as constituting an impediment to our diplomatic objectives of enhanced private trade and investment abroad.<sup>160</sup>

<sup>159</sup> See, for example, the remarks of Professor Philip C. Jessup, Regional Meeting, American Society of International Law, U.N. Headquarters, March 4, 1959. See also James O. Murdock, "International Law for Individuals through Arbitration," 11 *Arbitration Journal* 41 (1956): "there will gradually develop a case law basis for International Private Law [. . . which] will grant to the individual 'direct, effective remedies in international forums of first instance.'"

<sup>160</sup> See Hearings Before Ways and Means Committee, House of Representatives, 86th Cong., 1st Sess., on H.B. 5, "A Bill to Amend the Internal Revenue Code of 1954 to Encourage Private Investment Abroad and Thereby Promote American Industry and Reduce Government Expenditures for Foreign Economic Assistance" (Wash., D.C., 1959). Note, generally, the remarks of Hon. Henry Kearns, Asst. Secretary of Commerce for International Affairs, at pp. 9-13, and specifically those of Mr. Donald H. Gleason, National Association of Manufacturers: "it is clearly a matter of national self-interest to remove barriers to the most efficient conduct of American business operations abroad." (p. 326); of Hon. C. Douglas Dillon, Under Secretary of State: "We must provide additional impetus for the economic development process. Governmental resources and capabilities are of necessity limited, so new actions to stimulate the flow of private capital . . . have become an urgent necessity." (p. 79); and of Prof. Ezra Solomon, University of Chicago: "The problem of increasing private U.S. investment abroad has been explored extensively since World War II. Few avenues of national policy have had the unanimous support of the broad range of opinion which favors an increase in private foreign investment. The wide variety of economic, political, and human benefits expected from such an increase have already been well documented . . ." (p. 291).

## THE ACT OF STATE DOCTRINE

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It is proposed in the present paper to examine the act of state doctrine enunciated in the *dictum* of Chief Justice Fuller in *Underhill v. Hernandez*<sup>1</sup> that

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.<sup>2</sup>

This classic statement of a doctrine, that has elsewhere been termed the "rule of decision" principle,<sup>3</sup> will be examined from the point of view of its origins, its relation to the principle of sovereign immunity, its validity as a rule of international law, and the extent and scope of the exceptions to the rule, both those presently recognized and those which, it is submitted, would be a desirable improvement of this branch of the law.

The meaning of "act of state" in the following observations will include not only an executive or administrative exercise of sovereign power by an independent state, or by its duly authorized agents or officers,<sup>4</sup> but also legislative and administrative acts such as a statute, decree, or order.<sup>5</sup>

The writer is limiting his analysis to acts of state which purport to take effect within the jurisdiction of the state from which they emanate,<sup>6</sup> and it is assumed that the foreign state is one that has been recognized by the state of the forum.

The problem examined here may arise in a number of forms. A foreign decree confiscating property within the jurisdiction of the foreign state is brought into issue by a private party, who bases the validity of his title upon the purchase from the foreign government; or the same decree may be challenged by the original owner of the property as being unconstitutional according to the foreign law, contrary to international law, or so immoral as to preclude its enforcement by the court of the forum. Particular emphasis will be given to the question whether the doctrine prop-

<sup>1</sup> 168 U. S. 250 (1897).

<sup>2</sup> *Ibid.* at 252.

<sup>3</sup> See the useful monograph of E. D. Re, *Foreign Confiscations*, collecting all the relevant Anglo-American decisions.

<sup>4</sup> Halsbury (Hailsham), Vol. XXVI, p. 246.

<sup>5</sup> The writer is here accepting the definition proposed by Dr. F. A. Mann in his most helpful article "The Sacrosanctity of Foreign Acts of State," 59 *Law Quarterly Rev.* 42, 155 (1943).

<sup>6</sup> Thus no consideration will be given to the extraterritorial effect to be allowed to such acts of state.

erly applies when D-1 is sovereign or agent of a sovereign and sells property to D-2 who does not himself enjoy any personal immunity for his acts. Is the court bound by the act of state doctrine to refrain from inquiring into the question of the validity of the foreign act? May it go behind the foreign statute to examine its constitutionality or its formal validity? Is there a blanket rule preventing such inquiry, or is this judicial restraint based on well-established rules of private international law, which provide that the law of the place governing the act is to be applied, and if lawful by that law, then it will be applied by the forum? It is the burden of this argument that in many situations there is room for judicial review of such foreign acts of state and that the traditional deference with which they are treated in the *dicta* of judges is warranted by neither the dictates of reason nor the requirements of public policy.

It is helpful at the outset to attempt to trace the origins of the doctrine, for such a search may throw some light on the meaning and validity of its present formulation. Some distinction must be drawn between the English and American cases as, in spite of the process of action and interaction of one upon the other, the latter have gone further toward a strict interpretation which many consider out of harmony with modern conditions of international life.

It has been suggested<sup>7</sup> that, when applied in the leading case of *Luther v. Sagor*,<sup>8</sup> the doctrine had no higher or more direct authority than a number of decisions of the United States Supreme Court. But there are earlier English decisions which appear to have exercised an important influence in this field.

In 1673 Lord Nottingham granted a permanent injunction to prevent an action against a Danish citizen who had seized goods of the plaintiffs on the ground that they were infringing patent rights granted him by the King of Denmark. The Lord Chancellor said:

Now after all this to send it to a trial at law, when either the court must pretend to judge the validity of the King's letters patent in Denmark or of the exposition and meaning of the articles of peace, or that a common jury should try whether the English have a right to trade in Iceland is monstrous and absurd.<sup>9</sup>

Already at this stage, therefore, the courts had the gravest misgivings as to the propriety of an action against a foreigner who maintained a defense based on a foreign act of state.<sup>10</sup>

The case of *Duke of Brunswick v. King of Hanover*<sup>11</sup> involved the additional factor of the impleading of a foreign sovereign and certainly had an

<sup>7</sup> K. Lipstein, "Recognition of Foreign Governments and the Application of Foreign Laws," 35 Grotius Society Transactions 157, 161 (1949).

<sup>8</sup>[1921] 3 K.B. 532.

<sup>9</sup>Blads Case (1673), 3 Swan 603, 604 (1674).

<sup>10</sup> Admittedly, the additional complication of a treaty between England and Denmark, the interpretation of which was involved in the case, makes the decision less clear than would otherwise be the case.

<sup>11</sup> 6 Beav. 1 (1844), aff'd 2 H.L. Cas. 1 (1848).

important influence on later United States decisions. The appellant, formerly the reigning Duke of Brunswick [Charles] by an instrument executed in 1833 by King William the Fourth and William, Duke of Brunswick, was placed under the guardianship of the Duke of Cambridge, then Viceroy of Hanover. The instrument, in the German language and confirmed by the German Diet, deprived the appellant of the management of his property and placed him under the guardianship of the respondent, the reigning King of Hanover. The appellant claimed that the instrument of 1833 should be declared null and void and that the respondent be accountable to him. The appeal was dismissed by the House of Lords. It is not, however, altogether clear whether the decision was based on the fact that the respondent enjoyed personal immunity or on the principle that the validity of a foreign act of state may not be inquired into by English courts, in which case the decision would have been the same if the respondent had been a mere private citizen. In the words of Lord Cottenham,

A foreign sovereign coming into this country cannot be responsible for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution or not, the courts of this country cannot sit in judgment upon an act of a foreign Sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as a Sovereign.<sup>12</sup>

and further:

It is true, the bill states that the instrument was contrary to the laws of Hanover and Brunswick but, notwithstanding that it is so stated, still if it is a sovereign act, then, whether it be according to law or not according to law we cannot inquire into it.<sup>13</sup>

While in the lower court the decision of Lord Langdale was based on the personal immunity of the sovereign;<sup>14</sup> in the House of Lords it is possible that the case would have been affirmed equally on the ground that the acts as well as the person of the foreign sovereign are entitled to the same immunity.<sup>15</sup> Whatever the true meaning of the case, it is undoubted that it exercised a great influence upon the minds of judges in a number of classical American decisions, to which it is now necessary to turn.

<sup>12</sup> 2 H.L. Cas. 1, 17 (1848).

<sup>13</sup> *Ibid.* at 21.

<sup>14</sup> 6 Beav. 1. See, *e.g.*, at 50-51: "It appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns but that there are reasons for the immunities of sovereign princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors . . . I think that . . . a sovereign prince resident in the dominions of another, is exempt from the jurisdiction of the Courts there."

<sup>15</sup> Such, at least, was the understanding of Judge Wallace in *Underhill v. Hernandez*, 65 Fed. 577 (2d Cir. 1895), who, relying heavily on the Duke of Brunswick case, stated: "The decision [in the Duke of Brunswick case] was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad." *Ibid.* at 580.

In *Waters v. Collot*,<sup>16</sup> an action in tort against the former Governor of Guadeloupe for acts done in his official capacity, the Attorney General of the United States made the following remarks concerning the merits of the defendant's position, *i.e.*, his claim to immunity from suit:

I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation.<sup>17</sup>

With this case may be compared the *McLeod* case,<sup>18</sup> regarding which Secretary of State Webster finally agreed with the British authorities that a British soldier acting on behalf of his government could not be made personally liable for his participation in activities that resulted in the killing of an American citizen. The nature of this principle is unexceptionable and has little to do with the present problem, for the considerations at issue are of a very different nature. In the one case, the agent of the government is being sued for acts done within his official capacity, in the other the act of state is pleaded by a private defendant or is employed by the plaintiff to enforce a right created by the act of state. In the latter case the immunity pleaded is very much greater than that in the former, for it requires that the act itself be treated as immune from inquiry by the court of the forum, not merely that the actor be excluded from personal liability.

The principle of the act of state doctrine in its modern form was stated in the early case of *Hatch v. Baez*, when Mr. Justice Gilbert wrote:

We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory.<sup>19</sup>

The statement was much wider than the case required, for the acts complained of were done by the defendant in his official capacity as President of the Republic of San Domingo, and it would have sufficed to have based the decision on the personal immunity enjoyed by officials of a foreign government for acts done within the scope of their employment. This aspect of the decision was revealed by the concluding words of the court:

But the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof is essential to preserve the peace and harmony of nations and has the sanction of the most approved writers on international law.<sup>20</sup>

<sup>16</sup> 2 Dall. 247 (U.S., 1796).

<sup>17</sup> Bradford, Att'y Gen., June 16, 1794, 1 Ops. Att'y Gen. 45; 2 Moore, International Law Digest 23 (1906).

<sup>18</sup> *People v. McLeod*, 25 Wend. 483 (N.Y. 1841). For some of the governmental correspondence, see 2 Moore, Int. Law Digest 24 (1906).

<sup>19</sup> 7 Hun. 596, 599 (2d Dept., 1876).

<sup>20</sup> *Ibid.* at 600.

Thus, at this date, there seems to have been no single decision which established an immunity *rationae materiae* for acts of foreign states, as opposed to the personal immunity that courts allowed to foreign sovereigns and their agents and property.

In 1897 the Supreme Court decided the famous case of *Underhill v. Hernandez*.<sup>21</sup> Action was there brought by an American citizen against a general of ultimately successful revolutionary forces in Venezuela, who had prevented the plaintiff's departure from Bolivar by refusal to issue a passport. It would have been possible to dismiss the suit on either of two grounds, without invoking the wide principle of the act of state doctrine for which the case is usually cited. Since the act was rendered lawful under the *lex loci delicti commissi* through its retroactive adoption by the ultimately successful government, the ordinary conflict rules on tortious actions would have defeated plaintiff's claim. Moreover, the Court could have merely said that a sovereign's immunity from personal suit extends to those acting under superior orders on his behalf.<sup>22</sup> There was in this case the difficulty that a judgment against the defendant would, in effect, have been a judgment against the Venezuelan Government. As in the *McLeod* case and *Waters v. Collot*, the Court feared to pass upon the acts of agents of government or officials acting within the scope of their governmental authority. That the Court refused to pass upon the validity of the acts in question is not surprising, but the judgment has been interpreted to lay down a principle much wider than the facts of the case required. Chief Justice Fuller enunciated the *dictum* quoted above;<sup>23</sup> but his bald statement makes no allowance for the action of the public policy of the forum, nor for queries as to the constitutional validity of the foreign act, nor for inquiry as to its validity according to international law. On the latter point the Court held that it was not open for the plaintiff to complain before an American court that the law of Venezuela violated international law, but it is extremely doubtful whether any violation of international law was in issue in the case, and the *dicta* on this point are therefore *obiter*. A better basis for the decision is to be found in these words of the Chief Justice:

The immunity of individuals from suits brought in foreign tribunals for acts done within their own states in the exercise of governmental authority . . . must necessarily extend to the agents of governments ruling by paramount force as a matter of fact.<sup>24</sup>

<sup>21</sup> 168 U.S. 250 (1897).

<sup>22</sup> Cf. *Carr v. Francis Times & Co.*, [1902] A.C. 176, where an action in tort was brought against the commander of a British warship for the seizure of arms in the territorial waters of Muscat. The seizure was authorized by the Sultan of Muscat and, therefore, according to the English rule of the conflict of laws that the act must be unlawful both by English law and by the law of the country where it was committed, no action lay. See also *Dobree v. Napier* (1836), 2 Bing. N.C. 781.

<sup>23</sup> Page 826 above.

<sup>24</sup> *Loc. cit.* at 252.



The next important cases were *Oetjen v. Central Leather Company*<sup>25</sup> and *Ricaud v. American Metal Company*.<sup>26</sup> In the former the validity and effect of a Mexican confiscation were challenged by plaintiff, who claimed as the assignee of the Mexican owner from whom the hides had been seized by General Villa, while the defendant claimed title through a third party to whom they had been sold by General Villa. The Court, while relying upon the authority of *Underhill v. Hernandez*, extended its proper interpretation to cover a case between private parties, one of whom relied upon the act of state as an affirmative defense. That this was by no means a necessary implication of the decision has been shown above, but here for the first time the Court allowed an immunity *rationae materiae* in a case where the doctrine of personal immunity was not available to the defendant. The Court concluded that

the principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of the court, such as we have here, as it was held to be to the cases cited in which claims for damages were based on acts done in a foreign country; for its rests at last upon the highest considerations of international comity and expediency.<sup>27</sup>

But the decision is explicable on much simpler grounds than those advanced by the courts. It seems to have been acknowledged on all sides that the law governing the transfer of the hides was the *lex situs*, or Mexican law, and as the seizure was presumably lawful under Mexican law, the only remaining question was whether the alleged incompatibility of that law with international law affected the validity of the transfer.<sup>28</sup>

The latter case, on very similar facts, decided that the same principle applied even where the plaintiff was an American citizen. The Court held that, since the act of seizure was an act of government, it was consequently an act of sovereignty, and, as was stated in *American Banana Company v. United Fruit Company*,<sup>29</sup>

Sovereignty means that the decree of the sovereign makes law and foreign courts cannot condemn the influence persuading the Sovereign to make the law.

The Court was not deprived of jurisdiction over the case, but was denied the right to examine the "details of such action or the merit of the result."<sup>30</sup> But here again it may be said that the real question at issue was, what law to apply, the law of Mexico as it was before or after the revolution. The Court rightly, it is believed, applied the law of Mexico as if the insurrectionists had already been recognized. But in so

<sup>25</sup> 246 U.S. 297 (1918).

<sup>26</sup> 246 U.S. 304 (1918).

<sup>27</sup> *Ibid.* at 303.

<sup>28</sup> As to which see below, p. 839 *et seq.*

<sup>29</sup> 213 U.S. 847 (1909).

<sup>30</sup> It is a common error to assume that the act of state doctrine deprives the court of jurisdiction over the issue. Its alleged effect is rather to deprive the court of the possibility of inquiring into the validity of the act; the merits of the case must be decided as if the act were valid.

doing it used a formula which was not necessary to the decision and which unduly extended an immunity upon which many doubtful cases have subsequently been based.

When widespread litigation arose from governmental actions in the course of the Russian Revolution, the United States courts took the above-cited precedents uncritically and without examination as establishing an immunity for the acts of the foreign government, and they uniformly declined investigation of rights created by the Russian Government within its own territory.<sup>31</sup> The principle was also applied to rights arising out of acts of the Spanish Loyalist government,<sup>32</sup> and to excuse the courts from examining the validity of Nazi racial decrees.<sup>33</sup> Probably the most extreme and objectionable application of the doctrine was in the *Bernstein* case.<sup>34</sup> The plaintiff was a German Jew who had been seized in 1937 by "Nazi officials" and compelled to transfer a ship owned by him to an Aryan trustee. The ship was subsequently sold to the defendant, a Belgian corporation, which was alleged to have had knowledge of the duress involved in the original transaction. The vessel was sunk during the war, and the action was by way of attachment of the insurance moneys, which were far in excess of the price paid by the defendant.

The court clung tenaciously and rigorously to the act of state doctrine, and affirmed the district court's order quashing the attachment and dismissing the complaint. Judge Learned Hand stated for the majority that "a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state purporting to act as such."<sup>35</sup>

The court relied mainly upon three factors: (1) precedent;<sup>36</sup> (2) the desirability of preventing interference with the adjudication of reparation claims against Germany; and (3) the defendant's reliance on an act done under the auspices of the German Government. As to the latter two arguments, it is difficult to see their merit. The adjudication of the insurance

<sup>31</sup> *Salimoff v. Standard Oil Co.*, 237 App. Div. 686, 262 N.Y.S. 693 (1st Dept.), *aff'd*, 262 N.Y. 220, 186 N.E. 679 (1933); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 202 App. Div. 421, 193 N.Y.S. 472 (2nd Dept. 1922), *rev'd*, 234 N.Y. 372, 138 N.E. 24 (1923); *Dougherty v. Equitable Life Assurance Society*, 266 N.Y. 71, 193 N.E. 897 (1934).

<sup>32</sup> *Banco de Espana v. Federal Reserve Bank*, 114 F. 2d 438 (2d Cir. 1940).

<sup>33</sup> *Bernstein v. Van Heyghen Frères S.A.*, 163 F. 2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); *Werfel v. Zivnostenka Banka*, 260 App. Div. 747, 23 N.Y.S. 2d 1001 (1st Dept. 1940), *rev'd*, 287 N.Y. 91, 38 N.E. 2d 382 (1941); *Kleve v. Basler Lebens Versicherungs Gesellschaft*, 182 Misc. 776, 45 N.Y.S. 2d 882 (Sup. Ct. N.Y. 1943); *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798 (1938), *Annual Digest 1938-1940*, Case No. 71.

<sup>34</sup> *Bernstein v. Van Heyghen Frères S.A.*, cited above; *digested* in 42 A.J.I.L. 217 (1948).

<sup>35</sup> *Loc. cit.* at 249.

<sup>36</sup> *Cf. United States ex rel. Von Heymann v. Watkins*, 159 F. 2d 650 (2d Cir. 1947); *Banco de Espana v. Federal Reserve Bank*, cited note 32 above; *Hewitt v. Speyer*, 250 Fed. 367 (2d Cir. 1918), and Supreme Court decisions such as *Underhill v. Hernandez*, cited above, note 1.

moneys to Bernstein could hardly have affected the reparation negotiations in any significant respect, and the doctrine of reliance should not be used where there is bad faith or knowledge of the illegality on the part of him who pleads the principle. As to the first of the factors, the court was surely exaggerating the effect of previous decisions. In the first place, the court treated as immaterial the invalidity of the act under German law, and then proceeded to ask itself whether the Government of the United States had already so acted as to relieve its courts of the restraint of the exercise of their jurisdiction imposed upon them under the Constitution in general and under the particular rule that the courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." In spite of the Nuremberg Judgment, the Declaration of London (1943), the policy of the Military Government in Germany to deny all effect to Nazi confiscations from German citizens on racial, religious, or political grounds,<sup>37</sup> and the universal horror and indignation with which the racial policy of the defeated Nazi government was regarded, the court nonetheless bowed to the strict dictates of the stated doctrine.

Though there was no international delinquency in question (as the plaintiff was a German citizen at the time of the forced transfer), surely this was a case when the doctrine of public policy could have been safely and opportunely applied to strike out the defense based on the objectionable law and to allow recovery by the plaintiff, especially as the plaintiff was an American citizen at the time of the action. One of the most questionable features of this case is the degree of deference with which the courts in the United States treat the Executive Branch.<sup>38</sup> In spite of all the evidence available as to the attitude of the American Government toward the Nazi policies, the court took it upon itself to ascertain whether there was "positive evidence" of a policy *permitting* the exercise of jurisdiction, instead of assuming, as it might reasonably have done, that an absence of evidence restraining the exercise of jurisdiction implied liberty to assume it.<sup>39</sup>

The courts have a function to perform as the guardians of the public policy of the forum, and rules designed to promote uniformity and security may nevertheless be qualified by higher considerations of justice and the promotion of a minimum international standard. American courts seem to have adopted a wholly amoral attitude in this limited field of recognition of foreign acts of state, which accords but ill with their more flexible and liberal attitude in other respects.<sup>40</sup> Thus, for instance, foreign judgments

<sup>37</sup> Military Government Law No. 1, Arts. I, II; Reg. under Law No. 1, Part II; Law No. 52 as amended, Art. 1, par. 2 (Mil. Gov. Gaz., U.S. Zone, June 1, 1946).

<sup>38</sup> See Mann, "Judiciary and Executive in Foreign Affairs," 29 *Grotius Society Transactions* 143 (1943); Jaffe, *Judicial Aspects of Foreign Relations*.

<sup>39</sup> In 1949 the Department of State issued a letter, in 20 *Dept. of State Bulletin* 592 (1949), stating that it was the policy of the Executive to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. This would seem to be a clear statement that the courts need not apply the act of state doctrine in regard to Nazi acts. See comment on the Bernstein case by Lester H. Woolsey in 44 *A.J.I.L.* 129 (1950).

<sup>40</sup> See *Kleve v. Basler Lebens Versicherungs Gesellschaft*, 182 Misc. 776, 45 N.Y.S. 2d 882 (Sup. Ct. 1943): "As for the very obnoxious and offensive character of the German

which might equally be regarded as emanations of state, have been challenged even in United States courts on grounds of fraud,<sup>41</sup> fairness of procedure,<sup>42</sup> existence of jurisdiction;<sup>43</sup> and have also been denied conclusive effect when there has been a lack of reciprocity.<sup>44</sup> It is hard to escape the conclusion that American courts have been carried away by uncritical reiteration of a legal formula which seems to be applied in cases like that of *Bernstein* without any reference to the underlying purpose and meaning of the principle.<sup>45</sup>

To anticipate later conclusions, it is submitted that the proper function of the rule is to maintain a desirable harmony between the courts and the Executive Branch, to accord the proper measure of respect to the acts of foreign sovereign states, and to implement and recognize rights created in foreign countries, on the ground that good sense and the life of the international community require such an attitude from civilized nations.

But the limits of the doctrine can be perfectly drawn by the normal rules of conflict of laws. If the foreign sovereign or his agents are involved as defendants, *caedit questio*, for the doctrine of sovereign immunity will govern. If the act of state arises as a question incidental to a collateral action between private parties, then, if the conflicts rule refers to the foreign law, that law will apply insofar as the private international law of the forum allows. If a tort has been committed according to the *lex loci delicti commissi*, then the courts of the forum should allow recovery if the defendant is amenable to suit.<sup>46</sup> If a confiscation of tangible property has taken place, then the *lex rei sitae* will properly apply, unless it is contrary to international law or to the public policy of the forum. If the validity of a foreign statute is in question, the judge should place himself

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decrees, the court is obliged to hold that the governing law is no less controlling because it is bad law.' Accord, *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 N.Y. 474, 14 N.E. 2d 798 (1938). Cf. note 113 below for lower court's opposite view.

<sup>41</sup> *Schendel v. Chicago M. & St. P. Ry.*, 168 Minn. 152, 210 N.W. 70 (1926); *Harrison v. Triplex Gold Mines*, 33 F. 2d 667 (1st Cir. 1929).

<sup>42</sup> Cf. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

<sup>43</sup> *Dunston v. Higgins*, 138 N.Y. 70, 74; 33 N.E. 729, 730 (1893).

<sup>44</sup> *Hilton v. Guyot*, note 42 above; *Warren v. Warren*, 73 Fla. 764, 75 So. 35 (1917); and see *Morgenstern*, 4 Int. Law Q. 326, 340-343 (1951), for English, German, American and Italian decisions.

<sup>45</sup> Some comfort may be derived from Judge Learned Hand's suggestion that the United States courts might accept jurisdiction over cases involving foreign acts of state if the Executive has indicated that the courts should so act. This would leave the parties with the possibility of seeking a statement of the State Department's policy and so an avenue of escape from the present impasse. Cf. *Ex parte Muir*, 254 U.S. 522 (1921), for a closely analogous procedure in sovereign immunity cases.

<sup>46</sup> *Contra*: *American Banana Corporation v. United Fruit Co.*, 218 U.S. 347 (1908); *Stark v. Howe Sound Co.*, 148 Misc. 686, 266 N.Y.S. 368 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 637, 269 N.Y.S. 986 (3rd Dept. 1934), *amended*, 242 App. Div. 668, 271 N.Y.S. 1097 (3rd Dept. 1934); *McCarthy v. Reichsbank*, 259 App. Div. 1016, 20 N.Y.S. 2d 450, *aff'd*, *mem.*, 284 N.Y. 789, 31 N.E. 2d 508 (1940).

in the position of his opposite number in the foreign state and should allow himself the same power of review as the foreign law grants.

Thus, exception is here taken to the wide statement of the rule which is found in many of the cases. In none of the principal American decisions did any question of the invalidity of the act of state ever arise, and therefore remarks addressed to the subject were merely *obiter*; but, seized upon and reiterated by judges in countless subsequent cases, the principle is now, it must be admitted, taken by many to be a separate rule which goes further toward clothing in sanctity the foreign act of state than the normal conflicts rule would allow.<sup>47</sup>

Some inquiry will now be made into the English law on the subject before conclusions are reached as to the actual extent of the rule in its present formulation.

The leading English case is undoubtedly *Luther v. Sagor*,<sup>48</sup> which is said by Oppenheim to stand for the proposition that the "courts of one state do not, as a rule, question the validity or legality of the official acts of another sovereign or the official or officially avowed acts of its agents, at any rate insofar as they purport to have taken effect within the sphere of the latter state's own jurisdiction."<sup>49</sup>

Bankes, L.J., observed:

The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country has sold, under an f.o.b. contract, for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support this contention.<sup>50</sup>

In other words, Bankes, L.J., approached the question from the point of view of private international law and concluded that, on the facts, the application of the *lex rei sitae* could not be avoided by considerations of the public policy of the forum.

Warrington, L.J., said:

The question then is whether the Court has any power to question the validity of the proceeding under which the property in the goods has *prima facie* been transferred to the defendants. . . . It is well settled that the validity of acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the Courts of this country.<sup>51</sup>

This is clearly an echo of the Supreme Court decisions which have been noted above.

<sup>47</sup> See Re, Foreign Confiscations 159-163. <sup>48</sup> [1921] 3 K.B. 532.

<sup>49</sup> 1 Oppenheim, International Law 267 (8th ed., Lauterpacht, 1955). But notice the additional qualification introduced for the first time by the learned editor in this edition—that the act must not be contrary to international law.

<sup>50</sup> [1921] 3 K.B. 545.

<sup>51</sup> *Ibid.* at 548.

Scrutton, L.J., took an equally extreme but slightly different position in saying:

It appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is "contrary to essential principles of justice and morality." Such allegation might well with a susceptible foreign government become a *casus belli*; and should, in my view, be the action of the Sovereign through his ministers and not of the judges in reference to a state which their Sovereign has recognized.<sup>52</sup>

He drew an analogy from the immunity of foreign governments and concluded: "what the court cannot do directly it . . . cannot do indirectly. If it could not question the title to goods brought by that government to England, it cannot indirectly question it in the hands of a purchaser from that government. . . ." <sup>53</sup>

The case has been strongly criticized,<sup>54</sup> and at the very least is open to the objections that it states the rule too widely, it relies on not altogether satisfactory American authority, and that it fails to clarify the influence of the public policy of the forum upon the recognition of foreign laws.

In *Princess Paley Olga v. Weisz*,<sup>55</sup> on very similar facts, the Court of Appeal pronounced the same doctrine as that enunciated in *Luther v. Sagor*, with the important distinction that all three Lord Justices inquired into the validity of the Soviet decree confiscating the property in question.

Certain conclusions may be drawn from these two cases as to the state of the doctrine in English law. First, in both cases the ordinary conflict-of-laws rule governing the transfer of movables *inter vivos* looked to Russian law as the controlling law. Insofar as the courts refused to inquire into the validity or alleged immorality of that law, the decisions can be said to stand for the proposition that on the facts no requirement of English public policy stood in the way of recognizing the foreign law. Secondly, no question of international law arose in either case, as the plaintiffs in both were Russian nationals. The two cases do not, therefore, prevent an argument being made that a violation of international law need not be recognized or enforced by English courts. Thirdly, in the *Paley* case the court *did* inquire into the formal validity of the decree, and it is therefore some authority for the view that the courts of the forum may engage in such inquiry within the limits allowed by the foreign law.

If pared to their essentials and trimmed of excess verbiage, the two cases stand for the proposition that no action in tort lies to recover property seized by a foreign government acting within its own jurisdiction,

<sup>52</sup> *Ibid.* at 558.

<sup>53</sup> A clearly fallacious argument which takes as its premise the conclusion stated.

<sup>54</sup> See especially Lipstein, 35 *Grotius Society Transactions* 157 (1949); Fachiri, 12 *Brit. Yr. Bk. Int. Law* 95 (1931).

<sup>55</sup> [1929] 1 K.B. 718.

if such seizure be not contrary to English public policy. The American cases have certainly gone further in their effect and seem to have established a rule of judicial abstention from inquiry into the merits of foreign acts of state, with only slight hope of escape by way of the public policy principle, if the *Bernstein* decision is any guide.

It is comparatively unimportant to determine if the principle is one of public international law or whether it should be characterized as a rule of private international law. The question does not seem to have any practical effect. But it is submitted that there is no principle of public international law which requires the adoption of the rule by municipal courts. There is no case of an action in an international tribunal brought as a result of a failure to apply the doctrine. If the courts of the United States were to abandon the principle tomorrow, it is more than unlikely that any such action would be brought by an offended state, and just as absurd to suppose that an international court would entertain such an action. There does not seem to be any evidence of a "full faith and credit" rule in international law. Few of the countries of the Continent have adopted the principle in its extreme form, but seem rather to give effect to foreign acts of state only within the limits of their own public policy, and, more occasionally, of international law.<sup>56</sup> An international court would not go behind the statement of a municipal court that a particular foreign act or law was contrary to its public policy, and a decision which correctly applied international law would hardly be upset by an international court. The proper analysis seems to be that municipal courts give effect to foreign laws according to their own rules of conflict of laws; most of the cases discussed could have been decided on grounds other than the act of state rule—whether personal immunity of the sovereign or his agents, or the principle of superior orders, or the application of the *lex rei sitae*, or of the *lex loci delicti commissi*. It is submitted that the proper extent of the rule should be limited by the rules of the conflict of laws. Foreign laws should be recognized and enforced insofar as the private international law of the forum refers to the foreign law and insofar as the foreign law is formally valid according to its own law, not contrary to the public policy of the forum, and is in harmony with international law.

Certainly it is well established in most jurisdictions that courts of one country will not enforce penal or revenue laws of another state. "To enforce them would mean, in effect, to assist in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy."<sup>57</sup> The question, "When is a law to be considered a penal law?" is answered by Dicey by the statement that

<sup>56</sup> See discussion below, pp. 839, 846.

<sup>57</sup> 1 Oppenheim, *International Law* 329-330 (8th ed., Lauterpacht, 1955). See Wharton, *Conflict of Laws* 54 (3rd ed., 1905); Cheshire, *Private International Law* 133 (5th ed.); *Queen of Holland v. Drukker*, [1928] Ch. 877, in which the Chancery Division, in dismissing an action to "enforce a claim in England by a foreign State against the subjects of the foreign State in respect to revenue due from the foreign subject," observed that "there is a well recognized rule which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign states for the

a "penal law" is strictly and properly a law which imposes punishment for an offence against the state; and a "penal action" is a proceeding for the recovery in favor of the state of a penalty due under a penal law.<sup>58</sup>

The question whether foreign exchange regulations constitute penal laws was considered in the recent case of *In re Helbert Wagg*.<sup>59</sup> In 1924 an English banking corporation loaned English pounds sterling to a German corporation, principal and interest payable in London. The loan agreement was to be construed according to German law. In July, 1933, a German moratorium law required the debtor to make payments to the *Konversionskasse*, a German institution. Such payments were to act as a full discharge of the debt. The English creditor now claimed that the debtor had not discharged his obligation. Upjohn, J., held that German law must be applied, as the situs of the debt and the governing law were German. As to the alleged confiscatory or penal nature of the foreign law, he said that generally a state must be able to legislate with respect to movables and contracts governed by its law and such legislation will generally be recognized except when it is penal, confiscatory, or dictated against particular individuals or classes of individuals. He said that many cases<sup>60</sup> show that the court must recognize the right of a foreign state to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to these measures when the law of the foreign state is the proper law of the contract or when the movables are situated within the territorial jurisdiction of the foreign state. But, he added, it must be a genuine foreign exchange law—one genuinely designed to protect the economy in times of stress, and not one really passed for a purpose not in accordance with the usage of nations. Citing *Frankfurter v. Exner*<sup>61</sup> as authority, he said that the court could inquire into the nature of the legislation to see what was actually done under it. Also he said that the court of the forum must be entitled to

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benefit of the sovereigns of those foreign states." Cf. *Huntington v. Attrill*, [1893] A. C. 150; *Huntington v. Attrill*, 146 U.S. 657, 688 (1892); *Estonian State Cargo Line v. S.S. Elise and Laane and Baltser*, [1949] Can. S.O. Rep. 530; *King of Hellenes v. Brostrom* (1923), Annual Digest 1923-1924, Case No. 81; *Bergen v. Olsen* (1924), *ibid.*, Case No. 147 (Danish court refused to enforce a Norwegian revenue law); *Norwegian State v. Bruhn* (1924), *ibid.*, Case No. 148 (Swedish courts refused to take jurisdiction to collect Norwegian taxes); *Caisse Generale etc. v. S.A. des Ateliers de Godarville* (1930), Annual Digest 1929-1930, Case No. 63 (Belgian court refused to enforce German social insurance legislation involving the collection of taxes); *Court Fees (Danzig) Case* (1932), Annual Digest 1931-1932, Case No. 73 ("In accordance with the principles of international law, a foreign State may not employ the organs of another state for the execution of its foreign sovereign rights, for instance, to enforce payments of its public charges."); *Folliot v. Ogden* (1787), H. Bl. Rep. C.P. I, 124, 136.

<sup>58</sup> Dicey, *Conflict of Laws* 154 (8th ed., 1949).

<sup>59</sup> [1956] 1 Ch. 323; 50 A.J.I.L. 683 (1956).

<sup>60</sup> Citing *Bex v. International Trustee Bondholders A. G.*, [1937] A.O. 500; *Kahler v. Midland Bank*, [1950] A.C. 24; *Perry v. Equitable Life Assurance Co.* (1929), 45 T.L.R. 468.

<sup>61</sup> [1947] 1 Ch. 629.



consider whether, in all the circumstances, the law is so far-reaching in its scope and effect as to offend the public policy of the forum.

There is here, therefore, a clear statement of recent authority that the courts may go behind foreign legislation to examine it upon its merits and to determine if the object of the legislation is not in reality quite different from the official statement given.<sup>62</sup>

Dicey states that "no court can be expected to afford aid to a foreign sovereign in enforcing matters of sovereignty";<sup>63</sup> and he goes on to suggest that sovereign acts such as those of the legislature, executive or judiciary are enforced only by virtue of the sovereign's territorial authority. Insofar as the present inquiry is limited to the extent that courts will inquire into the validity of acts done within the jurisdiction of the foreign state, the well-established rule that no extraterritorial effect will be given to such political laws is not germane to the present issue. The question here is whether there are grounds on which the court may object to a foreign law or decree or act which is pleaded in evidence.

The suggestion is made in the most recent edition of Oppenheim that there is no obligation to recognize the effects of foreign legislation within the foreign country concerned when such legislation is itself contrary to international law.<sup>64</sup> As this is an assertion not previously made by the learned editor, it is proposed to examine it in some detail in order to test its validity and usefulness as a corrective to the stern and unbending judicial deference to foreign acts of states that is traditionally asserted by many authors.

It would seem to be self-evident that a higher standard of international morality will be promoted, and a greater respect for the sovereign acts of a foreign state will be engendered, if the courts of the forum have the right to reject a foreign *lex causae* which clearly conflicts with international law. The fear that such actions will be likely to cause hostility between nations, or injure the independence or dignity of sovereign states, or even give rise to warlike action was disposed of, in another context, by a learned writer in words that merit the greatest support. He rejects "these strained emanations of the notion of dignity . . . as a rational basis" for legal principles, and submits that "a state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards," and that "the time has probably come for abandoning what is now no more than an incantation alien to the conception of the rule of law national and international, and to the true position of the state in modern society."<sup>65</sup>

<sup>62</sup> See also *Oppenheimer v. Rosenthal & Co.*, [1937] 1 All E.R. 23, for a case similar on its facts to *Holzer v. Deutsche Reichsbahn Gesellschaft*, note 40 above. The court used a dubious interpretation of procedural law to avoid having to say that German law governed the contract. See generally, Rawson, "Racial Legislation," 10 M.L.R. 345 (1947).

<sup>63</sup> Dicey, *op. cit.* note 58 above, at 155.

<sup>64</sup> 1 Oppenheim, *International Law* 267-268 (8th ed., Lauterpacht, 1955).

<sup>65</sup> Lauterpacht, 28 Brit. Yr. Bk. Int. Law 229-231 (1951).

The question at issue is whether there is any sensible reason why municipal courts should not engage in such inquiry and whether there is any authority for the view that they should.<sup>66</sup>

It has been suggested<sup>67</sup> that the weight of authority is against the principle here advanced and that the dictates of policy suggest this might be the course of unwisdom. It is submitted with respect that a different view would be both desirable and possible. According to ordinary rules of conflict of laws, the *lex situs* governs the transfer of movables, and title to property transferred in accordance with the local law will normally be recognized in foreign courts; but if the legislation of the foreign state is confiscatory and involves a violation of the rules of international law relating to the protection of the property of aliens, it is submitted that the court of the forum has not only the right but the duty to reject the application of the foreign law.

In *Wolff v. Oxholm*,<sup>68</sup> Lord Ellenborough, C.J., held that the confiscation of enemy debts in wartime was "not conformable to the usage of nations" and declined, therefore, to have regard to a Danish law passed for this purpose and to a judgment of a Danish court based thereon.<sup>69</sup> The view that a foreign law contrary to international law may be disregarded was followed in *In re Fried Krupp*<sup>70</sup> in respect of a German ordinance prohibiting claims for interest on debts from German to British subjects.

Nor is there any reason to confine the principle to wartime legislation. In *Republic of Peru v. Dreyfus Brothers and Co.*,<sup>71</sup> the plaintiff government claimed certain cargoes in the hands of the defendants, in pursuance of a contract between them and the former *de facto* government, on the ground that by the law of Peru (an Act of Congress passed by the successor government) the contract in question was void. Kay, J., observed in his judgment that

it is difficult to see how [the case] can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign state may safely have dealings as existed in this case with a government which such state has recognized.

He continued by finding that at international law the plaintiff government was bound by the acts of the preceding government, and in dismissing the action he entirely ignored the existing Peruvian law.

It is submitted that this is a perfectly proper decision. The relation of international law to municipal law has caused the greatest dispute,

<sup>66</sup> See 1 Oppenheim, *International Law* 267-270 (8th ed., Lauterpacht, 1955); Fachiri, 12 *Brit. Yr. Bk. Int. Law* 95-106 (1931); Wortley, 33 *Grotius Society Transactions* 30 (1947); Morgenstern, 4 *Int. Law Q.* 326-344 (1951); Mann, 59 *Law Quarterly Rev.* 42-57, 155-171 (1943), and *ibid.* 70, 181-202 (1954).

<sup>67</sup> Lipstein, *Cambridge Law Journal* 138-141 (1956).

<sup>68</sup> (1817) 6 *Maule & Selwyn* 92.

<sup>69</sup> It is, of course, very doubtful if any court would today regard this a breach of international law, but the principle of the decision, it is suggested, is sound.

<sup>70</sup> [1917] 2 *Ch.* 188.

<sup>71</sup> (1883) 38 *Ch. D.* 348.

but it is certain that in nearly every jurisdiction it is recognized that, even in countries where courts are bound to apply municipal law, even if contrary to international law, a rule of construction is applied which obliges them to interpret laws wherever possible so as not to conflict with international law.<sup>72</sup> Further, in some countries international law is declared by the constitution to be directly adopted as part of the law of the land, and the courts of such countries should be under a clear duty to reject foreign laws contrary to international law.<sup>73</sup> Some even provide expressly for the judicial review of legislation in the light of international law.<sup>74</sup>

Where the judge is directed by the rules of his own conflict of laws to a foreign law which he deems to be contrary to international law, he should be able to disregard such foreign law. This principle seems to have been applied by a British court in Aden in the case of the *Rose Mary*,<sup>75</sup> where the Anglo-Iranian Oil Company claimed title to oil which, after nationalization, the defendants had purchased from the Iranian Government. The plaintiffs contended that the Iranian Government's title to the oil should not be recognized because, first, its acquisition was contrary to public policy, and, secondly, it was contrary to international law. Campbell, J., of the Supreme Court of Aden, found that there existed a clear rule of international law which made the Iranian confiscation illegal. He did not state whether he accepted the first or the second or both of the plaintiff's contentions to take account of that illegality, but concluded simply that

following international law as incorporated in the domestic law of Aden, this court must refuse validity to the Oil Nationalization Law insofar as it relates to nationalized property of the plaintiff which may come within its jurisdiction. I find the oil in dispute to be still the property of the plaintiffs.<sup>76</sup>

<sup>72</sup> See, e.g., *R. v. Keyn*, 2 Ex. D. 63, 85 (England); *The Charming Betsy*, 2 Cranch 64, 118 (U. S.); *Geoffrey & Delore v. Ins. Co. of Bulgaria*, Sirey, 1920, II, 17 (France); B.G.E. 56, I, 237 (Switzerland); RGStr. 62, 369 (Germany); 32 Clunet 416, 420 (Belgium); *Ex p. Koutalianos*, Annual Digest 1943-1945, Case No. 62 (Australia); *Croft v. Dunphy*, [1933] 1 D.L.R. 225 (Canada); *Mohammed Mohy-ud-din v. The King Emperor* (1946), 8 F.C.R. 94 (India).

<sup>73</sup> See Arts. 26 and 28 of the French Constitution of Oct. 27, 1946, and Art. 25 of the Grundgesetz of the West German Federal Republic enacted in 1949; Art. 98 of the Japanese Constitution of 1946; Art. 10 of the Italian Constitution of 1947.

<sup>74</sup> Art. 100, par. 2, of the Grundgesetz of the West German Federal Republic entrusts this function to the Bundes-Verfassungsgericht.

<sup>75</sup> *The Anglo-Iranian Oil Co. Ltd. v. Jaffrate et al.*, [1953] 1 W.L.R. 246, 1953 Int. Law Rep. 316.

<sup>76</sup> *Accord*: Recent German decisions on the effect of the Czechoslovak decrees of 1945 confiscating the property of Sudeten Germans without compensation. The persons affected were by Czech law foreigners, and hence the situation was governed by international law. The German courts held that according to the *lex rei sitae* at the time of the decrees, the property in question was transferred to the Czech Government, but that German courts must refuse recognition to the transfer which was "repugnant to ethical standards and public policy" and also to "international legal practice, which denies legal effects to all measures of foreign states constituting political *ad hoc* laws against certain groups of persons." 1 Neue Juristische Wochenschrift 628 (1947-1948); 15

The case has been criticized<sup>77</sup> as being contrary to precedent and because it creates practical difficulties.<sup>78</sup> It is said, for instance, that the courts are not adequately equipped to deal with the burden of discovering what is the international law on the subject, for instance, of confiscation and expropriation. While there may be some justice in the view, especially as international law is treated as a question of law and not one of fact to be proved by experts, there are considerations of greater validity on the other side.

First, international law is, at least in the Anglo-American systems, part of the law of the land,<sup>79</sup> and it is therefore difficult to assert that courts should be able to plead ignorance of the law in order to evade the responsibilities that may fall upon them. Secondly, municipal courts frequently have occasion to inquire into the principles of international law in such matters as recognition, sovereign immunity, interpretation of treaties, the limits of the territorial sea, and problems of jurisdiction. The fact that a municipal court is bound to apply its own law, even if it be in direct conflict with international law, appears to be no reason why it should approach foreign law in the same way. Even if the foreign constitutional law does not allow international law to prevail, it would be a circular argument to point to that refusal as justifying a recognition of the refusal by the court of the forum. As one learned writer says,

the true construction of the conflict rule by which the judge is referred to the foreign law is that it prescribes the application of such foreign law as is internationally lawful.<sup>80</sup>

Nothing in either international law or municipal law requires a judge to condone or implement a foreign international wrong by extending its operation to the forum.

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*Zeitschrift für Ausländisches und Internationales Privatrecht* 141 (1947); *Annual Digest* 1948, Case No. 12; 1958 *Int. Law Rep.* 31-34.

*Contra*: *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, High Ct. of Tokyo (1958), 1958 *Int. Law Rep.* 305; *Anglo-Iranian Oil Co. v. Società Unione Petrolifera Orientale di Roma*, *Il Gazzettino* 67, No. 61, p. 4; *Annual Digest*, 1919-1942, Case No. 75.

<sup>77</sup> Lipstein, *Cambridge Law Journal* 138-141 (1956); *contra*: Sir Hersch Lauterpacht, *Cambridge Law Journal* 20 (1954); E. Lauterpacht, 5 *Int. and Comp. Law Q.* 301 (1956); D. P. O'Connell, 4 *ibid.* 267 (1955).

<sup>78</sup> The real objection to the case seems to be rather that Campbell, J., erred in limiting the effects of the act of state doctrine to acts affecting nationals of the foreign state, as to which there is sufficient authority to the contrary: *Ricaud v. American Metal Company*, 246 U.S. 304 (1918); *Underhill v. Hernandez*, 168 U.S. 250 (1897); *O'Neill v. Central Leather Co.*, 87 N.J.L. 552; *In Re Claim Helbert Wagg*, [1956] 1 Ch. 328, 348.

The point is rather that acts of state which violate international law must be refused recognition and enforcement. Thus, if the United Nations Declaration on Human Rights were a binding treaty, treatment of *nationals* of the foreign state in violation of the Declaration would not be enforced by the court of the forum and *a fortiori* in the case of aliens.

<sup>79</sup> 1 Oppenheim, *International Law* 87-47 (8th ed., Lauterpacht, 1955).

<sup>80</sup> Mann, "International Delinquencies before Municipal Courts," 70 *Law Quarterly Rev.* 181, 195 (1954).

The fact that judges have found themselves in the unenviable position in which they have to apply their municipal law knowing it to be contrary to international law is a matter of regret, not a source of authority for similar indifference to the requirements of international law, when the constitutional law of the forum does not operate as a shackle.<sup>81</sup>

As to the view that the case is irreconcilable with authority, several cases have been noted above which indicate a preparedness of English courts to question the validity of a foreign act of state in the light of international law. There is very little jurisprudence to support the argument, partly for the reason that the view advanced by this writer is one of comparatively recent development, and partly because a decision by a court to such effect requires that one of the parties plead the irregularity, and normally such a plea is either difficult to sustain—clear breaches of international law being infrequent—or irrelevant to the issue; in other words, the question does not often arise.<sup>82</sup>

Such cases as *Luther v. Sagor*,<sup>83</sup> *Princess Paley Olga v. Weisz*<sup>84</sup> in England, and *Underhill v. Hernandez*,<sup>85</sup> *Oetjen v. Central Leather Co.*,<sup>86</sup> *Ricaud v. American Metal Co.*,<sup>87</sup> are irrelevant to the issue, as in none of them was any question of international law involved.<sup>88</sup> Thus in the last-named case the court, without any qualification whatsoever, enunciated the rule that the courts of one independent government will not sit in judgment on the validity of acts of another done within its jurisdiction. Yet Mr. Justice Clarke would presumably have agreed that he could refuse to enforce or even recognize a foreign penal or revenue law, or a foreign confiscatory law on grounds of public policy, and it is equally reasonable to suggest that a foreign legislative or executive act contrary to international

<sup>81</sup> *Ibid.* at 196. See Morgenstern, 4 Int. Law Q. 326, 330 (1951), for the suggestion that the courts of the forum should be able to inquire into the validity of acts of foreign states in the light of international law *only* if the courts of the foreign states are empowered to do likewise. To same effect, Lipstein, 35 Grotius Society Transactions 157, 180 (1949). It is suggested here that this power ought to exist *whether or not* the courts of the foreign state have the capacity to pass upon legislative or executive acts. If an international tribunal would apply "the essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice, and, in particular, by the decisions of arbitral tribunals—that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., in Case of the Chorzow Factory, Ser. A, No. 17, p. 47), then a municipal court should similarly "wipe out" the international delinquency by disregarding it.

<sup>82</sup> Naturally, a municipal court would only declare a foreign law contrary to international law if both the facts and the law were clearly established.

<sup>83</sup> [1921] 3 K.B. 532.

<sup>84</sup> [1929] 1 K.B. 718.

<sup>85</sup> 168 U.S. 250 (1897).

<sup>86</sup> 246 U.S. 297 (1918).

<sup>87</sup> 246 U.S. 304 (1918).

<sup>88</sup> Admittedly it was pleaded in *Oetjen v. Central Leather Co.* that the seizure was contrary to the Hague Regulations. But the court observed, *obiter*, that (1) the Hague Regulations did not apply to civil wars; and (2) that, even if they did apply to civil wars, they did not forbid such seizures as had taken place. Therefore there was no violation of international law.

law comes within the unstated exception to his rule. Even the normally cautious (or timid, depending on one's approach) American courts would surely not hesitate to inquire into the validity of a foreign executive act which, say, purported to make Methodists of all American nationals who were domiciled within the foreign state, or a legislative act which confiscated the property of all those who believed in God, or that imposed its nationality on all American citizens within the foreign state.<sup>89</sup> If an American national claimed that the property now possessed by the defendant had been taken from him by a foreign decree which declared unlawful the ownership of property by one-legged men and had then been sold to the defendant by the foreign government, it is difficult to imagine an American judge hesitating to apply either his view of public policy or of international law in order to declare such a seizure illegal. It will be contended below that the more satisfactory reason for the judge's disapproval would be the invalidity according to international law, for public policy is a changing and relative concept, uncertain in its application, whereas international law provides a relatively more objective standard against which foreign acts may be measured. Thus the difficulty that the property would be subject to different rules of ownership as it passed from one country to another would be more easily navigated by one clear and universal interpretation according to a standard outside the various municipal systems than by the differing interpretations of public policy.

It may be recalled that there is considerable authority for the proposition that municipal courts, when reviewing the acts of a belligerent occupant in a third country, should refuse effect or recognition to such acts as are contrary to international law.<sup>90</sup> There is here a close analogy helpful to the present argument, and it seems that there is no policy or doctrinal reason why such an attitude should not also be adopted in peacetime with regard to acts of any foreign state.

It should not be a breach of international law to apply international law. Therefore the argument that international law requires that foreign acts of state be treated as sacrosanct is clearly not applicable to the case of an international delinquency. In fact, it is more than doubtful whether there is any such rule of international law. The sacrosanctity of foreign acts of state is, according to Dr. F. A. Mann, applied only by virtue of municipal law and even then only in the United States, Great Britain and Holland.<sup>91</sup>

<sup>89</sup> See the decision of the Tribunal of the Seine, July 13, 1915, 16 *Rev. du Droit Int. Privé* 67 (1915), when it was held that a Brazilian law which imposed Brazilian nationality on all foreigners resident in Brazil who did not within six months claim their own nationality, contained "dispositions exorbitants du droit international," and had to be disregarded. For refusal of a Hungarian court to recognize, on analogous grounds, a Russian marriage entered into by a Hungarian, see *Annual Digest* 1927-1928, Case No. 19.

<sup>90</sup> See, for instance, *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (C. D. Utah, 1951), and cases cited by Morgenstern, "Validity of the Acts of the Belligerent Occupant," 28 *Brit. Yr. Bk. Int. Law* 291, 817-320 (1951).

<sup>91</sup> Mann, 70 *Law Quarterly Rev.* 180, 198 (1954).

It is submitted that in the Anglo-American system the approach suggested in this argument would be possible and desirable. There is no authority directly in point against the proposition, and therefore the courts are free to adopt a new attitude (within the limits of proper judicial caution). Though no court would issue an injunction to stop a foreign army marching, in breach of its international obligations, across the frontier of a neighboring state, a municipal court can and should refuse recognition and, *a fortiori*, enforcement to such foreign legislative and executive acts contrary to international law as arise in the course of litigation. If the agent of the foreign government or the government itself is involved as a defendant, the question, of course, will not arise, as sovereign immunity will apply. But if the matter arises in a collateral suit between private parties, the court must be free to do justice in clear cases. There would be the presumption that no intention to violate international law should be imputed to the foreign legislative or executive act unless cogent evidence is adduced to the contrary. But with this safeguard, it is contended that municipal courts can in this way make a worthy contribution to the cause of the rule of law in international relations, a rôle which they may more properly assume under the guise of incantations to the goddess of international comity than by way of the accustomed genuflections to the act of state doctrine.

There is the further question whether the act of state doctrine is limited in its effect to the content of the foreign acts or whether it reaches also the formal validity of those acts. It is contended that the rule illustrated by *Luther v. Sagor*<sup>92</sup> and *Underhill v. Hernandez*<sup>93</sup> does not prevent a court from inquiring into the competence of the organ from which the act emanates or the constitutionality of foreign law. The basis of this power is that municipal courts, in granting recognition to foreign law, must ascertain whether the foreign law is, indeed, valid. If the law of the foreign state to which the court is referred by its own rules of private international law does not allow any review by the courts of the validity or constitutionality of decrees or legislative enactments or administrative acts, then such decrees or acts *are* valid and must be so treated by the judge of the forum. If, however, the foreign judge has the power of review, the same right within the same limits would be allowed the judge of the forum. The fact that the *lex fori* does or does not allow such judicial review is irrelevant, as it is by virtue of the conflicts rule that foreign law is applied and, if applied, it should be treated as it would be by the judge's opposite number in the foreign country. The English rule preventing judicial review of legislation has its basis in the constitutional law of the country and is not of a procedural character so as to impose itself where foreign law is applicable.

<sup>92</sup> [1921] 1 K.B. 456; rev'd, [1921] 3 K.B. 532.

<sup>93</sup> 168 U.S. 250 (1897).

The question has not frequently arisen and little has been written upon the subject.<sup>94</sup> The English courts did not, in the Russian cases of the past two decades, hesitate to discuss the question as to whether the body responsible for a particular official act possessed administrative or legislative powers.<sup>95</sup> In *Princess Paley Olga v. Weisz*<sup>96</sup> there was doubt as to the validity of a Soviet decree enacted by the Council of the People's Commissaries without the confirmation of the Executive Council. The court gave recognition to the decree after it had established "that no Russian court would require evidence that such decree had been confirmed by the Executive Council."<sup>97</sup>

Foreign law is treated as a fact, but, nonetheless, a court, when faced with conflicting evidence as to a point of foreign law, must reach a decision which, in substance, determines what the foreign law on the subject actually is. Thus, if evidence is given and contradicted on the ground that the relevant rule of foreign law violates the constitution, an English court must give a decision. Although based on rather special facts, the case of *In Re Amand*<sup>98</sup> provides a helpful example. The constitutionality of the Dutch AI Decree imposing compulsory military service upon a Dutch national, who had resided in England for thirteen years, was challenged on the ground that in six respects it contravened articles of the Constitution of the state of The Netherlands. The Divisional Court rejected the argument that these questions could not lawfully be investigated, examined the decree in relation to each of the relevant articles of the Constitution and ultimately upheld its constitutionality.

The Court of Appeals has held that it could treat a foreign statute as unconstitutional and void if its formal invalidity was proved,<sup>99</sup> and at least one decision of the United States Supreme Court indicated willingness to do the same. In that case the Court was prepared to assume that, in adjudicating title to land, now in the United States, which had been subject to expropriation proceedings while under Mexican sovereignty, it could examine the validity of the expropriation by reference to the Mexican Constitution, and found it to have complied with Mexican law.<sup>100</sup>

The reason why the right of municipal courts to scrutinize the validity or constitutionality of foreign acts of state exists only within the limits

<sup>94</sup> Niboyet, *Rev. de Droit Int. et de la Législation Comparée* (1928) 753, 769, 770; Fedozzi, 27 *Hague Academy Recueil des Cours* 145, 221 (1929, II); Makarov, 74 *ibid.* 376 (1949); Wolff, *Private International Law* 175 (1945); McNair, *Legal Effects of War* 374-377 (3rd ed., 1948).

<sup>95</sup> See *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse & Others*, [1925] A.C. 112.

<sup>96</sup> [1929] 1 K.B. 718.

<sup>97</sup> At p. 723, per Scrutton, L. J.

<sup>98</sup> [1941] 2 K.B. 239; [1942] 1 K.B. 445. Cf. *King of the Hellenes v. Brostrom* (1923), 16 Ll. Rep. 190.

<sup>99</sup> *A/S Tallinna Laevauhisus v. Tallinn Shipping Co.* (1947), 80 Ll. Rep. 99 at 114, per Tucker, L. J.

<sup>100</sup> *Shapleigh v. Mier*, 299 U.S. 468 (1937), on appeal from 83 F. 2d 673 (5th Cir. 1936). But see *Eastern States Petroleum Co. v. Asiatic Corporation*, 28 F. Supp. 279 (S.D.N.Y. 1939). For similar cases in continental jurisprudence see Morgenstern, 4 *Int. Law Q.* 326, 331-332 (1951); Mann, 59 *Law Quarterly Rev.* 155, 160-162 (1948).



allowed by the foreign law, whereas, in the case of an alleged breach of international law, examination should take place whether or not the foreign law gives this right to its courts, is that in the former case the conflicts rule is looking to the foreign law as the *lex causae* and should apply it as the foreign judge would; there is no valid excuse, beyond that of public policy, for denying effect to a law that would be implemented by the foreign court. In the latter case the assumption must be made that international law has a dignity and effect over and above that of the foreign law to which the judge is referred. If it be contrary to this higher law, the municipal judge should refuse recognition and enforcement to the foreign act of state on the ground that it is even more important to uphold the principle of the international order than to give effect to the acts of foreign states. If the question is merely what the law is in the foreign state, then questions of formal validity or constitutionality should be examined only so far as the foreign judge could examine them.<sup>101</sup>

If it were the case that the courts of one country may not "sit in judgment" on the validity of a foreign act of state, there would presumably be no room for the application of the public policy of the forum. But all writers are unanimous that such exception is always available to the courts of any jurisdiction, and dispute arises only as to the limits and extent of the exception.<sup>102</sup> The rational basis for the principle is that in certain domains of the law no interference from foreign law can be tolerated. To allow recognition of foreign laws as equal or superior in such fields as penal law, constitutional law, or procedural law would be repugnant to ideas and notions the maintenance of which admits of no possible compromise. In the words of Lord Parker,

Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of the facts may be the state of some foreign law, but it is not the foreign law but one's own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored.<sup>103</sup>

It would be absurd if deference to foreign law went so far as to enforce rights which are fundamentally opposed to the moral, social, or economic principles upon which society is founded. As was said in one case,

<sup>101</sup> See Nussbaum, "The Problem of Proving Foreign Law," 50 Yale Law J. 1018 (1940), in which the learned writer cites an Austrian case to illustrate the difficulty involved in trying to determine complex constitutional issues of foreign law. See also 21 Brit. Yr. Bk. Int. Law 189 (1944), for comment on two relevant English cases.

<sup>102</sup> See Cheshire, *Private International Law* 150-158 (5th ed., 1957); Wharton, *Conflict of Laws*, sec. 4(a) (3rd ed.); Westlake, *Private International Law* 51 (7th ed.); Max Habicht, "The Application of Soviet Laws and the Exception of Public Order," 21 A.J.I.L. 238 (1927); Kahn-Freund, 39 Grotius Society Transactions 39-83 (1953); Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 Yale Law J. 1027-1036 (1940); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*.

<sup>103</sup> *Dynamit Action Gesellschaft v. Rio Tinto Co. Ltd.*, [1918] A.C. 292, 302.

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.<sup>104</sup>

Traditionally English and American courts have been wary of mounting the "unruly horse" of public policy. There is the ever-present danger of judges allowing personal prejudice to warp their view of the requirements of the public order. Views as to the undesirability of particular practices may change from time to time, and what is against public policy in one country is not necessarily against public policy in another. The concept suffers from the defect of its relativity both in time and in space. Thus, it was possible for Dicey to suggest in 1922 that the status of adoption, being unknown in English law, would not be recognized in England, but since the Adoption of Children Act, 1926, such a view is clearly untenable.<sup>105</sup>

Generally, it is desirable that the rules of private international law be strictly observed, but in exceptional cases there is room for a more flexible approach which looks beyond the requirements of comity and the needs of certainty in the law to the greater end of justice and conformity with fundamental and basic concepts.

There are but few decisions in point in Anglo-American jurisprudence. Both *Wolff v. Oxholm*<sup>106</sup> and *In Re Fried Krupp*<sup>107</sup> have been interpreted as decisions based on the public policy of the forum, though an equally possible view is that they were decided on the grounds of incompatibility with the law of nations. The famous *dictum* of Scrutton, L.J., that

it appears a serious breach of international comity if a state is recognized as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality,<sup>108</sup>

goes altogether too far, for it effectively closes the possibility of any foreign law or act of state from being refused recognition and enforcement, however immoral it may be. The decision in that case is better placed on the ground mentioned by the same learned judge,<sup>109</sup> that confiscation without compensation was not, on the facts, contrary to English public policy. The more extreme view is out of harmony with the view of the French and other Continental courts. The classical French decision is that of *Russian State v. Ropit*,<sup>110</sup> in which the Court of Cassation said:

Although the principle must be admitted that the courts of a state faced with a juridical situation governed by foreign law should apply foreign law, this rule is obligatory insofar as the application of foreign

<sup>104</sup> *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 98 (1918).

<sup>105</sup> Dicey, *Conflict of Laws* 512 (6th ed., 1949).

<sup>106</sup> Cited note 68 above.

<sup>107</sup> Cited note 70 above.

<sup>108</sup> *Luther v. Sagor*, [1921] 3 K.B. 532, 558.

<sup>109</sup> *Ibid.* at 559.

<sup>110</sup> 55 *Clunet* 674 (1928), *Annual Digest* 1927-1928, Case No. 43.

law and the respect for the rights acquired thereby are not incompatible with those principles and provisions of their own law which are regarded as essential from the point of view of public policy.

French courts repeatedly refused to recognize title to property which was based on a grant by Spanish authorities and had come into the possession of the latter as a result of measures of expropriation, on the ground that

French courts may not recognize any divestment of a right of ownership except with the consent of the owner, without just and previous indemnity.<sup>111</sup>

The case of *Holzer v. Deutsche-Reichsbahn Gesellschaft*<sup>112</sup> is a good illustration of the attitude of the United States courts. The plaintiff had been discharged from his employment in Germany under a German anti-Semitic statute eliminating Jews from the cultural, political, and economic life of the country. The court refused recovery because the contract and all its incidents were governed by German law.<sup>113</sup> There were certainly strong reasons for considering the entire body of German non-Aryan legislation as repugnant to the public policy of the forum. But the criterion of whether or not to nullify a foreign law in a particular case was said to be the closeness of the relation between the case and the forum.

How close this relation needs to be is difficult to define precisely. The more objectionable the foreign law or act of state, the fewer are the necessary points of contact. In *Citizens National Board v. Waugh*<sup>114</sup> it was said that the courts may not refuse, on grounds of public policy, to enforce a contract which is valid under the laws of the foreign state where it was made, "if the interests of the forum have but slight connection with the substance of the contract obligation." Probably the *Holzer* decision would have gone the other way if the objectionable statute had been pleaded by a plaintiff in order to get a recovery in the courts of the United

<sup>111</sup> *Société Potasas Iberias v. Nathan Bloch*, Annual Digest 1938-1940, Case No. 54; see also *ibid.*, Case No. 10; *ibid.* 1935-1937, Case No. 68. Cf. on identical issue *The Navemar*, *ibid.* 1938-1940, Case No. 68, at p. 182. See also *Bouniatos v. Société Optorg*, Clunet (1924), p. 133, which lays down that goods seized by a foreign government and transferred to a *bona fide* purchaser for value, who then transports them to France, may be recovered by the dispossessed owner, whether or not he is a French national. The test in French law seems to be the justice of the expropriation. Cf. Annual Digest 1949, Case No. 10; *ibid.*, Case No. 14; and the many decisions cited by Lipstein, 35 *Grotius Society Transactions* 157, 173-178; O'Connell, 4 *Int. and Comp. Law Q.* 287-290 (1955), for relevant French, Belgian and Dutch cases.

<sup>112</sup> 277 N.Y. 474, 14 N.E. 2d 798 (1938), Annual Digest 1938-1940, Case No. 71.

<sup>113</sup> The lower court had said indignantly: "And we are called upon to sanction the act. I say that our public policy does not compel us to give the act reinforcement. To give recognition to such conduct—though it pass for law in Germany—would lacerate our conscience, traduce our Declaration of Independence, rend asunder our Constitutions, Federal and State, antagonize our traditions, mock our history, and outrage our whole philosophy of life." 290 N.Y.S. 181 (Sup. Ct. Special Term, per Judge Collins), Annual Digest 1938-1940, Case No. 71, with comment by the editor.

<sup>114</sup> 78 F. 2d 325, 327 (1935). *Accord*: *Dougherty v. Equitable Life Assurance Co.*, 266 N.Y. 71, 90, 193 N.E. 897, 903 (1934); see 29 *Yale Law Journal* 745, 757, 758 (1920); Comment, 32 *ibid.* 471, 473 (1923).

States. The public policy doctrine may be applied affirmatively to allow recovery which would otherwise be unavailable, if the foreign law were strictly followed,<sup>115</sup> or negatively to deny a cause of action, created in another state, the enforcement of which is contrary to the strong public policy of the forum.<sup>116</sup> Mere recognition will be given to foreign laws more readily than enforcement, as was indicated by the court in *Kleve et al. v. Basler Lebens Versicherungs Gesellschaft*,<sup>117</sup> when it said of a German law forbidding the insurance company to pay on policies to Jews who had taken up permanent residence abroad: "the court is obliged to hold that the governing law is no less controlling because it is bad law." The court insisted that this was not a case of enforcing foreign law, as it would have been if the objectionable law were applied to assets of the plaintiff in the United States, but only a recognition of the force of German law in Germany. "We cannot undo and set at naught what has been done by the German Government with the assets of the plaintiff in Germany." But in *Plesch et al. v. Banque Nationale de la Republique d'Haiti*,<sup>118</sup> the court said that one cannot successfully assert a defense for wrongfully dealing with property of the plaintiff based on invalid and ineffective government orders. The confiscation decree upon which defendants relied was held to be clearly contrary to the public policy of the forum. Similarly, in another case, the Supreme Court of New York stated that it would not enforce confiscatory legislation contrary to its public policy.<sup>119</sup>

The traditional caution of the Anglo-American courts in the application of the public policy principle is to be commended and approved, as it may too easily become a means whereby personal prejudices of particular judges are brought to bear on foreign laws in a narrow-minded and provincial manner. But that restraint should go so far as to allow recognition to laws which shock the conscience of all civilized peoples is preposterous. In the *Bernstein* type of case there is certainly room for a more spirited and positive approach than the court felt itself able to take.

The doctrine of immunity for acts of state was based on an analogy from the immunity given to the foreign sovereign and his agents and property.

<sup>115</sup> *James & Co. v. Second Russian Insurance Co.*, 239 N.Y. 248, 146 N.E. 369 (1925); *Petrogradsky M. K. Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930); *The Vladikavkasky Ry. Co. v. The New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934); *Sulyok v. Penzintezetz Kozpont Budapest*, 111 N.Y.S. 2d 75, 279 App. Div. 528 (1st Dept. 1952).

<sup>116</sup> This being the formulation of the public policy rule in the Restatement, Conflict of Laws, Sec. 612 (1934).

<sup>117</sup> 182 Misc. 776, 45 N.Y.S. 2d 882 (Sup. Ct. N.Y. 1943), Annual Digest 1943-1945, Case No. 2.

<sup>118</sup> 77 N.Y.S. 2d 43, 273 App. Div. 224, aff'd, 298 N.Y. 573, 81 N.E. 2d 106 (1948).

<sup>119</sup> *Bollack v. Société Générale etc.*, 33 N.Y.S. 2d 986, 263 App. Div. 601. See also *Oscanyan v. Winchester Arms Co.*, 103 U.S. 261 (1880), in which the court refused to consider a Turkish law according to which the plaintiff, a representative of the Turkish Government, was allegedly permitted to agree with the defendant company on a commission for the sale of arms to the Government. That course of action was deemed "so repugnant to all our notions of right and morality that it can have no countenance in the courts of the United States"; and *Weiss v. Lustig*, 58 N.Y.S. 2d 547, 185 Misc. 910.



The courts should, with due regard to their constitutional position as makers of law and not makers of policy, feel confident in their power to adapt legal principle to the changing factual situations which come before them. Political expediency is not the steadiest of foundations for judicial decisions, and it is undesirable to make the judiciary "a mere weathercock of foreign policy."<sup>127</sup> By a consistent use of the principles of private international law, a proper deference to the clearly expressed policies of the Executive, and by an intelligent use of judicial discretion, it should be possible to recognize and give effect to all such foreign acts of state which do not conflict with the fundamental concepts of justice and morality prevailing in the international community.

<sup>127</sup> *Ibid.* at 149.

# GENERAL PRINCIPLES OF LAW AS APPLIED BY THE CONCILIATION COMMISSIONS ESTABLISHED UNDER THE PEACE TREATY WITH ITALY OF 1947

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## I. INTRODUCTORY REMARKS

The present study is intended to be a modest contribution to Schlesinger's research project concerning the "general principles of law recognized by civilized nations."<sup>1</sup> At the same time it tends to comply with the *vœu* recommended by Jenks to the *Institut de Droit International* concerning the desirability of better information on the decisions of international arbitral tribunals.<sup>2</sup> It is the aim of the present study to trace all explicit or implied references to these "general principles of law recognized by civilized nations" which may be found in the hitherto published decisions of the Conciliation Commissions<sup>3</sup> established under Article 83 of the Peace Treaty with Italy of February 10, 1947.<sup>4</sup> These Commissions consist of one member appointed by each of the states concerned. If

<sup>1</sup> On this project, see Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations," 51 A.J.I.L. 734-753 (1957).

<sup>2</sup> 47 *Annuaire de l'Institut de Droit International* 221 (1957, I).

<sup>3</sup> The decisions of the Franco-Italian Conciliation Commission have been published in "Recueil des Décisions de la Commission de Conciliation Franco-Italienne instituée en exécution de l'art. 83 du Traité de Paix avec l'Italie publié sous les auspices de la Représentation française à la Commission de Conciliation Franco-Italienne" (hereafter cited as "Recueil"). Selected decisions of the other Commissions have been published. This writer has had access to the texts of all decisions of the U.S.-Italian, and Netherlands-Italian Commissions. However, the unpublished decisions do not contain anything of importance in respect to the present researches. There is comparatively little literature on the work of these Commissions: Anonymous, "La Commission de Conciliation Franco-Italienne," *Affaires Etrangères*, January, 1951, No. 3; Bolla, "Quelques considérations sur les Commissions de Conciliation prévues par l'article 83 du Traité de paix avec l'Italie," *Symbolae Verzijl* 67-87 (1958); Bos, "The French-Italian Conciliation Commission," 22 *Acta Scandinavica juris gentium* 132 (1952); Maury, "L'Arrêt Nottebohm et la Condition de la Nationalité Effective," 23 *Zeitschrift für ausl. u. internat. Privatrecht, Festgabe für A. N. Makarov* 515 f. (1958); Seidl-Hohenveldern, "Schiedsgerichtliche Entscheidungen zu vermögensrechtlichen Fragen des italienischen Friedensvertrages," *Jur. Blätter* 1956, pp. 252-256, 277-281, 307-310; Seidl-Hohenveldern, *Neue Schiedssprüche zur Konfiskation feindlichen Privateigentums, Recht der Internationalen Wirtschaft* 45-47 (1956); Soubeyrol, "The international interpretation of treaties and the consideration of the intention of the parties," 85 *Clunet* 687 ff. (1958); Vignes, "La Commission de Conciliation Franco-Italienne," 1955 *Annuaire Français de Droit International* 212 f.; Vignes, "L'Affaire Florence Mergé," 1956 *ibid.* 430, and a mimeographed thesis by Grenier (Bordeaux, 1958).

<sup>4</sup> *Gazetta Ufficiale*, Dec. 24, 1947; 42 A.J.I.L. Supp. 47 f. (1948).

these two members fail to agree, they draft a "statement of disagreement," whereupon a third member,<sup>5</sup> citizen of a third state, is added to the Commission, which shall then decide the case concerned by a majority vote.<sup>6</sup>

In spite of their name<sup>7</sup> these Commissions acted as real Conciliation Commissions in only a few cases. In all such cases the Commission concerned stressed explicitly that the decision was reached "in a spirit of conciliation." The operative part<sup>8</sup> of such decisions is obviously without interest for the purpose of the present study. However, in the vast majority of cases the Commissions, even when composed of only two members, acted as "real arbitral tribunals."<sup>9</sup>

The present study includes not only explicit references to general principles, but also references by implication. Any application of a rule which does not figure either in the treaty law to be applied by the Commission,<sup>10</sup> or in general customary international law or in domestic law, has here been considered to be such an implied reference to the "general principles of law recognized by civilized nations." In order to allow each reader to judge for himself, the exact wording of the decision concerned<sup>11</sup> will be quoted when possible. Decisions based on equity have not been included. All references to generally recognized principles of *international law* were likewise omitted.

## II. GENERAL PRINCIPLES CONCERNING THE LAW OF CONTRACTS

The Conciliation Commissions refer to general principles in respect to contracts either indirectly, when dealing with treaty law on the strength

<sup>5</sup> The Franco-Italian Commission always chose as its third member the former President of the Swiss Federal Tribunal, Dr. h.c. Plinio Bolla. The other Commissions varied in the choice of their third members.

<sup>6</sup> Decisions rendered without the participation of a third member will be marked by a + and those reached by a majority decision by a °.

<sup>7</sup> On the rôle of real Conciliation Commissions, cf. Wehberg, "Die Vergleichskommissionen im modernen Völkerrecht," in 19 Zeitschrift f. ausl. öff. Recht u. Völkerrecht, Festgabe für Alexander N. Makarov 551 f. (1958). Bolla, *loc. cit.* 76, shares our view that the "Conciliation Commissions" established under the Peace Treaty with Italy are real tribunals, even in cases where a decision is rendered only by two members.

<sup>8</sup> However, the contentions of the parties may also in such cases contain references to "general principles." Cf. note 109 below.

<sup>9</sup> Anglo-Italian Conciliation Commission, Dec., May 8, 1954, in Re Competence of Conciliation Commission, 1955 Int. Law Rep. 872; "an international arbitral body," Italian-U. S. Conciliation Commission, Dec. No. 11, June 25, 1952+ (Amabile Claim), *ibid.* 843, 850; "an international tribunal," Franco-Italian Conciliation Commission Dec. No. 4, Nov. 13, 1948,+ S.A.I.M.I. Claim, 1 Recueil 38, 40; 1951 Int. Law Rep. 471.

<sup>10</sup> I.e., the Italian Peace Treaty and its Annexes and the Commission's own Rules of Procedure. Only the Rules of Procedure of the Franco-Italian Conciliation Commission are published in full (1 Recueil 25 f.). By various exchanges of notes other problems raised by the Peace Treaty or by these notes were likewise submitted to the Commissions. Bolla, *loc. cit.* 84, thinks that the three members of the Franco-Italian Commission in some of these cases did not act as the Commission but as an independent arbitral body appointed *ad hoc*.

<sup>11</sup> As for the facts of the decisions concerned and further details, cf. the author's article in *Diritto Internazionale*, 1959, pp. 227-259.



of the reasoning that treaties should be interpreted like contracts, or directly, as some of the disputes before the Commissions concerned contracts between private parties.

There are two decisions concerning a *pactum de contrahendo*. The first of these cases concerned the *pactum de contrahendo* figuring in paragraph 18 of Annex XIV of the Peace Treaty. The Commission said:

On the international plane as on the plane of most municipal private law legislation, parties who are at one on principal matters may reserve for subsequent agreement certain secondary points. The Treaty is not rendered imperfect, or ineffective, even if no agreement is concluded. There would then be a case for having recourse to [an international tribunal] to seek some method which would replace the agreement which has proved impossible. . . . The agreement referred to in para. 18 is not optional for the Governments concerned; as has just been explained, the latter were under an international obligation to enter into it and, if accord was found to be impossible, to seek out together a procedure capable of replacing it. Although para. 18 does not contain the actual solution of the problem concerned because it is manifestly impossible for it to do so, it gives sufficiently precise criteria which the [solution] ought to follow.<sup>12</sup>

In the other case a *pactum* was held to be "a nullity by reason of the insufficient determination of its content."<sup>13</sup>

The notion of a "stipulation in favor of a third party" was employed by the Commission to explain Article 76 (2) of the Treaty.<sup>14</sup>

The issuing of a power of attorney by a son on behalf of his mother without her previous authorization was held valid as an act of *negotiorum gestio* as understood by the French and "Italian Civil Code and moreover the mother although not formally having given her approval to this power of attorney had never contested it."<sup>15</sup>

In respect to the limits of party autonomy the Commission held that "the intention of the parties cannot be an obstacle to the dispositions of the Treaty to be applied as public law [dispositions de droit public]."<sup>16</sup>

"The rights [to restitution] awarded by Art. 78 of the Treaty do not depend on the condition that these rights formed the objective of some reservation during the war and moreover such a reservation could have been found *in re ipsa*."<sup>17</sup>

According to the majority of the Commission *any* subsequent change in a contract amounts to a novation thereof, *i.e.*, to the conclusion of

<sup>12</sup> Dec. No. 163, Oct. 9, 1953, Frontier (Local Authorities) Award, 4 Recueil 213, 233 f.; 1953 Int. Law Rep. 63, 71.

<sup>13</sup> Dec. No. 125, March 1, 1952,° I.V.E.M. Claim (No. 1), 4 Recueil 29, 59.

<sup>14</sup> Dec. No. 95, March 8, 1951,° Pertusola Claim, 3 Recueil 67, 79; 1951 Int. Law Rep. 414 (our translation).

<sup>15</sup> Dec. No. 13, Jan. 21, 1949 + Guillemot-Jacquemin, 1 Recueil 47, 50; 1951 Int. Law Rep. 403 (our translation).

<sup>16</sup> Dec. No. 125, March 1, 1952,° I.V.E.M. Claim (No. 1), 4 Recueil 29, 49.

<sup>17</sup> *Ibid.* 52.

a *new* contract.<sup>18</sup> In a minority opinion the Italian member contended that minor changes could not produce this effect.<sup>19</sup>

A secondary obligation (to repair goods to be restored) cannot exist without the primary obligation (to restore).<sup>20</sup>

A unilateral renunciation was held to be insufficient to annul a bilateral contract.<sup>21</sup> "A waiver cannot be assumed unless the intention of the claimants to waive their rights under the Treaty is quite unequivocal."<sup>22</sup> However, the fact that no demands concerning such rights were formulated between 1947 and 1953 was held to constitute such a waiver.<sup>23</sup>

After exhaustive researches concerning the notion of duress, the Commission held that a person acting under the pressure of economic difficulties does not act under duress. As a rule, a person having the possibility to profit from a situation in conformity with the law does not commit an injustice. However, under exceptional circumstances, the exercise of a right may constitute an act of duress. These exceptional circumstances arise if licit means are employed for an unjust purpose, in order to obtain something one had no right to.<sup>24</sup>

*Force majeure* was mentioned in two cases, however, in a rather atypical way.<sup>25</sup>

"In order that a person could—in relation to a third party—invoke the fact, that a certain business was only simulated, it is necessary to prove that this third party had itself taken part in this simulation."<sup>26</sup>

Acceptance by Greece of the Italian viewpoint on a matter also in dispute between Italy and France was held by France to be irrelevant as "*res inter alios acta*."<sup>27</sup>

### III. GENERAL PRINCIPLES CONCERNING THE INTERPRETATION OF CONTRACTS

France objected that general principles of interpretation of contracts should apply in respect to the Peace Treaty, as the latter is a law-making treaty (*traité-loi*) and not a "*traité-contrat*" providing reciprocal

<sup>18</sup> Dec. No. 85, Sept. 18, 1950,\* *Ottoz Claim*, 3 *Recueil* 22, 32; 1951 *Int. Law Rep.* 435.

<sup>19</sup> *Ibid.*, 3 *Recueil* 34-35.

<sup>20</sup> Dec. No. 152, March 10, 1953, *Société Nationale des Chemins de Fer Français Claim*,\* 4 *Recueil* 152, 159; 1953 *Int. Law Rep.* 481, 485 f.

<sup>21</sup> Dec. No. 125, March 1, 1952,\* *I.V.E.M. Claim (No. 1)*, 4 *Recueil* 29, 55.

<sup>22</sup> *Anglo-Italian Conciliation Commission*, Dec., Dec. 11, 1954; *Gassner Claim (The M.Y. Gerry)*, 1955 *Int. Law Rep.* 972, 974.

<sup>23</sup> Dec. No. 164, Nov. 21, 1953,\* *Collas et Michel Claim*, 4 *Recueil* 277, 280; 1953 *Int. Law Rep.* 628.

<sup>24</sup> Dec. No. 125, March 1, 1952,\* *I.V.E.M. Claim (No. 1)*, 4 *Recueil* 29, 57-61.

<sup>25</sup> Dec. No. 164, Nov. 21, 1953,\* *Collas et Michel Claim*, 4 *Recueil* 277, 280; 1953 *Int. Law Rep.* 628, and Dec. No. 112, Oct. 31, 1951,\* *Société Nationale des Chemins de Fer Français Claim*, 3 *Recueil* 153, 155 (our translation); 1953 *Int. Law Rep.* 481, 486. This French contention was practically accepted by the Commission in its Dec. No. 152, March 10, 1953,\* concerning the same case, 4 *Recueil* 152, 161; 1953 *Int. Law Rep.* 481.

<sup>26</sup> Dec. No. 169, March 16, 1954,\* *Dame Gamet, Veuve Vlasto Claim*, 5 *Recueil* 17, 26.

<sup>27</sup> Dec. No. 186, May 5, 1955,\* *Incis Claim*, 5 *Recueil* 200, 203.

rights and obligations between the parties.<sup>28</sup> However, the majority of the Franco-Italian Commission,<sup>29</sup> as well as the Italo-U.S.<sup>30</sup> and Anglo-Italian Commissions,<sup>31</sup> held that "even in the case of a treaty of peace imposed on a defeated State without the latter having had the opportunity of making observations beforehand, the ascertaining of the intention of the parties, and not of one party only, remains the principal aim of interpretation."<sup>32</sup>

Another preliminary objection against the application of general rules of interpretation consists in the assertion that the meaning of the provision is clear and that hence there is no need to have recourse to rules of interpretation. The several Commissions, however, held that "the old maxims, '*in claris non fit interpretatio*' and, '*clara non indigent interpretatione*' are repudiated by the most authoritative modern teaching of every country."<sup>33</sup> However, the claimant governments sometimes relied on these maxims.<sup>34</sup>

There is scope for the application to the interpretation of treaties of most of the general principles which hold good in municipal law for the interpretation of contracts, especially to find the true common intention of the parties without fastening on inexact expressions or descriptions which they may have used.<sup>35</sup>

This is true even in case of a dictated peace treaty.<sup>36</sup> However, the victorious states cannot require that such a treaty "shall be interpreted according to their undisclosed wishes; it must be interpreted according to

<sup>28</sup> French dissenting opinion attached to the Pertusola Claim, Dec. No. 95, March 8, 1951,<sup>o</sup> 3 Recueil 67, 93, and to Dec. No. 136, June 25, 1952,<sup>o</sup> In re Rizzo (No. 1), 4 Recueil 82, 86, 101; 1952 Int. Law Rep. 478.

<sup>29</sup> In re Rizzo (No. 1),<sup>o</sup> 4 Recueil 82, 88, 91; 1952 Int. Law Rep. 478, 481; Pertusola Claim,<sup>o</sup> 3 Recueil 67, 87; 1951 Int. Law Rep. 414, 420.

<sup>30</sup> Dec. No. 55, June 10, 1955, Mergé Claim, 1955 Int. Law Rep. 443, 448; digested in 50 A.J.I.L. 154 (1956).

<sup>31</sup> Dec., May 8, 1954, in re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 871.

<sup>32</sup> In re Rizzo (No. 1), 4 Recueil 82, 91; 1952 Int. Law Rep. 478, 481.

<sup>33</sup> Franco-Italian Commission, Dec. No. 95, March 8, 1951,<sup>o</sup> Pertusola Claim, 3 Recueil 67, 75; 1951 Int. Law Rep. 414, 415; Anglo-Italian Commission, May 8, 1954, in re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 870 f.; Italian-U. S. Commission, Dec. No. 18, Oct. 22, 1953,<sup>o</sup> Armstrong Cork Company Claim, 1955 Int. Law Rep. 945, 950. Cf., however, the following passage from Italian-U. S. Commission Dec. No. 5, March 4, 1952,<sup>+</sup> Carnelli Claim, 1955 Int. Law Rep. 340, 345: "The Agent of the United States Government has cited certain cases decided by international and Italian tribunals which it is not deemed necessary to discuss, inasmuch as those cases do not deal with an interpretation of the Treaty of Peace with Italy and inasmuch as the Commission has been guided in its decision of this point by the clear language of the Treaty itself." Case digested in 50 A.J.I.L. 153 (1956).

<sup>34</sup> 3 Recueil 67, 93, and 1955 Int. Law Rep. 870 (cf. note 33 above), as well as Dec. No. 78, Oct. 2, 1950,<sup>+</sup> 2 Recueil 100, 105, Pertusola Claim.

<sup>35</sup> Dec. No. 95, March 8, 1951,<sup>o</sup> Pertusola Claim, 3 Recueil 67, 87; 1951 Int. Law Rep. 414, 419. To the same effect Dec. No. 136, June 25, 1952,<sup>o</sup> In re Rizzo (No. 1), 4 Recueil 82, 91; 1952 Int. Law Rep. 478, 481.

<sup>36</sup> Italian-U. S. Commission, Dec. No. 5, March 4, 1952,<sup>+</sup> Carnelli Claim, 1955 Int. Law Rep. 340, 343.

the will of the victorious States as they have expressed it [*exteriorisée*] and reduced it to writing [*concrétisée*], and as it appears objectively in the Treaty."<sup>37</sup> What is important from an international point of view is the fundamental character of a measure, not the legal label stuck on it.<sup>38</sup> A definition given in the treaty shall not only apply where the actual word was used, but in every instance where the *concept* concerned was involved.<sup>39</sup>

In the *Pertusola Claim*, the Commission stated:

The function of the interpreter is, in effect, the same whether a contract or a law is in question. It consists, in both cases, in determining through its external manifestation the juridically efficient content of an intention [*"une volonté"*]. The criteria to which the interpretation of contracts should conform are therefore analogous to those which govern the interpretation of laws, save that in the case of contracts, the effective will can also be found outside the verbal expression thereof, while, in the case of a law, the effective will or intention is impersonal and is therefore crystallised in the text.<sup>40</sup>

The Commissions adhere to the principle of effective interpretation,<sup>41</sup> i.e., "an interpreter must strive to give a reasonable meaning to the condition imposed by the Treaty,"<sup>42</sup> so that "the main object of the Treaty may be fulfilled."<sup>43</sup> A clause of the treaty "must be interpreted rather in such a way that it may produce an effect as in a way leaving it without any effect."<sup>44</sup> "In order to obviate the paradoxical consequences which an interpretation exclusively taken from the words of the text would . . . at times be liable to reach one must have recourse to the determination of the ratio legis of the Treaty."<sup>45</sup> "A reasonable interpretation must confirm or otherwise the conclusion to which the interpreter has been led, in any given instance, by a grammatical analysis of a passage taken in isolation."<sup>46</sup>

An interpretation must be rejected which would make a term "appear meaningless, or at least tautological," as when the clause concerned should

<sup>37</sup> In re Rizzo (No. 1),<sup>o</sup> 4 Recueil 82, 91; 1952 Int. Law Rep. 478, 481; *Pertusola Claim*, 3 Recueil 67, 87; 1951 Int. Law Rep. 414, 420.

<sup>38</sup> Dec. No. 107, Sept. 15, 1951, *Duc de Guise Claim*, 3 Recueil 119, 127 f.; 1951 Int. Law Rep. 423, 426.

<sup>39</sup> Italian-U. S. Commission, Dec. No. 5, March 4, 1952, *Carnelli Claim*, 1955 Int. Law Rep. 340, 343.

<sup>40</sup> *Pertusola Claim*,<sup>o</sup> 3 Recueil 67, 74 f.; 1951 Int. Law Rep. 414, 415.

<sup>41</sup> Dec. No. 201, March 16, 1956,<sup>o</sup> In re Interpretation of Art. 78, par. 7, of the Peace Treaty, 5 Recueil 296, 321, quoting Sir H. Lauterpacht in 1950 *Annuaire de l'Institut de Droit International* (I).

<sup>42</sup> *Pertusola*<sup>o</sup> Claim, 3 Recueil 67, 77; 1951 Int. Law Rep. 414, 417.

<sup>43</sup> Decision cited note 41 above.

<sup>44</sup> *Ibid.* and also Dec. No. 136, In re Rizzo (No. 1),<sup>o</sup> 4 Recueil 82, 88; 1952 Int. Law Rep. 478.

<sup>45</sup> Anglo-Italian Commission, Dec., May 8, 1954, 1955 Int. Law Rep. 867, 872, stressing that "the application of this principle is found in all jurisprudence established by the Permanent Court of International Justice." In the *Pertusola*<sup>o</sup> Decision, 3 Recueil 67, 83, 1951 Int. Law Rep. 414, 419, the Franco-Italian Commission quotes to the same effect 1,2 C. de leg. 1, 14: "*Scire leges non est verba earum tenere sed vim et potestatem*." Dec. No. 82, Dec. 1, 1950, *Piedmont Silk Weaving Company's Claim*, 3 Recueil 5, 16; 1951 Int. Law Rep. 427.

<sup>46</sup> *Pertusola*<sup>o</sup> Claim, 3 Recueil 67, 78; 1951 Int. Law Rep. 414, 417.

be interpreted as referring to "a loss suffered as the result of damage."<sup>47</sup> "The use of pleonasmus cannot be presumed, nor can one assume that the draftsmen of the Treaty had knowingly had recourse to a tortuous phrasing to express what is after all quite a simple idea."<sup>48</sup> However, "no interpretation must ever arrive at a solution other than that which emerges formally from the terms of the treaty, unless, obviously, this leads to an absurd result."<sup>49</sup>

"It is a universally recognized principle of interpretation that the dispositions of a treaty shall be interpreted in their context."<sup>50</sup> "Judicial decisions moreover have given to this method of interpretation a growing importance, as this context may be extended from the sentence containing the word to be interpreted, to the various paragraphs of the article concerned or to the text as a whole and even to the texts of several treaties having some links between them."<sup>51</sup> "The provisions of the Peace Treaty should be interpreted as being complementary to each other and as limiting each other."<sup>52</sup> An expression "must be interpreted and applied in a sense common to all the signatory powers."<sup>53</sup>

"The general principles of law must be invoked for the interpretation of the clauses of the Peace Treaty."<sup>54</sup> This applies especially to the principle of good faith. "In virtue of its character as a contractual instrument the Peace Treaty must be interpreted according to the principle of good faith."<sup>55</sup> Had the Allies really wished to contest the interpretation favorable to Italy which an Italian memorandum gave to a somewhat ambiguous clause of the draft of the treaty, "good faith would have obliged them either to draw the attention of the Italian Delegation to the misunderstanding, or to modify the drafting of the sub-paragraph so as to exclude the interpretation given by the Italian Delegation."<sup>56</sup> It is to be expected that in con-

<sup>47</sup> Pertusola ° Claim, 3 Recueil 67, 76; 1951 Int. Law Rep. 414, 416.

<sup>48</sup> *Idem*, ° 3 Recueil 67, 76; 1951 Int. Law Rep. 414, 417.

<sup>49</sup> In re Competence of Conciliation Commission (note 45 above), 1955 Int. Law Rep. 867, 874.

<sup>50</sup> Dec. No. 201, ° March 16, 1956, 5 Recueil 296, 305, quoting Sir H. Lauterpacht (cf. note 41 above) and 1 Bousseau, *Principes Généraux du Droit International Public*, No. 436; Pertusola ° Claim, 3 Recueil 67, 83; 1951 Int. Law Rep. 414, 419, quoting 1,24 D 1, 3: "*In civile est nisi tota lege perspecta una aliqua particula eius proposita, iudicare vel respondere*"; *idem*, 3 Recueil 67, 75, 78; 1951 Int. Law Rep. 414, 416 and 418.

<sup>51</sup> 5 Recueil 305; cf. note 50 above.

<sup>52</sup> Dec. No. 163, Oct. 9, 1953, *Frontier (Local Authorities) Award*, 4 Recueil 213, 232; 1953 Int. Law Rep. 68, 69.

<sup>53</sup> Dec. No. 136, In re Rizzo (No. 1), ° 4 Recueil 82, 88, 93; 1952 Int. Law Rep. 478 (our translation).

<sup>54</sup> Dec. No. 82, Dec. 1, 1950, *Piedmont Silk Weaving Company's Claim*, 3 Recueil 5, 13; 1951 Int. Law Rep. 427 (our translation).

<sup>55</sup> Dec. No. 33, Aug. 29, 1949, In re Italian Special Capital Levy Duties, 1 Recueil 95, 99; 1951 Int. Law Rep. 406 (our translation); Dec. No. 82, Dec. 1, 1950, *Piedmont Silk Weaving Company's Claim*, 3 Recueil 5, 16; 1951 Int. Law Rep. 427; Dec. No. 152, *Société Nationale des Chemins de Fer Français Claim*, ° March 10, 1953, 4 Recueil 152, 164; 1953 Int. Law Rep. 481, 490; Dec. No. 201, ° March 16, 1956, 5 Recueil 296, 321.

<sup>56</sup> Pertusola Claim, ° 3 Recueil 67, 90; 1951 Int. Law Rep. 414, 422.

formity with the rules of good faith the parties should have agreed to avoid such consequences of the principles admitted as might be susceptible in practice of "causing the party on whom they operate inconveniences out of proportion to the advantages which they would have brought to the party profiting from them."<sup>57</sup> However, the interpretation according to the principle of good faith must not be carried too far. "It must be said that it accords with the practice and the decisions of the Court that the application of general principles shall not exceed the limits of positive law; in applying them the judge does not become free to decide *ex aequo et bono*."<sup>58</sup> "The clauses of a Treaty must be strictly followed even when they constitute a derogation from the general rules of international law,"<sup>59</sup> but, on the other hand, international jurisprudence applies "the principle which submits to a restrictive interpretation provisions which derogate from common law."<sup>60</sup>

As far as formal rules of interpretation are concerned, trying to determine the real intentions of the victorious Powers as evidenced in an imposed Peace Treaty<sup>61</sup> "is much the same as the determination, in the case of a law, of the will of the legislator, through the study of the preparatory work."<sup>62</sup> Recourse to such work is also admitted in other decisions.<sup>63</sup> Italy contended that the only conclusion to be drawn from the fact that imposed peace treaty<sup>61</sup> "is much the same as the determination, in the be interpreted *contra proferentem*."<sup>64</sup> In case of a bilingual text of a treaty, "it is not in order to rely exclusively on one of them. An interpreter ought rather to strive to explain one by the use of the other."<sup>65</sup>

It is to be assumed that the several dispositions of the treaty intend to deal with the same factual situation in an identical manner.<sup>66</sup> "It is good

<sup>57</sup> Dec. No. 163, Oct. 9, 1953, Frontier (Local Authorities) Award, 4 Recueil 218, 238; 1953 Int. Law Rep. 63, 75.

<sup>58</sup> Anglo-Italian Commission, May 8, 1954, In re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 871.

<sup>59</sup> Italian-U. S. Commission, Dec. No. 55, June 10, 1955, Mergé Claim, 1955 Int. Law Rep. 443, 447; Dec. No. 78, Oct. 2, 1950, 2 Recueil 100, 105 (French contention).

<sup>60</sup> Anglo-Italian Commission, May 8, 1954, In re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 874.

<sup>61</sup> Cf. notes 29, 32 and 37.

<sup>62</sup> Pertusola v. Claim, 3 Recueil 67, 87; 1951 Int. Law Rep. 414, 420.

<sup>63</sup> Dec. No. 191, Sept. 15, 1955, Agache Claim, 5 Recueil 225, 230; 1955 Int. Law Rep. 626, 629, and Dec. No. 201, March 16, 1956, 5 Recueil 296, 319; Dec. In re Italian Special Capital Levy Duties, 1 Recueil 95, 100; 1951 Int. Law Rep. 406, 409, and in the Italian-U. S. Commission, Dec. No. 27 of Dec. 6, 1954, Shafer Claim, 1955 Int. Law Rep. 959, 962, 50 A.J.I.L. 152 (1956), and in Dec. No. 18, Oct. 22, 1953, Armstrong Cork Company Claim, 1955 Int. Law Rep. 945, 951, 50 A.J.I.L. 151 (1956). Incidentally these two decisions and the Agache decision show that this method also may lead to conflicting interpretations.

<sup>64</sup> In re Rizzo (No. 1), 4 Recueil 82, 88; 1952 Int. Law Rep. 478 (our translation); Dec. No. 201, 5 Recueil 296, 324; Pertusola Claim, 3 Recueil 67, 90; 1951 Int. Law Rep. 414, 422.

<sup>65</sup> In re Italian Special Capital Levy Duties, 1 Recueil 95, 100; 1951 Int. Law Rep. 406, 409.

<sup>66</sup> In re Rizzo (No. 1), 4 Recueil 82, 93; 1952 Int. Law Rep. 478, 482.

drafting to employ, in the same treaty the same expression every time the same thing is referred to," but the Commission continues to state resignedly "that it sometimes happens . . . that that principle is no more followed than the other, equally excellent rule that one should use different expressions to indicate different things."<sup>67</sup> Yet, in interpreting the treaty it should be assumed that its drafters had complied with these rules, "unless other considerations, drawn from the text of the Treaty, would permit the conclusion that the parties wanted to give in different passages of the Treaty, a different meaning to one and the same word."<sup>68</sup> "A pleonastic statement, made for the purpose of facilitating the interpretation of the treaty, shall under no condition serve as starting point for an argumentation '*a contrario*.'"<sup>69</sup> Other decisions also advise caution in using an argumentation '*a contrario*.'<sup>70</sup>

Although argumentation by analogy is not generally rejected by the Commission,<sup>71</sup> such argumentation must be excluded where it would lead to an extension of certain obligations which France had voluntarily assumed,<sup>72</sup> or where the rule to be applied by analogy has the character of an exception.<sup>73</sup> "It is an universally admitted principle, in international law as well as in domestic law, that any contractual obligation—and the Treaty, by its nature, is such—must be performed only within the limits of what has been agreed."<sup>74</sup> "A clause of a compromis cannot be interpreted liberally [*extensivement*], particularly in the international sphere, as regards the competence of an arbitrator or arbitrators."<sup>75</sup> It is an universally admitted maxim that '*exceptio est strictissimae applicationis*.'<sup>76</sup> A remedy based on an exception shall only be granted where the conditions for its application appear to be fulfilled "in the most clear and absolute manner."<sup>77</sup> "The principle shall not be deprived of all its content by the exception."<sup>78</sup>

As for the respective rank of the above-mentioned maxim: "it is only applicable in case of doubt and, in the present instance, it cannot prevail against the other traditional rule of interpretation that obligations contained in conventions must be interpreted in such a way as to impose the minimum burden on the debtor party."<sup>79</sup> "In case of doubt the principle of '*favor debitoris*' (*benignius est interpretandum, in obscuris quod mini-*

<sup>67</sup> Pertusola Claim, ° 3 Recueil 67, 81; 1951 Int. Law Rep. 414, 418.

<sup>68</sup> Dec. No. 201, ° 5 Recueil 296, 309. <sup>69</sup> *Ibid.* 296, 313.

<sup>70</sup> Dec. No. 33, Aug. 29, 1949, Guillemot-Jacquemin Claim (No. 2), 1 Recueil 105, 112; 1951 Int. Law Rep. 403, 405; Dec. No. 171, July 6, 1954, In re Rizzo (No. 2), 5 Recueil 57, 80; 1955 Int. Law Rep. 500.

<sup>71</sup> Cf. text at note 102 below.

<sup>72</sup> In re Rizzo (No. 2), 5 Recueil 57, 80.

<sup>73</sup> Dec. No. 201, ° 5 Recueil 296, 302.

<sup>74</sup> Italian-U. S. Commission, Dec. No. 55, June 10, 1955, Mergé Claim, 1955 Int. Law Rep. 443, 447; 50 A.J.I.L. 154 (1956).

<sup>75</sup> Montefiore Claim, 5 Recueil 260, 272; 1955 Int. Law Rep. 840, 842 f.

<sup>76</sup> Dec. No. 201, ° 5 Recueil 296, 300, 304; In re Rizzo ° (No. 1), 4 Recueil 82, 86, 92; 1952 Int. Law Rep. 478, 481.

<sup>77</sup> Ottoz Claim, ° 3 Recueil 22, 32; 1951 Int. Law Rep. 435 (our translation).

<sup>78</sup> Frontier (Local Authorities) Award, 4 Recueil 213, 232; 1953 Int. Law Rep. 63, 70.

<sup>79</sup> In re Rizzo ° (No. 1), 4 Recueil 82, 92; 1951 Int. Law Rep. 435 (our translation).

*num est sequimur*), is as valid for treaties as for contracts, especially . . . when the contract was drawn up by the creditor."<sup>80</sup> The same principle is also alluded to as the maxim "*in dubio mitius*."<sup>81</sup>

"There is no reason to make use of the rules of construction mentioned above [concerning exceptions and *favor debitoris*] except in the extreme case when every other means has failed to establish the intentions of the parties."<sup>82</sup>

Finally, an absence of protests against a certain clause of a draft may be construed as acquiescence only to the manifest meaning, however, and not to any hidden intention of that clause.<sup>83</sup>

#### IV. GENERAL PRINCIPLES CONCERNING PROCEDURAL PROBLEMS

Although the Commissions were permitted to decide procedural problems also on the strength of equitable considerations,<sup>84</sup> the following references seem to be intended as references to general principles of law rather than to equity.

"The meaning of jurisdiction is the same in international and internal law,"<sup>85</sup> *i.e.*, to determine actual disputes:

To interpret the Treaty in such a way that the Commission would also have the power to interpret the provisions of the Peace Treaty in an abstract and general manner, with obligatory effect for all future cases, would be to run the risk, because [the power] is open to abuse, of the Commission's giving a judgment blemished by excess of power—it would create rules of law, which is not a jurisdictional function but a legislative function.<sup>86</sup>

It should, however, be noted that this view of the Anglo-Italian Commission is not fully shared by the Franco-Italian Commission.<sup>87</sup>

"A *compromis* clause cannot be interpreted liberally [*extensivement*]."<sup>88</sup>

A question which involves contractual rights of a third party not involved in the litigation between the parties before the Commission is "*de*

<sup>80</sup> Pertusola Claim,° 3 Recueil 67, 90; 1951 Int. Law Rep. 414, 422, quoted in the Italian Dissenting Opinion to Dec. No. 144,° Jan. 17, 1953, Mossé Claim, 4 Recueil 117, 132; 1953 Int. Law Rep. 217; Italian-U. S. Commission, Dec. No. 18, Oct. 22, 1953,° Armstrong Cork Company Claim, 1955 Int. Law Rep. 945, 953.

<sup>81</sup> In re Rizzo (No. 1),° 4 Recueil 82, 83; 1952 Int. Law Rep. 478.

<sup>82</sup> *Idem*, 4 Recueil 82, 92; 1952 Int. Law Rep. 478, 482.

<sup>83</sup> Pertusola Claim,° 3 Recueil 67, 89; 1951 Int. Law. Rep. 414, 421 f.

<sup>84</sup> The decision cited at note 58 above rightly concludes, on the strength of a reference to Blühdorn, "Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes," in 41 Hague Academy Recueil des Cours 190 (1932, III), that "this excludes the application of these rules to the disputes themselves."

<sup>85</sup> Anglo-Italian Commission, May 8, 1954, Re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 878; Dec. No. 186, May 5, 1955,° Incis Claim, 5 Recueil 200, 203, Italian contention.

<sup>86</sup> In re Competence of Conciliation Commission, 1955 Int. Law Rep. 867, 878.

<sup>87</sup> Dec. No. 201,° March 16, 1956, 5 Recueil 296, 325; Dec. No. 176,° July 1, 1954, 5 Recueil 120, 121; Dec. No. 82, Aug. 29, 1949, In re Italian Special Capital Levy Duties, 1 Recueil 95, 104; 1951 Int. Law Rep. 406.

<sup>88</sup> Cf. note 75 above.



*jure tertii* and cannot be raised between these parties nor decided before the present tribunal.”<sup>89</sup> However, “the competence of an international tribunal to pronounce on preliminary pleas . . . cannot be contested.”<sup>90</sup> According to a French contention, “in international law the incompetence of a tribunal cannot be based on the fact that there exists a parallel set of remedies.”<sup>91</sup>

“Even if this institution of private law [the objection of non-compliance with time limits] could produce effects also in the field of international law, it is by its nature one of the cases where a *negotiorum gestio* is not admitted.”<sup>92</sup>

A party who, although in an irregular way, was “actually informed of a judgment . . . cannot plead that she knew nothing of the lawsuit” concerned.<sup>93</sup> Simple unsubstantiated statements (*dires invérifiables*) by the interested party are not accepted as evidence of an alleged damage.<sup>94</sup> An *atto di notorietà* unilaterally established by the interested party has less probative value than a later protocol established in a contradictory manner.<sup>95</sup> An *atto di notorietà*, like an affidavit, is an *ex parte* statement made under oath before a notary public, who does not verify whether this statement is in fact true.<sup>96</sup> Although “not meeting the criterion recognized by the legal system under which a domestic court of law functions,”<sup>97</sup> it may be submitted as evidence before international tribunals.<sup>98</sup> The question of their evidentiary weight is a separate matter, which depends on the circumstances of the case.<sup>99</sup>

“The principle of contradictory investigation, in the proper sense of the term, will apply only to the jurisdictional function of a judge and signifies that the accomplishment of this function [aiming to decide the dispute submitted to him] presupposes that he grants to the impleaded party a possibility to intervene and to take part in the debates.”<sup>100</sup> This principle and the related principle of “*par conditio*” of the litigants have been

<sup>89</sup> Dec. No. 169, March 16, 1954, + Dame Gamet, Veuve Vlasto Claim, 5 Recueil 17, 27, Italian contention. The case was subsequently settled out of court.

<sup>90</sup> Dec. No. 192, Sept. 15, 1955, Michelin Italiana Claim, 5 Recueil 232, 239; 1955 Int. Law Rep. 876, 879 f.

<sup>91</sup> Dec. No. 111, Oct. 31, 1951, + Mossé Claim, 3 Recueil 146, 151.

<sup>92</sup> Piedmont Silk Weaving Company's Claim, 3 Recueil 5, 9; 1951 Int. Law Rep. 427 (our translation).

<sup>93</sup> Dec. No. 106, Sept. 28, 1951, + Simone Reverand Claim, 3 Recueil 115, 117 f.

<sup>94</sup> Dec. No. 67, July 19, 1950, + Dame Bracet née Marguerite Flori Claim, 2 Recueil 78, 80.

<sup>95</sup> Dec. No. 25, May 25, 1949, + Viscardi Claim, 1 Recueil 76, 77.

<sup>96</sup> Italian-U. S. Commission, Dec. No. 11, June 25, 1952, + Amabile Claim, 1955 Int. Law Rep. 843, 849; digested in 50 A.J.I.L. 158 (1956).

<sup>97</sup> 1955 Int. Law Rep. 850.

<sup>98</sup> *Ibid.* 851; Italian-U. S. Commission, Dec. No. 15, April 10, 1953, + Steinway Claim, *ibid.* 858, 862.

<sup>99</sup> Amabile Claim, + *ibid.* 843, 852.

<sup>100</sup> Dec. No. 183, March 7, 1955, + I.V.E.M. Claim (No. 2), 5 Recueil 153, 174; 1955 Int. Law Rep. 875 (our translation).

called "fundamental principles."<sup>101</sup> In an instruction given to an expert to evaluate certain assets "in contradictory manner with the parties concerned," "this notion can only be applied by analogy, as an expert does not exercise jurisdictional functions. . . . In his instructions these words could only mean—that the parties should be informed, during the expert's investigations, of the steps taken by the expert to fulfil his task."<sup>102</sup>

In the *I.V.E.M. Claim* the Commission held that:

The opinion of the expert witness does not bind the Conciliation Commission, which ought to base its findings on its own convictions. At the same time, when it concerns enquiries and assessments which presuppose technical knowledge denied to the members of the Conciliation Commission, there is no reason why the latter should not adopt the opinion of an expert—so long as the latter's reasoning is not contrary to the facts which appear on the dossier or to common knowledge or, of course, to the provisions of the law or the dictates of logic. The report of an expert is only one way of convincing the Court: however, the latter being ignorant of certain facts which it might know but which in fact it does not know, can only be sure about them through the knowledge of the expert. . . . All that remains for the Conciliation Commission is to ascertain whether the expert witness and his collaborators may not, by chance, have exceeded the limits of his science and entered into the sphere of law, or whether his arguments ought to be regarded as inconclusive or whether they conflict with facts known to the Commission.<sup>103</sup>

In the *Ousset* case, the Italian dissenting opinion held that, where an expert had made investigations beyond the limits of the task entrusted to him, his conclusions based on such *ultra vires* researches "could only be qualified as the opinion of a *quidam de populo* having no authority to intervene in the case concerned. No account should have been given to such conclusions, as they constitute an element of evidence irregularly acquired."<sup>104</sup> The majority opinion upheld the expert findings. The Commission, in the *MacAndrews and Forbes Company Claim*, "attributed more weight to the findings of experience than to more theoretical considerations."<sup>105</sup>

Article 78, paragraph 4a, of the treaty concerning compensation for Allied property is, according to the French agent, based on the legal rules generally applicable in case of expropriations, especially in France, which rules recognize in the person affected by the expropriation a right to an indemnity which will permit him to be in the same situation as before the expropriation, including *lucrum cessans*.<sup>106</sup> "A precedent for such a

<sup>101</sup> Italian dissenting opinion to Dec. No. 170, July 5, 1954,° *Ousset Claim*, 5 *Recueil* 36, 55; 1955 *Int. Law Rep.* 312 (our translation).

<sup>102</sup> Note 100 above.

<sup>103</sup> *I.V.E.M. Claim* (No. 2),° 5 *Recueil* 153, 177; 1955 *Int. Law Rep.* 875; Dec. No. 162, Nov. 20, 1953, *Duc de Guise Claim* (No. 2), 4 *Recueil* 200, 209.

<sup>104</sup> 5 *Recueil* 36, 55; 1955 *Int. Law Rep.* 312 (our translation). The majority, however, held that the expert had acted within his sphere of competence.

<sup>105</sup> Italian-U. S. Commission, Dec. No. 29, Dec. 6, 1954, 1955 *Int. Law Rep.* 307, 310; digested in 50 *A.J.I.L.* 152 (1956).

<sup>106</sup> Dec. No. 78,° *Pertusola Claim*, 2 *Recueil* 100, 101 (our translation). Cf. also note 153 below.

*restitutio in integrum* may especially be found in international law and in the Treaty of Versailles.<sup>107</sup> The Commission held that "even if the sufferer is in the position himself to manufacture similar property he has the right to buy it on the market, at the market price,"<sup>108</sup> i.e., the retail price.<sup>109</sup> The value for which the goods lost had been insured was disregarded. It could only be adduced in proof if the goods concerned were no longer on the market.<sup>110</sup> The Commission drew this conclusion from the word "purchase" used in Article 78 (4a) of the treaty:

Article 78 (4) a of the Peace Treaty provides, in a case where the restoration of the property is impossible, a special method of calculating compensation, and an interpreter must adhere to that; he has no right to have recourse to the generally accepted principles of calculating damage.<sup>111</sup>

Thus it follows *a contrario* that, under general principles, payment of the net costs would have been held sufficient. Insofar as the increase in the price—as compared with the prewar price—of the article purchased in order to make good the loss was due to technical improvement of the prewar model, the basis of calculation employed by the Commission would lead to "undue profits." The value of such improvements must therefore be deducted from the sum due as compensation.<sup>112</sup>

"Internal amortization which the owner of property may have carried out as a measure of prudence, or even in the discharge of a legal obligation, does not lessen the value of the property in question as regards a third party who is bound to pay him compensation, either under municipal law or under an international obligation. On the other hand, the intrinsic value of installations constructed for the exploitation of a State concession cannot be determined by excluding consideration for the concession itself."<sup>113</sup> "It is a generally admitted principle in the case of repurchase of State concessions" [where the conceding state intends to cancel the concession prematurely against indemnity] that the price shall be calculated on the average yearly earnings of the concessionaire during the last five years to be multiplied with the number of years which the concession had still to run.<sup>114</sup> "It is a generally admitted usage" to grant the conces-

<sup>107</sup> Dec. No. 86, Dec. 15, 1950, \* Dame Hénon Claim, 3 Recueil 35, 38 (French contention).

<sup>108</sup> Dec. No. 158, Oct. 7, 1953, Suermondt et Dumont Claim, 4 *ibid.* 183, 187; 1953 Int. Law Rep. 491, 492.

<sup>109</sup> Dec. No. 194, Dec. 5, 1955, \* Gaz Lebon Claim, 5 Recueil 251, 253, settled in a spirit of conciliation, and calculated at a price half-way between the retail and the wholesale price.

<sup>110</sup> Suermondt et Dumont Claim, 4 Recueil 183, 186.

<sup>111</sup> *Ibid.* 187.

<sup>112</sup> Anglo-Italian Commission, Dec. of March 13, 1954, Currie Claim, 1955 Int. Law Rep. 801, 307, and note 108 above.

<sup>113</sup> Dec. No. 146, Jan. 21, 1953, and No. 164, Nov. 21, 1953, \* Collas et Michel Claim, 4 Recueil 184, 140, and 277, 280; 1953 Int. Law Rep. 628, 632.

<sup>114</sup> Collas et Michel Claim, 4 Recueil 277, 282 (our translation).

sionaire a prorogation of his concession for a period equal to that during which he was prevented from exploiting the concession.<sup>115</sup>

The value of a manufacturing firm is "as a rule" to be found by adding the replacement value of the material assets of the firm (*valeur de substance ou de reproduction*) to the capitalization of the average profits (*valeur de rendement*) and then dividing this sum by two; however, this general rule cannot be employed indiscriminately, but only according to the circumstances of the case.<sup>116</sup> An official estimation made for the purpose of taxation of the value of the shares of the firm concerned, which were not introduced at the Stock Exchange, cannot be considered as a reliable yardstick to contest an evaluation arrived at by the above-mentioned method.<sup>117</sup>

"As for the determination of the sale value of real estate the method consisting of drawing an average from several evaluations arrived at by different reasoning is advised by good authority and is largely applied in most different countries and for the purpose of the most varied investigations. . . . This method would be falsified, if each of the parties could exclude from this average those evaluations which are less favourable to its cause."<sup>118</sup> In the instant case this method consisted of drawing an average out of the replacement value of the estate, of the capitalization of the rental value of the estate and of the sum for which it was insured by the owners.<sup>119</sup>

Losses expressed in a currency which had been devaluated since the evaluation of the loss will be revalued so as to make good the devaluation up to the day of the decision. Several yardsticks may be employed for this re-evaluation, such as the relation of the currency to gold, or to wholesale prices or to the cost of living.<sup>120</sup> Damages expressed in a foreign currency will be converted at the official rate of exchange either at the time of judgment<sup>121</sup> or at the day of payment.<sup>122</sup>

Reliance on a simulated sale<sup>123</sup> and on accounts which the Italian agent considered to be falsified<sup>124</sup> would, according to him, lead to an international award *contra bonos mores*.

"A fact admitted by a party may be held against it only if this party's

<sup>115</sup> *Ibid.* 283.

<sup>116</sup> Dec. No. 183, March 7, 1955,° I.V.E.M. Claim (No. 2), 5 *ibid.* 153, 180; 1955 Int. Law Rep. 875.

<sup>117</sup> *Idem*, 5 Recueil 178.

<sup>118</sup> Dec. No. 162, Nov. 20, 1953, Duc de Guise Claim, 4 Recueil 200, 209.

<sup>119</sup> *Ibid.* 203, 205.

<sup>120</sup> Dec. No. 157, Oct. 6, 1953, Mossé Claim (No. 3), 4 Recueil 179, 182; 1954 Int. Law Rep. 217.

<sup>121</sup> Suermondt et Dumont Claim, 4 Recueil 183, 188; 1953 Int. Law Rep. 491.

<sup>122</sup> Dec. No. 182, March 5, 1955, Société Nationale des Chemins de Fer Français Claim (No. 2), 5 Recueil 151, 152.

<sup>123</sup> Dame Gamet, Veuve Vlasto Claim, 5 Recueil 17, 26.

<sup>124</sup> I.V.E.M. Claim (No. 2),° 5 Recueil 153, 179; 1953 Int. Law Rep. 875.

confession is clear and unequivocal."<sup>125</sup> In several instances<sup>126</sup> the Commission applied the rule of estoppel. However, a passive attitude adopted under duress was rightly not held to constitute estoppel.<sup>127</sup> The Commission refused to take into account a note "presented as it was after the Commission had already begun its hearings."<sup>128</sup>

In the *I.V.E.M. Claim*, the Commission held:

According to the generally admitted principles of procedure, the fault of *ultra petita* is not concerned with the reasons given for the sentence, but with the operative part thereof. A case of *ultra petita* arises only if the sentence in its operative part goes beyond the limits of the request.

Thus the plea of *ultra petita* was unfounded, when, in spite of evaluating certain items higher than the claimants had, the total sum allotted by the Commission was less than the total sum claimed.<sup>129</sup>

The petition must contain a complete statement setting forth the purpose of the petition and the relief requested. The Commission hence refused outright to consider a claim for interest which was not included in the petition.<sup>130</sup> The Commission, however, also refused to award interest claimed in the petition if no interest was claimed during the negotiations on the administrative level:

In view of the absence of any provision for interest in the agreements or negotiations concerning claims under Article 78, it is the opinion of this Commission that the fundamental principles of justice and equity, as well as the sounder opinion of other international tribunals, require that a clear and express request for interest, whenever the subject matter of the claim does not involve a prior contractual provision for interest, is a condition precedent to the responsibility of a State (if it exists) for interest on claims.<sup>131</sup>

When "interest is demanded as a punitive measure based on alleged delay in the settlement of claims on the administrative level, there is all the more reason for requiring that Italy be advised of the claim for interest based

<sup>125</sup> *Idem*, 5 Recueil 153, 187; 1953 Int. Law Rep. 875 (our translation).

<sup>126</sup> Piedmont Silk Weaving Company's Claim, 3 Recueil 5, 16; 1951 Int. Law Rep. 427; Collas et Michel Claim, 4 Recueil 277, 280; 1953 Int. Law Rep. 628; Guillemot-Jacquemin Claim, 1 Recueil 47, 50; 1951 Int. Law Rep. 403.

<sup>127</sup> Dec. No. 170, July 5, 1954, Ousset Claim, 5 Recueil 36, 46; 1955 Int. Law Rep. 312, 315.

<sup>128</sup> Dec. No. 108, Sept. 15, 1951, Explosifs et Produits Chimiques Claim, 3 Recueil 129, 133.

<sup>129</sup> Dec. No. 183, I.V.E.M. Claim (No. 2), 5 *ibid.* 153, 187; 1953 Int. Law Rep. 875 (our translation). Bos, *loc. cit.* 152, points critically to the fact that the Franco-Italian Commission in its Decision No. 65 of July 19, 1950, Société Foncière Lyonnaise Hôtel d'Ospedaletti Ligure Claim, 2 Recueil 74, 76, imposed on Italy a time limit to comply with certain French requests, although France had not asked for such a time limit. In this case, however, Italy did not raise any objection of "*ultra petita*."

<sup>130</sup> Italian-U. S. Commission, Dec. No. 5, March 4, 1952, Carnelli Claim, 1955 Int. Law Rep. 340, 346; digested in 50 A.J.I.L. 153 (1956).

<sup>131</sup> Italian-U. S. Commission, Dec. No. 24, July 12, 1954, Fatovich Claim, 1955 Int. Law Rep. 409, 412; digested in 50 A.J.I.L. 153 (1956).

on such delay."<sup>132</sup> A decision of the Franco-Italian Commission in a given case awarded 5% interest claimed in the petition. It is, however, not clear from the record, whether a similar claim for interest had already been made at the time when the claim was being dealt with on the administrative level.<sup>133</sup>

As opposed to such interest on the *claim* a right to interest on the *award* was at least theoretically admitted by the Commission (apparently even without a specific claim to this effect in the administrative stage of the claim).<sup>134</sup> In another case the Commission awarded to the claimant interest "at the legal rate" on the sum recognized as being due to the claimant under a private settlement arrived at between the parties, such interest running from the date on which the Commission took notice of this settlement, which the other party subsequently failed to fulfil.<sup>135</sup>

#### V. GENERAL PRINCIPLES OF COMMERCIAL LAW

Even the principal shareholder of a company is not the company's owner and hence cannot claim that a factory belonging to the company should be restored to *him*.<sup>136</sup> The Commission did not deem it necessary to decide "whether there should be applied on the strength of general principles of law . . . certain mitigations, which some legislations inspired by the principles of good faith have granted even outside of tax law, from the consequences of the existence of two persons juridically distinct from each other: the company and its shareholder, even if all or nearly all of the company's capital belongs directly or through intermediaries to a single person who *de facto* controls the company. However, as a rule, only third parties and not the company or the shareholder are allowed to avail themselves of such mitigations."<sup>137</sup>

According to a French contention in the *Vlasto Claim*, the mere physical seizure of share certificates did not affect the ownership of these shares.<sup>138</sup> The appointment during the war of an administrator-sequestrator is a "conservatory measure taken equally for the protection of the owner."<sup>139</sup> His first duty "is to conserve the capital assets of the business, which is entrusted to him." Selling the stocks of the firm against paper money, in face of the increasing devaluation without being able to replenish the stock, amounts to negligence.<sup>140</sup> On the other hand, the fact that such an

<sup>132</sup> 1955 Int. Law Rep. 413.

<sup>133</sup> Dec. No. 167, March 9, 1954, *Società Generale dei Metalli Preziosi Claim*, 5 Recueil 5, 11.

<sup>134</sup> Italian-U. S. Commission, Dec. No. 5, March 4, 1952, *Carnelli Claim*, 1955 Int. Law Rep. 340, 346.

<sup>135</sup> Dec. No. 159, Oct. 19, 1953, 4 Recueil 189, 194, and Dec. No. 172, July 7, 1954, *Dame Lachenal Claim*, 5 *ibid.* 83, 89.

<sup>136</sup> Dec. No. 17, March 16, 1949, *"Petit Fils de C.J. Bonnet" Claim*, 1 *ibid.* 57, 58.

<sup>137</sup> Dec. No. 82, Dec. 1, 1950, *Piedmont Silk Weaving Factory Claim*, 3 *ibid.* 5, 13; 1951 Int. Law Rep. 427 (our translation).

<sup>138</sup> Dame Gamet, *Veuve Vlasto Claim*, Dec. No. 169, March 16, 1954, 5 Recueil 17, 21.

<sup>139</sup> Dec. No. 174, July 6, 1954, *Schappe Spinning Mill Claim*, *ibid.* 93, 103; 1954 Int. Law Rep. 141, 142.

<sup>140</sup> *Idem*, 5 Recueil 104; 1954 Int. Law Rep. 143.

administrator-sequestrator, holding shares of a certain company, preferred to sell rather than exercise the option to buy new shares, granted by such company to its shareholders in the course of an increase of its capital, does not constitute negligence.<sup>141</sup>

#### VI. GENERAL PRINCIPLES OF CIVIL LAW OTHER THAN CONTRACT LAW

In the *Frontier (Local Authorities) Award*, the Commission held that "Apportionment cannot legitimately modify the nature of existing rights."<sup>142</sup>

In the *Collas et Michel Claim*, a question on the borderline between private and public international law was raised by the problem whether the situs of cash sequestered by Italian authorities in the subsequently ceded Aegean Islands should be deemed to be in the island concerned. This cash could not be considered an asset, having remained in the ceded territory, unless the Italian authorities had appointed an administrator-sequestrator, or if it could be proved by the books of the French firm concerned that the sequestered cash had been employed by the authorities for the benefit of the firm. Otherwise, the cash went to swell the coffers of the Italian Government and would thus be located in Italy proper.<sup>143</sup>

#### VII. GENERAL PRINCIPLES OF PUBLIC LAW

In the *Frontier (Local Authorities) Award*, Italy argued against an interpretation according to which property of former Italian communes ceded to France should, in virtue of Annex XIV, paragraph 1, of the treaty, become the property of the French state as such: "Such a consequence would mean the suppression of local collectivities and yet the communes form the basis of the organization of all civilized countries."<sup>144</sup> However, the Commission was not impressed by this argument.<sup>145</sup>

In the *Rizzo* case, the Commission stated:

Although it is true to say that in certain arbitral awards given in the twentieth century the opinion is expressed that the independence of the courts, in accordance with the principle of separation of powers as generally recognized in civilized countries, excludes the international responsibility of States for acts of the Judiciary which are contrary to law, yet that theory today appears to be universally and rightly repudiated by writers on and courts administering international law.<sup>146</sup>

In the *Bacharach Claim* it held that:

<sup>141</sup> Dec. No. 193, Sept. 15, 1955, *Sudreau Claim*, 5 *Recueil* 243, 250.

<sup>142</sup> Dec. No. 163, Oct. 9, 1953, 4 *ibid.* 213, 237; 1953 *Int. Law Rep.* 63, 74.

<sup>143</sup> Dec. No. 146, Jan. 21, 1953, *Collas et Michel Claim*, 4 *Recueil* 134, 141; 1953 *Int. Law Rep.* 628, 633.

<sup>144</sup> Dec. No. 163, Oct. 9, 1953, 4 *Recueil* 213, 226; 1953 *Int. Law Rep.* 63, 64 (our translation).

<sup>145</sup> *Idem*, 4 *Recueil* 229; 1953 *Int. Law Rep.* 67.

<sup>146</sup> Dec. No. 196, Dec. 7, 1955, *In re Rizzo* (No. 3), 5 *Recueil* 260, 282; 1955 *Int. Law Rep.* 317, 328.

An abstract statement (in an Italian law, to the effect that persons residing in enemy countries are considered enemy nationals) is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property.<sup>147</sup>

"The retroactivity of a provision of law must always be expressly established in the law itself." The Commission, in the *Carnelli Claim*, applied "this legal principle" to the provisions of Article 78 of the Treaty of Peace and found that retroactivity there is clear.<sup>148</sup>

On the guaranty of acquired rights the following may be quoted from the Commission's decisions:

It is self-evident that, once the Treaty of Peace has come into force, the property in Italy of United Nations nationals becomes subject to the limitations and obligations to which private property is subject in Italian law, irrespective of the nationality of the owner. Among such limitations are [liability to] expropriation or requisition, against compensation, of the property for public purposes.<sup>149</sup>

In connection with the *Rizzo Claim* concerned with the right granted to France in the Peace Treaty to seize, retain and liquidate Italian property in Tunis with the exception of the property of Italians permitted to reside there, the Commission started its interpretation from "the principle that properties of private individuals cannot be liquidated to satisfy claims against the State of which they are nationals."<sup>150</sup>

In order to interpret the notion of "war damage" the Commission, its French member dissenting,<sup>151</sup> referred to authors of many nationalities who all understand by "war damages" damages caused by acts of war.<sup>152</sup> An Italian contention wanted to go further, stating that "the very word 'indemnity' employed by the draftsmen of the Treaty is a word whose weight is restricted in the war damage legislation of the various States," and that their use of this word proves that "they did not have in mind a 'reparation' which aims at the payment of an economic equivalent, but only a partial compensation of the damage sustained."<sup>153</sup>

In the *Rizzo* case the Agent of the French Government contended that nobody had ever succeeded in giving a definition of the word "residence" valid for all cases.<sup>154</sup> The Commission itself attempted the following definition:

<sup>147</sup> Italian-U. S. Commission, Dec. No. 23, Feb. 19, 1954, \* *ibid.* 646, 648; digested in 50 A.J.I.L. 157 (1956).

<sup>148</sup> Italian-U. S. Commission, Dec. No. 5, March 4, 1952, \* 1955 Int. Law Rep. 340, 344.

<sup>149</sup> Dec. No. 107, Sept. 15, 1951, Duc de Guise Claim, 3 Recueil 119, 127; 1951 Int. Law Rep. 423, 426.

<sup>150</sup> Dec. No. 136, June 25, 1952, ° In re Rizzo (No. 1), 4 Recueil 82, 92; 1952 Int. Law Rep. 478, 482.

<sup>151</sup> Dec. No. 95, March 8, 1951, ° Pertusola Claim, 3 Recueil 67, 92; 1951 Int. Law Rep. 414.

<sup>152</sup> *Idem*, 3 Recueil 77 f.; 1951 Int. Law Rep. 417.

<sup>153</sup> Dec. No. 78, Oct. 2, 1950, ° Pertusola Claim, 2 Recueil 100, 104.



The residence of which the Treaty speaks . . . is not domicile. . . . Domicile is a juridical conception; residence is a general, material conception, or one of fact. The essence of domicile is the stable character of the (individual's) establishment. Residence does not require that stability; it is the relationship between a person and a territory during a temporary stay. That relationship cannot be simply one of physical presence; a passing through or a sojourn is not sufficient; the stay must have a habitual character, even if it is not continuous, together with an element of intent (*animus*), namely the intention to remain (but not necessarily to establish oneself) in the place in question. It is, in fact, the concept of residence, such as it has been historically determined in jurisprudence, as a "*domicilium minus proprium*." <sup>156</sup>

Residence does not require continued physical and effective presence in the country concerned—a short visit abroad does not interrupt it.<sup>156</sup> However, residence is lost if a person leaves a country with a re-entry visa and does not re-enter the country concerned before the expiration of the visa.<sup>157</sup> "Suspension of the execution of an order does not affect the order itself. . . . There can be no question of tacit renunciation of an administrative measure such as expulsion." <sup>158</sup>

An error *in personam* made by officials in the exercise of their functions does not transform such act into a personal act on the part of the officials: "mistakes of this kind are clearly conceivable and inevitable in the ordinary conduct of administration." <sup>159</sup> If police officials when carrying out a seizure subsequently abscond with the seized property, this latter act would undoubtedly constitute a personal act of the officials in question: "This would raise the legal problem whether, in the international sphere, a State is responsible for the acts of its officials acting within the *apparent* limit of their duty, in a way which was not entirely opposed to the orders they received." <sup>160</sup>

#### CONCLUSIONS

For the purpose of further research into the general principles of law, the following conclusions may be drawn from the present analysis:

1. The number and type of general principles found in any given body of international decisions will obviously be influenced by the material selected as the object of analysis. Thus, for instance, the absence of all general principles on human rights in the present analysis is due to the fact that the Commissions were only entitled to decide claims concerning damage to property.

<sup>154</sup> *In re Rizzo* (No. 1),<sup>o</sup> 4 *ibid.* 82, 87.

<sup>155</sup> *Ibid.* 82, 94; 1952 *Int. Law Rep.* 478, 483 f.; Dec. No. 171, July 6, 1954, *In re Rizzo* (No. 2), 5 *Recueil* 57, 69; 1955 *Int. Law Rep.* 500, 504.

<sup>156</sup> *Idem*, 5 *Recueil* 57, 69; 1955 *Int. Law Rep.* 500, 504 f.

<sup>157</sup> *Idem*, 5 *Recueil* 57, 70; 1955 *Int. Law Rep.* 500, 505.

<sup>158</sup> *In re Rizzo* (No. 1), 4 *Recueil* 82, 99; 1952 *Int. Law Rep.* 478, 486.

<sup>159</sup> Dec. No. 144, Jan. 17, 1953,<sup>o</sup> *Mossé Claim*, 4 *Recueil* 117, 127; 1953 *Int. Law Rep.* 217, 221.

<sup>160</sup> *Idem*, 4 *Recueil* 127; 1953 *Int. Law Rep.* 221 (our translation).

2. Recourse to general principles is by no means limited to cases where decisions explicitly refer to these principles. In many more cases such recourse has to be implied from the general context.

3. The comparatively frequent reference to alleged general principles made by the parties will sometimes,<sup>161</sup> but not always, be accepted as a conclusive argument<sup>162</sup> by the Commissions.

4. In many cases, however, it will be impossible to determine whether a reference to an alleged "general principle" was accepted or rejected by the Commission, as the Commission may have based its decision on a different appreciation of the facts, on treaty laws, *et cetera*.

5. Not only the parties to the disputes or the national members but also the various neutral members sometimes disagree as to the existence or content of general principles.

6. Such disagreements seem to result at least partially from a subconscious assumption that the general principles of national law of the member concerned will or ought to be recognized universally as general principles.

7. In view of the fact that all members of these Commissions came from Western countries, such divergencies were certainly less frequent than in the case of more far-flung researches. However, even in the present research, there were some differences of approach between Commission members from civil law countries and Anglo-American members.<sup>163</sup>

8. Future larger-scale researches will do well to remain aware of these facts.

9. If researches were to be extended so as to test each alleged general principle as to whether it is really recognized as such by all the legal systems of the world, comparatively few "principles" will emerge as being indeed *generally* recognized.

10. It may well be doubted that all of the "principles" mentioned in the present analysis would command such general recognition. The "Common Law of Mankind" may be more rudimentary than the various members of the Conciliation Commissions appear to assume. This may appear to be a disappointing result to be expected from such large-scale researches. However, the very fact of dispelling the different misconceptions cherished here and elsewhere in respect to the content of these "principles" will contribute to the lessening of international tension, and this seems by itself ample justification for continuing and extending the scope of these researches—even when leaving aside the other advantages to be expected therefrom.<sup>164</sup>

<sup>161</sup> Cf., for example, note 25 above.

<sup>162</sup> Cf. notes 144 and 145.

<sup>163</sup> Cf. note 63 above. Compare especially Dec. No. 18, Oct. 22, 1953,<sup>o</sup> of the Italian-U. S. Conciliation Commission, Armstrong Cork Company Claim, 1955 Int. Law Rep. 945, 952: "The error committed in the Pertusola case is due to the desire to interpret according to the continental technique the provision of a Treaty the origin of which is Anglo-Saxon: it is also due to the desire to assert a theoretical, abstract conception of causality in the interpretation of the Treaty, discarding the normal doctrines of causality," with Bolla, *loc. cit.* 70.

<sup>164</sup> Schlesinger, *loc. cit.* 741, 747 f.

## EDITORIAL COMMENT

### INTERVENTION AND THE INTER-AMERICAN RULE OF LAW

If, after the manner of Hamlet's dramatic presentation of the alternatives, the issue before the Meeting of Foreign Ministers at Santiago, August 12-18, had read: "To intervene or not to intervene," there is little doubt that the answer would have been unanimously in the negative. But so confused are the issues involved in intervention that the mere negative vote would throw little light upon the situation. For the principle of non-intervention, like that of sovereignty, requires interpretation. Stated as absolutes, both terms run counter to the very concept of the rule of law.

The progress of international law in the Western Hemisphere during the past fifty years or more might be presented in terms of the contrast between a President of the United States in 1904 assuming the rôle of an "international policeman" to put an end to disorders in the Caribbean and a Secretary of State of the United States in 1959 declaring that the principle of non-intervention was the foundation stone of Hemisphere relations. To President Roosevelt "chronic wrongdoing" in the Caribbean justified unilateral intervention on the part of the United States to prevent European governments from violating the Monroe Doctrine. In 1933, under pressure from all sides, the United States accepted "the general principle of non-intervention," although entering a reservation to the absolute form in which the principle was stated in the treaty. Three years later the principle of non-intervention was accepted by the United States without the earlier reservation, the condemnation of intervention being explicitly that of any one state in the internal or external affairs of any other. But this time a new element entered into the negotiations. While condemning unilateral intervention the Buenos Aires Conference of 1936 made provision for consultation in the event of a threat to the peace, thus obligating the inter-American community to accept a collective responsibility to find a solution for situations similar to those that President Roosevelt had felt justified the exercise of his "international police power."

The procedure of consultation could obviously lead only in the direction of greater and greater responsibility on the part of the American states as a whole for the maintenance of peace. At Havana in 1940, and more specifically at Mexico City in 1945, the principle of collective security was proclaimed—that an attack upon one was to be regarded as an attack upon all; and at Rio de Janeiro in 1947 the principle was given definite form and content in the Treaty of Reciprocal Assistance. But this might well lead to intervention, although of a collective character; so that when the Inter-American Conference met at Bogotá the following year and repeated in the Charter of the Organization of American States the condemnation of

intervention in the old unilateral sense, it was explicitly recognized that measures taken by the regional group for the maintenance of peace and security in accordance with existing treaties would not constitute a violation of the principle of non-intervention.

What, now, are the limitations imposed by the prohibition of intervention of the old unilateral character, and what is the scope of collective intervention recognized as permissible under the Rio Treaty? Both fields are controversial, but perhaps less controversial than might appear from the discussions in the Council of the Organization of American States preceding the meeting of Foreign Ministers at Santiago. Positive acts of intervention by a state are clearly to be condemned. Articles 15 and 17 of the Charter of the Organization of American States are explicit in that respect. But how far must a state see to it that its territory is not used as a starting-point for military expeditions intended to overthrow the government of a neighboring state? Where the preparations for such expeditions are open and public, the obligation to prevent them has long since been established. But such is not likely to be the case; and the question is presented how far a particular state, consistent with respect for the right of freedom of assembly, must prevent conspiracies looking to an ultimate military expedition. Again, must special restrictions be placed upon refugees from the neighboring state to prevent them from using their right of asylum to plan an insurrection within their national state? The duty of prohibiting the export of munitions of war intended to promote insurrection or civil war in a neighboring state is well established. Should it now be extended to include radio or TV broadcasts directed to the object of creating discontent with a recognized *de jure* government, or otherwise inciting to rebellion? These are but a few of the various forms of intervention which the Meeting of Foreign Ministers in Santiago apparently had in mind when calling upon the Inter-American Peace Committee to study methods and procedures to prevent any activities from abroad designed to overthrow established governments and in calling upon the Council of the Organization to prepare a document listing the greatest possible number of cases constituting violations of the principle of non-intervention.

In contrast with the wide scope of the obligations resulting from the principle of unilateral non-intervention is the more limited scope of the right of collective intervention recognized by the Charter as permissible when "in accordance with existing treaties." The offensive word "intervention" does not occur, but the exception clearly indicates the character of the measures it might be necessary to take. Two treaties are involved: The Charter of the United Nations and the Treaty of Reciprocal Assistance signed at Rio de Janeiro in 1947. The former may be set aside, inasmuch as the provisions of the Charter of the Organization of American States could not in any case override the obligations of the universal treaty. In respect to the Rio Treaty the Charter contemplates "measures adopted for the maintenance of peace and security." What is the scope of these measures? In the successive applications of the Rio Treaty from 1948 to

1959 the measures adopted by the Organ of Consultation have consisted in nothing more than the protection of the state making the request for the application of the treaty. Constructive measures have not gone beyond bringing the two governments together and getting them to agree upon the observance of obligations acknowledged in principle, but found difficult in practice. The complaint of Costa Rica against Nicaragua in 1948 was settled by a Pact of Amity between the two countries without any further intervention on the part of the American states as a body other than to recommend the avoidance of certain conditions directly involved in the controversy. In like manner the case between Haiti and the Dominican Republic in 1950, the case between Costa Rica and Nicaragua in 1955, and the complaint brought by Nicaragua against Costa Rica in 1959, gave rise to nothing more than intervention to meet the danger immediately presented. The complaint of Honduras against Nicaragua in 1957 was, indeed, based upon the positive acts of a government; but in this case Nicaragua alleged equal rights of sovereignty over the territory in question. But even here the Organ of Consultation under the Rio Treaty did not find it necessary to take action other than to insist upon a cessation of hostilities and subsequently to note the agreement of the two parties to submit the case to the International Court of Justice.

In none of the applications of the Rio Treaty to date is there anything to suggest that the provisions of the treaty would warrant collective action beyond the protection of the state against an armed attack or an act of aggression short of an armed attack by the removal of the conditions giving rise to the complaint. Rather the inferences are all the other way. In 1954 when the threat of international Communism led to the adoption of a resolution at the Conference at Caracas declaring that the domination of the political institutions of an American state by the "international Communist movement" would endanger the peace of America and would call for a Meeting of Consultation to consider the adoption of appropriate action in accordance with existing treaties, the fear that collective resistance to the intervention of Communism might result in collective intervention by the American states themselves led to the adoption of a formal supplement to the effect that the declaration of foreign policy thus made was designed to protect and not to impair the inalienable right of every American state "freely to choose its own form of government and economic system and to live its own social and cultural life."

Collective intervention thus has its limits, and they would appear to preclude action beyond the immediate threat to the peace that might lead to the convocation of a Meeting of Foreign Ministers. Secretary Herter, responding to arguments at Santiago seeking to justify setting aside the principle of non-intervention when the overthrow of a dictatorship was the objective, affirmed in strong terms that the principle held in favor of one and all, and that it must not be weakened in an effort to promote representative government. Strong as are the terms of the Declaration of Santiago with which the Meeting of Foreign Ministers closed on August 18th, even to the extent of declaring that the existence of anti-dem-

ocratic regimes constitutes a violation of the principles on which the Organization of States is founded and endangers the peace and solidarity of the Hemisphere, there is no suggestion of any collective action being taken beyond the appeal to principles and to voluntary co-operation. The coercion of public opinion is for the present the only measure within the law.

C. G. FENWICK

EDGAR TURLINGTON

October 24, 1891–September 27, 1959

The American Society of International Law has suffered a grievous loss with the death, on September 27, 1959, of Edgar Turlington. An Honorary Editor of the AMERICAN JOURNAL OF INTERNATIONAL LAW and a Vice President of the Society, it was the Society and its activities which commanded his interest. A busy practitioner, he nevertheless devoted great time and energy to the affairs of the Society. He was stalwart, imaginative and wise in his efforts to improve the contributions of the Society and the *Journal* to the understanding and development of international law. During the past few years, as chairman of a Special Committee to Study the Policies and Procedures of the American Society of International Law and, later, as chairman of the Committee on Administration, he galvanized members into a reassessment of the somewhat modest rôle of the Society and indicated the way to greater usefulness, to more co-ordinated effort. This legacy he leaves to the Society. It is distressing to know that we must go on without his wise counsel, his considerate thoughtfulness and his warm friendship.

HERBERT W. BRIGGS  
*President of the Society*

## NOTES AND COMMENTS

### THE UNITED NATIONS *AD HOC* COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE

On December 13, 1958, the General Assembly of the United Nations adopted a resolution, over Soviet *bloc* dissent, establishing an *ad hoc* Committee to report to the Fourteenth General Assembly on:

- (a) the activities and resources of the United Nations, its specialized agencies, and of other international bodies relating to the peaceful uses of outer space;
- (b) the area of international co-operation and programmes in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices . . . ;
- (c) the future United Nations organizational arrangements to facilitate international co-operation in this field;
- (d) the nature of the legal problems which may arise in the carrying out of programmes to explore outer space;

The committee was to be composed of representatives of Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, U.S.S.R., United Arab Republic, United Kingdom and the United States.<sup>1</sup> The Soviet Union, Czechoslovakia and Poland immediately announced that they would not participate.

After some delay, the *Ad Hoc* Committee met for the first time on May 6, 1959. Not only the Soviet Union, Czechoslovakia and Poland, but also India and the United Arab Republic were absent. The latter two states presumably stayed away in order to avoid involvement in what may have appeared to be a "cold war" dispute. The Soviet Union has recently been insistent on "parity" in both political and international scientific meetings and probably this case was another manifestation of that policy. Actually, as in the contemplation of its proponents, the Committee's function was merely to study and define problems which it thought needed further consideration on an international scale. The nonpolitical nature of the Committee's task was repeatedly stressed by the United States Delegation which, as was to be expected, took the leading rôle in the first meetings.<sup>2</sup> The President of the Committee, Ambassador Matsudaira of Japan, emphasized that "the Committee will never be permitted to act in any sense whatsoever as an instrument of the cold war,"<sup>3</sup> and other delegates echoed these sentiments.

<sup>1</sup> Res. 1348 (XIII). For consideration of U.N. discussions with respect to outer space in 1958, see Taubenfeld, 53 A.J.I.L. 400-405 (1959).

<sup>2</sup> See Summary Records, U.N. Docs. A/AC.98/SR. 1-3, especially speeches of Ambassador Lodge, Dr. Hugh L. Dryden (Deputy Administrator of NASA) and Loftus E. Becker (Legal Adviser to the Department of State), SR.1, pp. 4-6, SR.2, pp. 4-6, SR.3, pp. 3-7.

<sup>3</sup> U.N. Press Release PM/3728 (May 6, 1959).

After formal inaugural meetings, the *Ad Hoc* Committee formed a Technical and a Legal Committee. By mid-June these two Committees had completed their reports and the Secretariat had also prepared a Report on "the activities and resources of the United Nations, of its specialized agencies and of other international bodies related to the peaceful uses of outer space."

The members of the Technical Committee took as a basis working papers circulated by the United States and Italy on the scientific possibilities of use of outer space and on the activities and resources of the United Nations and the specialized agencies in the field of outer space.<sup>4</sup> The Technical Committee also received oral comments from persons connected with such organizations as UNESCO, the World Meteorological Organization (WMO), the International Telecommunications Union (ITU) and the International Civil Aviation Organization (ICAO).<sup>5</sup> There was general agreement that the exploration of space was "a task vast enough to enlist the talents of scientists of all nations."<sup>6</sup> Just as there was no way to limit the definition of "atmosphere" for WMO's weather purposes, there was general agreement that outer space was scientifically indivisible.<sup>7</sup> The usefulness of participation in space efforts by nations lacking launching capabilities, particularly through such voluntary co-operative scientific arrangements as the IGY's successor in this field, COSPAR (Committee on Space Research), was emphasized and the United States was complimented several times on its offers to permit scientists from other nations to design experiments to be carried out by U.S.-launched satellites.<sup>8</sup> The stress was on co-operative efforts of the COSPAR type, though it was generally agreed that, when the research stage was passed, functional intergovernmental arrangements of the WMO, ITU type were probably essential. The possibility of international launching sites was also raised.

The Technical Committee's report was approved by the *Ad Hoc* Committee on June 18, and became part of the report to the General Assembly.<sup>9</sup> This report stressed that to make best use of all available talent and, in some cases, due to the costs involved, "space activities, scientific and technological . . . even more than . . . astronomy . . . inherently ignore national boundaries. Space activities must to a large extent be an effort of Planet Earth as a whole." The connection between military activities and space research with its hampering effect on exchange of information was also noted, but it was concluded that the development of space vehicles has reached the point in several countries where it was a question of engineering only, not of science. Some of the potentially useful scientific studies were outlined, as were the techniques available for use and the possibilities for application of new knowledge to improvement in weather

<sup>4</sup> See U.N. Docs. A/AC.98/L.1 and Rev. 1; L.4-6.

<sup>5</sup> See, for example, *ibid.* SR.2, pp. 3 ff.

<sup>6</sup> Dr. Hugh L. Dryden, *ibid.* SR.2, pp. 4-6. See also comments of the Iranian representative, *ibid.* SR.2, pp. 3-4.

<sup>7</sup> See *ibid.* SR.2, pp. 6-7.

<sup>8</sup> See remarks of the Japanese and Italian representatives, *ibid.* TECH/SR.1.

<sup>9</sup> The Technical Committee's Report is U.N. Doc. A/AC.98/3.



forecasting, radio communications, mapping and navigation. International co-operation was felt to be desirable or even essential for such matters as orderly use of radio frequencies, registration of orbital elements at a central point, removal of spent satellites, termination of transmissions, re-entry, recovery and return of equipment, identification of origin and contamination both of outer space and of Earth on return. The allocation of radio frequencies for space activities was suggested as "the first technical area in which immediate international action is required." The ITU was urged to act on the radio problem, and stress was laid on the usefulness of COSPAR, the International Council of Scientific Unions (ICSU), UNESCO, the World Data Centers, and WMO in promoting international co-operation. A need was felt for a suitable center related to the United Nations to act as a focal point for co-operative efforts in outer space. It was suggested that the United Nations Secretariat might include a small section to keep co-operation under review, or a new U.N. body might be created to do that job. There was, however, no need yet for "an international agency for outer space."

The Legal Committee proceeded with the aid of working papers and drafts submitted by the United States and Mexico.<sup>10</sup> Its report was also approved by the *Ad Hoc* Committee on June 18. The Committee observed that the provisions of the United Nations Charter and of the Statute of the International Court of Justice are, as a matter of principle, not limited in their operation to the confines of the Earth.<sup>11</sup> It was agreed that not enough was now known about the actual and prospective uses of outer space to make a comprehensive code practicable or desirable, but that it was necessary to take "timely, constructive action and to make the law of space responsive to the facts of space."

It was unanimously recognized that the principles and procedures developed . . . to govern the use of such areas as the air space and the sea deserved attentive study for possibly fruitful analogies . . . [though] outer space activities were distinguished by many specific factual conditions . . . that would render many of its legal problems unique.<sup>12</sup>

Among legal problems susceptible of priority treatment, it was suggested, is the broad one of freedom of outer space for exploration and use. Here, the Legal Committee, in mentioning the flight of space vehicles "over" countries during the IGY, suggested that

<sup>10</sup> U.N. Docs. A/AC.98/L.7 and L.8.

<sup>11</sup> The Legal Committee's Report is U.N. Doc. A/AC.98/2.

<sup>12</sup> In a proposed draft report, the words "the sea" were followed by "and other regions of the Earth." These words were deleted at the insistence of the Argentine representative, who argued that they might be taken to mean the Polar Regions and that "The territories of Antarctica were subject to national sovereignty, a fact that excluded any possibility of analogy with air [*sic*] space. As the general trend of the report was in favor of treating outer space as *res communis omnium*, he wished to ensure that the . . . paragraph was not interpreted to mean that the same situation prevailed with respect to Antarctica." U.N. Doc. A/AC.98/C.2/SR.5 (PROV).

with this practice, there may have been initiated the recognition or establishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements.

Other priority problems included by the Committee were liability for injury or damage caused by space vehicles, including the need for machinery to determine liability and ensure payment of compensation. Here, the Committee suggested the compulsory submission to the International Court of Justice of disputes between states as to liability, and considered relevant ICAO experience with respect to the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. Allocation of radio frequencies, termination of transmissions, avoidance of interference between space vehicles and aircraft, identification and registration of vehicles through markings, call signs and orbit and transit characteristics, registration and co-ordination of launchings, and re-entry and landing problems were also considered of current importance.

Problems which may be ignored for the present, as either too remote from the point of view of technological development or because activities can be conducted without their resolution, were thought to include the determination of precise limits between airspace and outer space, the provision of regulations against contamination of outer space or from outer space, the promulgation of rules covering sovereignty, exploration, settlement and exploitation of celestial bodies and rules for the avoidance of interference among space vehicles.<sup>13</sup> As is obvious, the report avoids commitments on several problems which many feel are more imminent than the Committee is cautiously willing to acknowledge.

The Secretary General's Report usefully details the activities of the international scientific organizations—the Scientific Unions, ICSU, the IGY, COSPAR and others—in relation to the need for co-operation and co-ordination of research in outer space. The same treatment is then accorded to intergovernmental organizations, the United Nations itself, UNESCO (and the Provisional International Computation Center in Rome, a UNESCO-sponsored project), WMO, ITU, and ICAO. The essentials of this report were also included in the *Ad Hoc* Committee's Report.<sup>14</sup>

Chairman Matsudaira's suggestions,<sup>15</sup> modified by Swedish proposals and some slight changes advocated during the discussions, were adopted as the conclusions of the *Ad Hoc* Committee to be transmitted to the General Assembly along with the three reports already described.<sup>16</sup> These conclusions may be briefly summarized. No autonomous intergovernmental agency should be created at this time nor should any such existing agency

<sup>13</sup> The United States had also suggested that the problem of relations with extra-terrestrial life has a very low priority. U.N. Doc. A/AC.98/L.7.

<sup>14</sup> See U.N. Doc. A/AC.98/4, and, as approved by the Committee, *ibid.* L.13.

<sup>15</sup> U.N. Doc. A/AC.98/L.10.

<sup>16</sup> See U.N. Docs. A/AC.98/L.11, SR.4 (PROV) and SR.5 (PROV).

be asked to undertake over-all responsibility for space matters. There might be a small unit in the Secretariat to serve as a focal point for co-operation and a small committee to advise the Secretary General. Finally, there could be a special committee of the General Assembly (although the criteria for its composition could not be agreed upon<sup>17</sup>) which would fulfill the following functions:

- (a) To provide a focal point for facilitating international co-operation with respect to outer space activities undertaken by governments, specialized agencies, and international scientific organizations;
- (b) To study practical and feasible measures for facilitating international co-operation, including those indicated by the *Ad Hoc* Committee in its report under paragraph 1(b) of the resolution [of December 13, 1958];
- (c) To consider means, as appropriate, for studying and resolving legal problems which may arise in the carrying out of programs for the exploration of outer space;
- (d) To review, as appropriate, the subject matter entrusted by the General Assembly to the *Ad Hoc* Committee in resolution 1348 (XIII).

Thus, the Committee stressed at most a rôle of co-ordination or the promotion of co-operation for the United Nations, though the Swedish representative expressed fears that there might be an increasing gap between the great forward surge of space activities and the efforts of the United Nations to promote the use of space for the benefit of all mankind, unless immediate action was taken within the United Nations.<sup>18</sup> Others, however, insisted on "modest proposals" to meet only the most pressing needs.<sup>19</sup> The *Ad Hoc* Committee's caution is quite understandable in the political circumstances, since in any actual program for promoting the peaceful uses of outer space, the non-participation of the Soviet Union would rob the effort of much of its value. It was the obvious hope that if Soviet non-participation were due to any misunderstanding of the Committee's functions, that difficulty would be overcome. Of course, if, as a matter of national policy, the Soviet Union does not wish to co-operate in this effort, it will find pretexts for further refusals.

The Committee finished its work and approved its Report to the General Assembly on June 25, 1959.<sup>20</sup>

PHILIP C. JESSUP

HOWARD J. TAUBENFELD

<sup>17</sup> The Australian representative suggested that not only geographical distribution but the present distribution of capabilities and active interest in outer space also be considered. U.N. Doc. A/AC.98/SR.5 (PROV), p. 4. On the difficulties with this idea, see U.N. Press Release OS/26 (June 25, 1959).

<sup>18</sup> U.N. Doc. A/AC.98/SR.4 (PROV), p. 6.

<sup>19</sup> See, e.g., *ibid.* SR.5 (PROV), pp. 4-5.

<sup>20</sup> See *ibid.* SR.5 (PROV). The Report is U.N. Doc. A/4141.

## SOVIET TREATY PRACTICE ON COMMERCIAL ARBITRATION SINCE 1940

In contrast with the postwar treaty practice of the United States by which provisions on commercial arbitration have been incorporated in treaties of friendship, commerce and navigation, of similar pattern, Soviet practice in this field has not been uniform, and both the instruments used and the contents of these instruments have been extremely varied.

Like the United States,<sup>1</sup> the Soviet Union was not a party either to the Geneva Protocol on Arbitration Clauses of September 24, 1923, or to the Geneva Convention on the Execution of Foreign Arbitral Awards of September 26, 1927,<sup>2</sup> and with the considerable growth of trade within the last twenty years, the Soviet Union has concluded a large number of agreements with foreign countries, both Communist and non-Communist, that contain provisions on arbitration. These agreements have been concluded on a purely bilateral basis, and in that respect, Soviet policy on commercial arbitration can be said to have a certain similarity to that pursued by the United States, even though the objects of that policy have been different.

The point of departure for the pages that follow is the Convention of September 7, 1940, on the Exchange of Goods and Payments with Sweden.<sup>3</sup> For, although prior to that date the Soviet Union concluded certain agreements<sup>4</sup> containing provisions on commercial arbitration, these agreements were not numerous, and it was only after the signature of the convention with Sweden that the Soviet Union can be said to have embarked on a systematic policy of concluding a large number of bilateral agreements containing provisions on commercial arbitration. The bilateral agreements in question have taken the form of treaties of commerce and navigation,<sup>5</sup> treaties of commerce<sup>6</sup> and trade agreements.<sup>7</sup>

The provisions on commercial arbitration contained in these bilateral agreements are of three varieties: declarations of principle on the right to

<sup>1</sup> For a complete summary of U.S. treaty policy, see Herman Walker, Jr., "United States Treaty Policy on Commercial Arbitration, 1946-1957," *International Trade Arbitration*, 1958, p. 49.

<sup>2</sup> Were either the U.S.A. or the U.S.S.R. to sign and ratify the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, of June 10, 1958, such a step would be an important development in the treaty policy on commercial arbitration of the country so signing and ratifying.

<sup>3</sup> Followed by the Protocol to the Convention of Oct. 7, 1940.

<sup>4</sup> See, for instance, the treaty with Germany of Oct. 12, 1925, Part VI; the Trade Agreement with Belgium of Sept. 5, 1935, Art. 13; the treaty with Turkey of Oct. 8, 1937, Art. 12.

<sup>5</sup> See the treaty with Denmark of Aug. 17, 1946, and the Protocol thereto; the treaty with Hungary of July 16, 1947; the treaty with Czechoslovakia of Dec. 11, 1947; the treaty with Italy of Dec. 11, 1948; the treaty with Austria of Oct. 17, 1955; and the treaty with Bulgaria of April 1, 1958.

<sup>6</sup> See the treaty with Poland of July 7, 1945; the treaty with Rumania of Feb. 20, 1947; the treaty with Finland of Dec. 1, 1947; and the treaty with Switzerland of March 17, 1948.

<sup>7</sup> See the Trade Agreement with France of Sept. 3, 1951; the exchange of notes relating to the Trade Agreement with the Lebanon of April 30, 1954; and the Trade Agreement with Canada of Feb. 29, 1956.

settle commercial disputes by arbitration, provisions on the recognition and/or the enforcement of awards, and rules of procedure.

1. *Declarations of Principle on the Right to Settle Commercial Disputes by Arbitration*

The Trade Agreement with Canada provides that disputes arising from business transactions covered by the Agreement may be settled by arbitration (Article 6). Similar declarations of principle, though couched in somewhat different terms, will be found in the Trade Agreement with France,<sup>8</sup> in the exchange of notes relating to the Trade Agreement with the Lebanon, in the treaties with Austria,<sup>9</sup> Czechoslovakia,<sup>10</sup> Denmark,<sup>11</sup> Hungary,<sup>12</sup> Italy,<sup>13</sup> and Rumania,<sup>14</sup> as well as in the convention with Sweden (Article 14).

However, unlike the various other instruments of which mention has just been made, the trade agreements with Canada and France and the exchange of notes with the Lebanon do not contain any other provisions on arbitration, for their purpose, insofar as arbitration is concerned, is to affirm the right to settle a commercial dispute by arbitration. Naturally, had the Soviet Union been a party to the Geneva Protocol of 1923, no such declaration of principle would have been necessary.

2. *Provisions on the Recognition and Enforcement of Arbitral Awards*

Articles on the enforcement of arbitral awards will be found in the treaties with Austria, Bulgaria, Czechoslovakia, Finland, Hungary, Poland, Rumania and Switzerland, and articles on the recognition and the enforcement of awards will be found in the treaty with Italy, as well as in the convention with Sweden of September 7, 1940.

The provisions to be found in the treaties with Bulgaria (Article 18), Czechoslovakia (Article 14), Finland (Article 13), Hungary (Article 17), Poland (Article 10) and Rumania (Article 14), are similar in content, the prototype being the treaty with Poland of July 7, 1945. These treaties provide that the Contracting Parties undertake to enforce within their territory arbitral awards made by standing or *ad hoc* tribunals, where the awards relate to a dispute arising from a transaction entered into by the nationals or juridical persons of the Contracting Parties. Under these treaties, the enforcement of an award can be refused solely in three cases: First, where the award has not acquired the force of a final decision under the law of the country in which it was made; secondly, where the award

<sup>8</sup> Art. 11. Under this article provision is made for the jurisdiction of courts of law in the absence of an agreement to arbitrate.

<sup>9</sup> Art. 11. Under this article it is expressly stated that an agreement to arbitrate excludes recourse to courts of law for the purpose of settling the dispute.

<sup>10</sup> Art. 4 of the Schedule to the treaty.

<sup>11</sup> Arts. 14 and 15. The latter article contains provisions designed to avoid a conflict of jurisdiction in the absence of an agreement to arbitrate.

<sup>12</sup> Art. 5 of the Schedule to the treaty.

<sup>13</sup> Art. 4 of the Schedule to the treaty.

<sup>14</sup> Art. 4 of the Schedule to the treaty.

requires a party to the dispute to take any action prohibited by the law of the country in which enforcement is sought; thirdly, where the award is contrary to the public policy of the country in which enforcement is sought.

In addition, the treaties mentioned in the preceding paragraph provide that enforcement proceedings are to be carried out in conformity with the legislation of the country where enforcement is sought.

Both the respective treaties with Austria (Article 11) and with Switzerland (Article 11) are similar in content to the treaty with Poland as to the grounds on which the enforcement of awards is refused, as to the procedure for enforcement, and, in the case of the treaty with Austria, as to the awards covered by the treaty. The treaty with Switzerland differs on the latter question, for the treaty is stated to apply to the enforcement of awards made "pursuant to commercial contracts entered into by individuals, juridical persons or associations *resident* in the territory of either Contracting Party."

Both the Treaty of Commerce and Navigation with Italy and the Convention on the Exchange of Goods and Payments with Sweden contain provisions on the enforcement of arbitral awards that differ considerably from those to be found in the treaty with Poland. But before these provisions are examined, mention should be made of the fact that, whereas in the treaties of the Polish prototype the recognition of awards, as opposed to their enforcement, is not covered explicitly, both the treaty with Italy and the convention with Sweden use the terms "recognition and enforcement."

In the Convention on the Exchange of Goods and Payments with Sweden (Article 15), the Contracting Parties undertake to recognize and enforce within their territories awards made in accordance with the procedure established under the protocol to the convention,<sup>15</sup> provided that the awards in question relate to disputes arising from transactions between "institutions, firms and nationals" of either country. In addition to arbitral awards made under the procedure established by the protocol, the convention provides for the recognition and enforcement of other arbitral awards, on condition that such awards be made pursuant to arbitral agreements valid under the law of the country where the arbitration is held.

Under the convention, the enforcement of an award made under the procedure provided for in the protocol can be refused in six cases alone. The first ground for refusal is where the award has been set aside in the country where it was made. The second ground is where, in the country where the award was made, the question of its validity is pending before a court of law, or where the award has not acquired the force of a final decision in that country, such as where the time limit for petitioning to set aside the award has not expired. The third and fourth grounds on which enforcement can be refused are where, in the country in which enforcement is sought, the subject matter of the dispute is not one that can

<sup>15</sup> The provisions of the protocol are examined in part 3 of this note.

be settled by arbitration, or where the award is contrary to public policy. The last two cases of refusal are those in which the unsuccessful party was not informed of the proceedings in time to present his defense or was not legally represented, and those in which the award does not relate to the dispute referred to arbitration under the arbitral agreement, or where there is no such agreement.

Unlike any of the preceding treaties that have been referred to, the Treaty of Commerce and Navigation with Italy places on the party seeking to enforce an award the onus of proving its regularity. The treaty provides that arbitral awards made in the territory of either Contracting Party, in respect of disputes arising from commercial transactions between nationals or juridical persons of either Contracting Party, shall be enforceable in the territory of the other, provided that they have acquired the force of a final decision under the law of the country in which they were made, and provided that they are not contrary to public policy under the law of the country in which enforcement is sought (Article 21).

In addition, the treaty with Italy provides that enforcement proceedings shall conform with the law of the country where enforcement is sought.

### 3. *Provisions on Arbitral Procedure*

Mention has been made of the fact that the Treaty of Commerce and Navigation with Denmark affirms the right to settle commercial disputes by arbitration. In addition, the treaty envisages negotiations between the Contracting Parties designed to conclude an agreement whereby arbitral procedure is standardized (Article 14). Until the time when such an agreement has been entered into, certain rules of arbitral procedure have been established by the protocol to the treaty. These rules govern commercial transactions where the parties to such transactions wish to provide for the settling of future disputes by arbitration.

The following matters are covered by the protocol on the organization of arbitral procedure: the composition of the arbitral tribunal; the appointment of the arbitrators; the place of arbitration.

The protocol provides that each party to an arbitration shall appoint an arbitrator, and that within fourteen days of their appointment the arbitrators shall appoint a chairman. In appointing the chairman, the arbitrators are allowed complete liberty of choice, including the right to choose one of the persons whose names appear on a panel<sup>16</sup> drawn up by the Danish Ministry of Commerce, Industry and Shipping and the U.S.S.R. commercial representatives in Denmark. Where the arbitrators fail to agree upon a chairman, the latter is appointed by the drawing of lots from the names appearing on the panel. Where the arbitration is held at Copenhagen, the drawing of lots takes place at the Copenhagen Chamber of Commerce, and where the arbitration is held at Moscow, the lots are drawn at the U.S.S.R. Chamber of Commerce.<sup>17</sup> It is expressly provided

<sup>16</sup> The panel consists of five Danish and five Soviet nationals.

<sup>17</sup> The protocol also has certain provisions as to the persons who may be present at the drawing of the lots, etc.

that the chairman cannot be objected to by the parties once he has been appointed.

Under the protocol, arbitrations are held in the country of the claimant, but, at the request of either party, hearings may be held at the place where the goods forming the subject matter of the dispute are situated.

At first sight, these rules on arbitration would appear to be somewhat fragmentary and incomplete, for the protocol fails to deal with a number of vital questions such as, *inter alia*, what law the arbitrators are to apply, what their powers are, within what time limit the award is to be made, and how costs are to be dealt with. However, as the purpose of the protocol is provisional, and as in East-West trade relations the difficulty of agreeing upon a place of arbitration often constitutes a stumbling block to the successful conclusion of a contract, the protocol constitutes a break<sup>18</sup> in the current trend of attempting to have all arbitrations "at home" as opposed to having some, at any rate, abroad. While this trend is not limited to East-West trade,<sup>19</sup> it is prevalent in that sphere<sup>20</sup> where the various Soviet trading organizations have always attempted to insert in their contracts with Western traders an arbitration clause providing for arbitration in Moscow,<sup>21</sup> whereas Western traders have been equally adamant in seeking to provide for arbitration in their own countries.

The Convention of September 7, 1940, on the Exchange of Goods and Payments with Sweden contains a proviso whereby the parties to a commercial transaction between Sweden and the U.S.S.R. can agree to settle disputes by arbitration in accordance with the arbitration rules set out in the protocol to the convention (Article 14).

The protocol to the convention expressly provides that an arbitration agreement excludes recourse to courts of law. In addition to this provision, the protocol covers the following matters: the initiation of the arbitral procedure; the composition of the arbitral tribunal; the appointment and replacement of the arbitrators; the place of arbitration; the applicable law; costs.

<sup>18</sup> Another break in that tendency, insofar as the U.S.S.R. is concerned, will be found in the various protocols relating to general conditions of sale that have been concluded by the U.S.S.R. Ministry of Commerce with the Ministries of Commerce of various other countries in Eastern Europe. Under these protocols, provision is made for the holding of arbitrations in the defendant's country. See Korolenko, *USSR Commercial Treaties and Conventions 194-195* (Moscow, 1953).

<sup>19</sup> See Peter Benjamin, "Inter-Institutional Agreements Designed to Extend Existing Facilities for International Commercial Arbitration," 8 *International and Comparative Law Quarterly* 289 (1959).

<sup>20</sup> On this policy, see André Tunc, "Les aspects juridiques du commerce entre les pays d'économie planifiée et les pays d'économie libre," *Revue Internationale de Droit comparé*, 1958, No. 2; John Hazard, "State Trading and Arbitration," *International Trade Arbitration* 94.

<sup>21</sup> On the procedure before the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce, see Peter Benjamin, "Aperçu des institutions arbitrales de l'Europe de l'Est qui exercent une activité dans le domaine de l'arbitrage commercial international," *Revue de l'Arbitrage*, 1957, No. 4, p. 114, and 1958, No. 1, p. 2; see also Domke, "The Israeli-Soviet Oil Arbitration," in this *JOURNAL*, p. 787 above.



Unlike the protocol to the treaty with Denmark, the protocol to the convention with Sweden contains a proviso on how the arbitral machinery envisaged is set into motion. The protocol provides that an arbitration is commenced by the claimant sending a registered letter to the other party informing him of the claimant's arbitrator's name and address, and calling upon the other party to appoint an arbitrator and inform the claimant of his appointment, name and address within fourteen days of the receipt of the claimant's letter.

As in the case of the protocol to the treaty with Denmark, provision is made for complete liberty of choice with regard to the appointment of an arbitrator.

One of the "gaps" in the protocol to the treaty with Denmark was its failure to cover what was to happen when the defendant failed to appoint an arbitrator. Under the protocol to the convention with Sweden, if the defendant omits to appoint an arbitrator, the claimant is entitled to request the Stockholm Chamber of Commerce (where the defendant is of Swedish nationality) or the Moscow Chamber of Commerce (where the defendant is of Soviet nationality) to appoint an arbitrator on the defendant's behalf.

The protocol to the convention with Sweden also contains provision for the challenging of arbitrators by requesting the Stockholm Chamber of Commerce (where the challenged arbitrator was appointed by the Swedish party) or the Moscow Chamber of Commerce (where the challenged arbitrator was appointed by the Soviet party) to remove and replace an arbitrator.

Like the protocol to the treaty with Denmark, the protocol to the convention with Sweden provides for a three-member arbitral tribunal, consisting of the arbitrators appointed by either party and a chairman designated by the arbitrators within fourteen days of their appointment. The arbitrators are allowed complete liberty of choice, including the right to appoint as chairman one of the persons whose names appear on the panel of arbitrators drawn up annually by the Swedish Ministry of Commerce and the U.S.S.R. commercial representatives in Sweden.

An innovation under the protocol is that the panel consists exclusively of nationals of third countries.<sup>22</sup> Where the arbitrators fail to agree upon a chairman, or where they appoint as chairman a person whose name does not appear on the panel and such person is successfully challenged by either party, the chairman is appointed by the drawing of lots from the names appearing on the panel.

As was the case with the protocol to the treaty with Denmark, arbitrations are held in the claimant's country, but, at the request of either party, hearings can be held at the place where the goods forming the subject matter of the dispute are situated. A further exception to the rule that

<sup>22</sup> A second panel is also set up consisting of 4 members (similarly chosen from nationals of third countries) and constituting a reserve from which members of the first panel are replaced by the drawing of lots where death or incapacity prevents a member of the first panel from acting.

hearings take place in the claimant's country is contained in a proviso that where an application is made for a declaration as to the rights of a party or for the ascertainment of a fact, without there being a demand for payment or performance, then the arbitrators sit in the defendant's country.

Under the protocol to the convention, the arbitrators are required to make their award on the basis of the contract in respect of which the dispute arose, and in accordance with the applicable law under the relevant system of conflict. The arbitrators are also empowered to apply the generally accepted usages of international trade.

The question of costs is dealt with by merely requiring the arbitrators to award costs.

Although the provisions on arbitration that have been mentioned are more complete than those to be found in the protocol to the treaty with Denmark, it should nevertheless be observed that, as a code of arbitration, these rules are silent on a large number of questions that may arise in the course of an arbitration. The rules do not cover the powers of the arbitrators in general, and in particular the possibility of their proceeding *ex parte*, their making an interim award, or ordering security for costs; nor is there any guidance on the question of evidence that may be admitted, unless it can be said that the provisions relating to the law which the arbitrators are to apply do not solely cover the substantive law applied to the dispute, but also relate to the procedure. The rules are equally silent on the time for filing a defense or counterclaim, the form of the award, and the basis on which costs are to be awarded. Nor is there any indication as to whether an award is final, once made.

\* \* \*

Based on a policy of bilateralism, it will have been seen from the above that Soviet treaty practice has been extremely varied, for not only will there be found statements of principle on the right to settle commercial disputes by arbitration, but also provisions on the recognition and enforcement of awards, often varying from one treaty to another, as well as procedural rules on arbitration.

From the point of view of the development of international commercial arbitration, the latter form of treaty is of great importance, for it constitutes a radical departure from the traditional variety of treaty touching upon commercial arbitration, where recognition and enforcement alone are dealt with, or where the right to settle commercial disputes by arbitration is proclaimed. Moreover, from the point of view of East-West trade relations, the two protocols containing rules on the procedure of arbitration constitute a useful attempt, in clearly defined markets, to avoid a deadlock on the choice of a place of arbitration.

Were the Soviet Union to sign and ratify the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, it would mark a significant departure from the policy of bilateralism pursued up till now with regard to international commercial

arbitration. However, it should be stressed that the United Nations Convention deals exclusively with the recognition and enforcement of arbitral awards rather than with rules of procedure, and that, with regard to the recognition and enforcement of awards, the provisions of the convention do not affect the validity of any of the instruments referred to in this note.<sup>23</sup>

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#### POINT FOUR AND CODIFICATION†

The American technical assistance program known as Point Four (because it constituted point four in President Truman's message to Congress in 1949) usually is concerned with helping so-called underdeveloped countries in the fields of health, education, agriculture and industry. More recently such aid also has been given with regard to problems of public administration, but very rarely only in the domain of law and, in particular, in that of codification. Only a few such codification or related projects seem to have been undertaken thus far. They shall be described here briefly.

1. *Liberia*.<sup>1</sup> The first codification project originated in a request made early in 1952 on behalf of Mr. William V. S. Tubman, President of the Republic of Liberia, to Professor Milton R. Konvitz of Cornell University to prepare a code of laws for Liberia. An agreement was entered into between the U. S. Technical (now International) Cooperation Administration, Cornell University and Liberia, which provided for the preparation of a complete code of laws drawn along the lines of the best and latest American Federal and State models. After a survey on the spot in the spring of the same year, Professor Konvitz concluded that it would be better to base the code on Liberia's own experiences and ideas, i.e., on the laws enacted by the Liberian Legislature since 1847, when Liberia became an independent republic. This was agreed upon and within two months a complete set of all statutes, colonial laws and executive orders still in force was collected (perhaps the only such complete collection in the world). A professional staff of three members of the New York State Bar with experience in the drafting of statutes was engaged to prepare a systematic code out of the large mass of laws which had been assembled. By the summer of 1955 a first draft was completed which was reviewed by a com-

<sup>23</sup> See Art. VII of the Convention, reprinted in 53 A.J.I.L. 420 (1959).

\* The views expressed herein are the writer's personal views and should not be interpreted as those of the Organization.

† For information used in this note the present writer is indebted to Professor Milton R. Konvitz of Cornell University, Director of the Liberian Codification Project, and to Miss Carol Piper, Chief, Technical Resources Branch, Public Administration Division, International Cooperation Administration.

<sup>1</sup> The above summary follows closely the Introduction by Professor Konvitz to *Liberian Code of Laws of 1956*, Vol. I, pp. vii-x (Ithaca, 1957), reprinted in 2 *Journal of African Law* 116-118 (1958).

mission of Liberian officials. The commission, which included the Solicitor General and the Assistant Attorney General of Liberia, introduced many changes in the draft to reflect present practices and the understanding of Liberian lawyers as to the present status of the law of Liberia. The Project staff thereupon drew up a revised code which incorporated all the changes made at the conferences with the commission. The new draft was submitted to the Legislature of Liberia and adopted by the same as the "Liberian Code of Laws of 1956."

Following completion of the draft a new agreement was concluded between the Government of Liberia and Cornell University. This provided, *inter alia*, for preparing an index to the Code, for seeing through its publication, and for drafting such revisions thereof as may become necessary. The first two tasks were duly completed in 1957, when the Liberian Code of Laws was published in four volumes.<sup>2</sup> In the terms of section 1 of the Law of March 22, 1956, Validating the Code, the Code "embraces all of the general laws of the Republic of Liberia in force on December 31, 1955" and replaces "all existing general statutory laws of the Republic to that date." The Code is arranged alphabetically and consists of 37 titles; it also includes an up-to-date version of the Liberian Constitution.

To bring the Code up to date, the Project staff prepared a first Supplement to the same which covers the laws passed by the Liberian Legislature since the adoption of the Code through its 1957-58 session, and puts them into systematic form and order. The Supplement is to be enacted by the Liberian Legislature.

The Project staff also is preparing new laws, and revisions of some laws included in the Code.

2. *Panama*. Since the creation of the Republic of Panama in 1903, close to 3,000 laws and acts of equal rank (including a dozen very comprehensive Codes like the Civil, Commercial, Penal Codes, *et cetera*) and more than 7,000 executive decrees of general importance have been adopted. They are all published in the *Gaceta Oficial*, but there is no general index to the more than 200 bulky volumes of this official publication nor individual indices to the yearly volumes. There are special collections of the laws and decree-laws (but not of the executive decrees) which, however, are neither up to date nor indexed. It is thus very difficult (if not nearly impossible) to know whether there is a law or decree on a certain subject, and if so, whether it has been amended or abrogated, and where its text can be found.

With a view to remedying this situation, an agreement between the Government of Panama and the International Cooperation Administration and a contract between the latter and the University of Tennessee, concluded in 1955, provided, *inter alia*, for the services of a codification adviser to develop a coding and indexing system for the laws and decrees of Panama and for the Supreme Court decisions.

In this capacity the present writer, with the assistance of a staff provided by the Government of Panama and the Law School of the University of

<sup>2</sup> Liberian Code of Laws of 1956 (4 vols., Cornell University Press, Ithaca, 1957).

Panama, took an inventory of the legislative material mentioned above and of the Supreme Court decisions concerning the constitutionality of the same. A card index, comprising cards for each legal text and decision and arranged alphabetically by subject matter, was set up. The entire material so indexed is being analyzed to determine the relationships between the various acts and decrees and to find out which of them are in force and to what extent they are in force at the present time. Upon completion of this analysis, about half-way done by the Adviser and to be finished by the Law School of the University of Panama, an Index of the Law in Force in Panama will be published. On the basis of this Index it is intended to prepare up-to-date editions of the various Codes of Panama (e.g., the Civil Code, adopted in 1916 and since then revised numerous times, exists only in a 1926 official edition), and of other important laws and then perhaps also an all-inclusive Code of Panamanian Law.

In the meantime a first volume of *Legislación Panameña* has been prepared and published.<sup>3</sup> It consists of an Analytical and a Chronological Index of the Constitutions, legislative acts, decrees and resolutions, codes, laws and decree-laws of Panama adopted since the Republic was founded, and of the court decisions concerning their constitutionality rendered since 1941 (when judicial review of legislation was instituted in Panama).

Volume II of *Legislación Panameña* will be the above-mentioned Index of the Law in Force in Panama. It will be both more and less comprehensive than Volume I: more comprehensive in that it will also include the executive decrees, and less comprehensive in that it will be concerned only with material considered to be in force.

In order to institutionalize the work, the Adviser drafted a bill for the creation of a *Servicio Técnico de Legislación*. Among other things this Service is to keep the Index up to date and, in general, to advise the Government in all matters of codification. The bill has not yet passed the National Assembly of Panama.

3. *Turkey*. Within the framework of a public administration co-operation program in Turkey a New York University team, under the terms of a contract with the International Cooperation Administration, began to prepare in 1955 a "detailed master subject index" of the laws of Turkey, which never seem to have been completely classified. "Although not an immediate purpose, such an index might be useful in the preparation of a compilation and codification of the Turkish Statutes and a general encyclopedia of Turkish law."<sup>4</sup> Early in 1956, 375 manuscript pages of the Master Index were completed. Work on it then seems to have been suspended. According to a recent Progress Report the project is to be revived.<sup>5</sup>

<sup>3</sup> *Legislación Panameña*, Vol. I (Universidad de Panamá, Panamá, 1958, 595 pages).

<sup>4</sup> Report of Progress: Program of Technical Cooperation in Public Administration for Turkey (Graduate School of Public Administration and Social Service, New York University, Feb. 1, 1956), p. 14a.

<sup>5</sup> *Idem*, July 1, 1958, p. 28.

4. *Thailand*. The Research Division of the Institute of Public Administration at the University of Thammasat, under a contract financed by the International Cooperation Administration, in 1957 began work on a "comprehensive compilation of laws, decrees and regulations dealing with governmental administration; in the absence of a Thai legal code<sup>6</sup> this collection will have special value."<sup>7</sup> This work resulted in the publication, in 1958, of a volume entitled: *Laws, Royal Decrees, and Ministerial Regulations relating to Public Administration in Thailand*.<sup>8</sup> This is a selective index to the Law Directories, 1951-1956, and to the Royal Thai Government Gazettes, 1957-1958, and it is more comprehensive than the title may suggest: the material covered includes, *inter alia*, the Constitution, the National Assembly, elections, national and local administration, the legal and court systems, citizenship, aliens, commerce, labor, social welfare, and education.

*Conclusion*. The above are interesting examples of international legal co-operation and of the rôle which universities can play in it. The work done is beneficial not only to the country concerned but also to other countries by making knowledge of the various legal systems more easily accessible to them.

From this point of view, information on one branch of American Federal law is quite "underdeveloped," too: *treaties*, together with the Constitution and Federal legislation, are the "supreme law of the land." Yet, as pointed out in the Preface to *United States Treaty Developments*,<sup>9</sup> there is no one publication which provides full up-to-date information on the status of the treaties and agreements to which the United States is a party.

The situation has improved now with the editions of *Treaties in Force*,<sup>10</sup> after an interval of some fifteen years. It will further improve if and when the proposed supplements to *United States Treaty Developments* (discontinued for eight years) are published again. The contrast between the readily available full data on the other two sources of the supreme law of the land and the incomplete, dated information on this source of ever-growing importance is, however, quite striking, and something like a "U.S. Treaty Code" is very much needed.

SALO ENGEL

<sup>6</sup> There is an ancient Thai Code which has never been indexed. The above-mentioned Research Division sponsored such an index which "will open up the ancient code to more ready and systematic use by students, historians and legal scholars" (Second Semi-Annual Progress Report, Indiana University Public Administration Team to the University of Thammasat, Nov. 3, 1955, to May 3, 1956).

<sup>7</sup> *Idem*, Fifth Semi-Annual Progress Report, May 3-Nov. 3, 1957.

<sup>8</sup> Institute of Public Administration, University of Thammasat, March 31, 1958, 54 pages, mimeographed.

<sup>9</sup> Department of State Pub. 2857. Cf. also Engel, "On the Status of International Legislation," 44 A.J.I.L. 737-739 (1950).

<sup>10</sup> Department of State Pub. 6762.

## THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

Announcement has recently been received of the formation of the British Institute of International and Comparative Law for the purpose of providing a center for studying the practical application to current problems of public and private international law and comparative law, including Commonwealth, Colonial and foreign law. The Institute, which brings together the Grotius Society, founded in 1915, and the Society of Comparative Legislation and International Law, founded in 1894, will seek to provide the means of ascertaining British law and practice in general for inquirers and visitors from foreign countries, and will promote research on selected subjects. It is intended to become the principal British organization for the encouragement of research and for exchange of views in the whole field of international and comparative law. By promoting in a practical way the mutual comprehension of different legal systems and problems of law, it is hoped that the work of the Institute will make a useful and important contribution to international peace and understanding.

The *International and Comparative Law Quarterly*, previously published by the Society of Comparative Legislation and International Law, will henceforward be published under the auspices of the Institute. The *Transactions of the Grotius Society*, published annually, will also appear under the auspices of the Institute. In addition, the Institute will be associated with the preparation, already under way, of the *British Digest of International Law and Practice*. The Institute is also undertaking to produce a Survey of Colonial Law and to study the Common Law as it is being developed to meet new problems by the courts in the different parts of the Commonwealth.

The Institute will serve as a source of information on legal matters affecting British commercial, financial and private interests abroad, and in this connection will hold joint meetings with trade associations and similar bodies on current problems arising in these fields.

Under its Articles of Association the Institute's activities are comprised under three divisions: the Comparative and International Law Division, the Grotius Division, and the General Division. The first of these will be concerned with matters within the purposes of the Society of Comparative Legislation and International Law, the second, with those of the Grotius Society, and the General Division will have the general management of the Institute's affairs, under a Council of Management. The Chairman of the Council is the Right Honorable Lord Denning. His alternate is Mr. M. E. Bathurst. An Advisory Board, composed of prominent lawyers in the fields of the Institute's projected activities, is divided into sections on Public International Law, Comparative Law, and Private International Law. The Right Honorable Lord Shawcross is Chairman of the section on Public International Law; the Honorable Mr. Justice Diplock is Chairman of the section on Comparative Law; and the Honorable Mr. Justice Karminski is Chairman of the section on Private International Law.

Individuals and corporations are eligible for membership in the Institute, subject to the approval of the Council. The annual membership fee

is £4 4s and entitles members to receive the four issues of the *International and Comparative Law Quarterly* and the annual volume of *Transactions of the Grotius Society*. For those who wish to receive only one of these publications the membership fee is £3 3s. For persons in the United Kingdom studying to enter the legal profession or who have been qualified in the profession for less than three years, the annual membership fee (not including either publication) is £1 1s. Applications for membership should be addressed to the Secretariat of the Institute, 4 Pump Court, Temple, London, E.C.4.

E. H. F.

#### THE SOCIETY'S NEW QUARTERS—THE TILLAR MEMORIAL BUILDING

Last fall the Society was able to acquire the spacious mansion at No. 2223 Massachusetts Avenue, corner of R Street, N.W., Washington, D.C., through the generosity of Mrs. Benjamin J. Tillar. After title to the premises was taken, use of the premises was prevented by the zoning regulations of the District of Columbia. Recourse was then had to the Congress to permit an exception to the zoning regulations, and the Society is happy to announce that a bill allowing use of the premises as the national headquarters of the Society was enacted, and signed by the President on August 25, 1959 (P.L. 86-208, 86th Congress, 73 Stat. 431, 36 U.S.C. 341-352).

Preparations are now being made to make the house, to be known as the Benjamin Johnston Tillar Memorial Building, suitable for occupancy by the Society. The expense that will necessarily be incurred for renovating the premises will be substantial and may exceed \$30,000. The Society will gratefully receive contributions in any amount toward this purpose from any person, corporation or other source willing to give tangible expression of its support for the aims and objectives of the Society. If such financial support is forthcoming, it is to be anticipated that the Tillar Building may be dedicated to the Society's use in the course of its next annual meeting scheduled to take place April 28-30, 1960.

RALPH G. ALBRECHT

*Chairman, Committee on Financing and Endowment*

#### INSTITUTE ON LEGAL ASPECTS OF THE EUROPEAN COMMUNITY

The Federal Bar Association will sponsor the first conference in the United States on the Legal Aspects of the European Community. The conference will be held February 11, 12, and 13, 1960, at the Hotel Statler, Washington, D. C. Leaders and legal officials from the executive branches of the Common Market, Euratom, and the Coal and Steel Community will participate in the conference on the legal issues and problems raised by Western European economic integration and their impact upon commercial, industrial and financial relations with the United States.

The American Bar Association, the American Society of International Law and the Washington Foreign Law Society will join the Federal Bar Association as co-sponsors of the conference.



Among those who will address the conference is Mr. Jean Rey, a leading representative of the European Community. He is a member of the nine-man Commission of the European Economic Community and was formerly Minister of Economic Affairs of Belgium. He has served in the Belgian Parliament and as a delegate to the United Nations and the Council of Europe.

Another principal speaker at the conference will be Mr. Michel Gaudet, Director of the Joint Legal Service for all three Communities (Common Market, Euratom, and Coal and Steel). Mr. Gaudet was previously Director of the Legal Department of the High Authority of the Coal and Steel Community and prior to that had been Director of the Office of the Secretary of State for Finance and Economic Affairs of France.

At the session on Thursday, February 11, 1960, which opens at 9:15 a.m., the following subjects will be discussed: "An American Lawyer Views the Community"; "Effects of the Community on the Pattern of U.S. Business in Europe"; "A General Survey of Community Infrastructure"; "Business Organization Problems and How the Community Will Affect Them"; "Tax Planning for the European Common Market"; and "Trademarks and Patents."

On Friday, February 12, the subjects for discussion will be: "Restrictive Trade Practices"; "Economic Effect on American Enterprise of Conditions of Controlled Competition in the Community"; "Legal Problems under the U. S. Antitrust Laws Incident to Doing Business in the Community"; "Financing Operations in Europe"; "Services Offered by U. S. Government Agencies in Regard to Doing Business in the Community"; and "The Court of Justice and Legal Systems of the Community."

The final session on Saturday, February 13, will be devoted to "Legal Aspects of Euratom"; "The Coal and Steel Community"; and "Great Britain, the 'Outer Seven,' and the Common Market."

A banquet is scheduled for Thursday, February 11.

Henry T. King, Jr., Deputy General Counsel, International Co-operation Administration, is Chairman of the European Community Conference Committee. Others on the Committee include Whitney Gilliland, President-elect, Federal Bar Association; George S. Leonard, Deputy Chief, Civil Division, Department of Justice; Mark Massel, Brookings Institution; Nathan Ostroff, Assistant General Counsel, Department of Commerce; Sigmund Timberg; E. K. Gubin; Lawrence C. Moore; Phillip Levy; Dorothy Goodwin; Marcus Hollabaugh; Harry Inman; Donald K. Duvall; Henry M. Shine, Assistant Director, Commission on Civil Rights; Abe McGregor Goff, Commissioner, Interstate Commerce Commission, and A. J. Esgain.

There will be a registration fee for the full conference of \$15.00 for members of the Federal Bar Association and \$40.00 for non-members. Checks in payment of registration fees should be made payable to the Federal Bar Association and forwarded to Mr. Henry T. King, Jr., Chairman of the Conference Committee, c/o Federal Bar Association, 1737 H Street, N.W., Washington, D. C.

E. H. F.

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

COLLECTED AND ANNOTATED BY

DENYS P. MYERS

EDITOR'S NOTE: Through the generosity of The International Law Fund, the AMERICAN JOURNAL OF INTERNATIONAL LAW is able to undertake, on an experimental basis, a new section devoted to Contemporary Practice of the United States relating to International Law. In making a three-year grant to the JOURNAL, the Trustees of The International Law Fund—Lord McNair, Lord Shawcross and Sir Gerald Fitzmaurice—attached no conditions as to its expenditure. It was the view of Mr. E. Lauterpacht, Secretary of the Fund, that the Trustees would be happy if the JOURNAL saw fit to use some of the grant for the publication of documents or surveys of contemporary United States practice relating to international law. The Board of Editors of the JOURNAL has authorized the inclusion of a section on contemporary practice on an experimental basis and has been fortunate in securing the experienced services of Mr. Denys P. Myers to initiate the project.

Criteria for the selection of materials may vary with experience, but the guiding purpose will be to select materials which reveal contemporary practice by the United States in invoking and applying principles, rules and procedures of international law or policies relating thereto. Although effort will be made to place the documentary materials or policy statements in an appropriate frame of reference, their value as precedents will remain a matter of appreciation.—H. W. B.

### RECOGNITION OF GOVERNMENTS

#### *Provisional Government of Cuba recognized by United States—Notes from Ambassador to Foreign Minister*

On January 1, 1959, President Fulgencio Batista and the members of his Government fled from Cuba before the advancing forces of the 26th of July Movement. The leader of that Movement, Fidel Castro, designated Judge Manuel Urrutia Lleo President of Cuba, who immediately organized a Cabinet. On January 7, 1959, the Ambassador of the United States, Earl E. T. Smith, delivered to the Foreign Minister of Cuba, Roberto Daniel Agramonte, a note which read:

I have been instructed by my Government to inform Your Excellency that, having noted with satisfaction the assurances given by the new Government of Cuba of its intention to comply with the international obligations and agreements of Cuba, the Government of the United States is pleased to recognize the Government under the Presi-

gency of Dr. Manuel Urrutia Lleo, as the provisional Government of the Republic of Cuba.

At the same time the Government of the United States expresses the sincere good will of the Government and people of the United States towards the new Government and the people of Cuba.<sup>1</sup>

Recognition of a new government in an existent state involves a judgment on the part of the recognizing government that the new régime is in effective control of the country and capable of maintaining order, as well as the formal assurance by the new government that it intends to comply with its international obligations. The terms of the note of recognition are, therefore, the acceptance of a proposal in what amounts to an exchange of notes.

*Non-recognition in multilateral instruments—reservations excepting reciprocity between certain parties to multilateral conventions*

The majority of the states of the world do not accredit missions to one another,<sup>2</sup> but they deal with one another in the organs of the United Nations and other international organizations under the Charter and other constituent instruments, and as parties to other multilateral treaties. Ordinarily no issue is raised in these practical multilateral relations as to whether or not A and B individually admit the existence or legitimacy of each other. The matter is raised by reservations made by several states to the International Sugar Agreement of 1958, to which the United States has acceded.

The agreement of December 1, 1958, supersedes a previous one of October 1, 1953, and stems from the earlier one of May 6, 1937, to which China was a party. The Republic of China is one of the "participating governments" under the agreement of 1958. In signing for China its representative made the following reservation:

The Government of the Republic of China is the only legitimate Government of China. In signing this Agreement, I declare, in the name of my Government, that any statements or reservations made thereto which are incompatible with or derogatory to the legitimate position of the Government of the Republic of China are illegal and therefore null and void.

In signing for the Soviet Union, Czechoslovakia and the Polish People's Republic their representatives made reservations to the effect of this Soviet assertion:

The signing, in behalf of the Union of Soviet Socialist Republics, of the present draft of the agreement, which in Articles 14 and 34 mentions China (Taiwan), by no means indicates a recognition of the Chiang Kai-shek government over Taiwan territory, nor the recog-

<sup>1</sup> 40 Department of State Bulletin 128 (1959).

<sup>2</sup> If each Member of the United Nations accredited a diplomatic mission to each of the other Members, the total number of missions would be 6,642. There are probably not more than 2,500 diplomatic missions actually accredited, though much bilateral business is done by temporary missions and through consular officers.

dition of the so-called "National Government of China" as the legal and competent government of China.

Alternately the United Kingdom and Denmark, which have "recognized" the People's Republic of China, made reservations to this effect:

At the time of signing the present Agreement I declare that since the Government of the United Kingdom do not recognise the Nationalist Chinese authorities as the competent Government of China they cannot regard signature of the Agreement by a Nationalist Chinese representative as a valid signature on behalf of China.

"China (Taiwan)" by the agreement is one of the exporting countries which is assigned a basic tonnage quota for the free market, as is also "Germany, Eastern," but without a vote in the Council. On the other hand, the Federal Republic of Germany continues as a participating government and has Council votes as an importing country. This treatment of German entities was the subject of a Czechoslovak reservation which stated "that the expression 'Germany, Eastern' to designate the German Democratic Republic in Article 14 is not correct" and continued:

The German Democratic Republic was established on October 7th, 1949 on the basis of the Constitution which was approved by the Third German People's Congress on May 30th, 1949. By virtue of a series of Acts undertaken by the Soviet Union the German Democratic Republic acquired full sovereignty under international law. The German Democratic Republic equally obtained international recognition by the establishment of diplomatic, economic and trade relations with many countries. The official designation of this sovereign state is, as can be seen, for example, in Article 2 of the above-mentioned Constitution, the German Democratic Republic, and hence this is the only correct designation to be used in international legal documents.

These reservations are expressions of political fact to the governments making them and are put forward with relation to an agreement which is designed to deal with a complex economic-agricultural matter of common concern. In legal effect they give notice that certain of the participating governments are not on speaking terms with each other. The purpose of the agreement, however, is to bring together the suppliers and consumers of an essential product and to order its distribution. The agreement deals with states which either export or import sugar from the territories they control and administer, and it would be relatively ineffective if any of either category were omitted. The agreement disregards political relations between the parties and provides that each of the "participating governments" is a member of the International Sugar Council, which is charged with managing the system established by the agreement. The casting of the 45 votes of the Federal Republic of Germany in the 1,000 votes of the importing countries or the 65 votes of China in the 1,000 votes of the exporting countries is not likely to affect the decisions of the Council sufficiently to bring into application the political gestures of the reservations.

Use of this sort of reservation to a multilateral convention was first made by the United States and Spain as to the Convention signed at Paris

June 21, 1926,<sup>3</sup> revising the International Sanitary Convention of July 17, 1912. The Soviet Union was a party to the 1926 convention and the ratification of the United States was deposited with the following "understandings and conditions":

1. The ratification of the International Sanitary Convention is not to be construed to mean that the United States of America recognizes a regime or entity acting as government of a signatory or adhering power when that regime or entity is not recognized by the United States as the government of that power.

2. The participation of the United States of America in this International Sanitary Convention does not involve any contractual obligation on the part of the United States to signatory or adhering power represented by a regime or entity which the United States does not recognize as representing the government of that power until it is represented by a government recognized by the United States.

#### TERRITORIAL JURISDICTION

*Treaty applicable to a state's territory is not a commitment on the extent of the territory—boundary between Muscat and Oman and Saudi Arabia*

The Treaty of Amity, Economic Relations and Consular Rights between the United States and Muscat and Oman, signed December 20, 1958, was considered by the Senate Committee on Foreign Relations on April 7, 1959. Wilson T. M. Beale, Assistant Secretary of State for Economic Affairs, was asked, inasmuch as the suzerainty of the Sultan is a controversial question in the Arab world,<sup>4</sup> whether neighboring Arab states had been advised of the treaty. "Mr. Beale," says the committee report,<sup>5</sup> "replied that:

these states had been informed and had offered no objections.

Because the borders of Muscat and Oman are not clearly defined and have been a matter of dispute between Saudi Arabia and the Sultan, the committee inquired as to whether the treaty might amount to recognition by the United States of the Sultan's suzerainty over the disputed territory. Mr. David Newsom, officer in charge of Arabian Peninsula Affairs of the Department of State, testified as follows:

\* \* \* By the treaty we recognize as we always have the independence of the Sultan of Muscat and Oman, but there is no effort in this treaty to reach any definition of what the Sultan's territories are.

The committee asked why the United States chose to abstain when the question of Oman's political status was brought before the United Nations in the fall of 1957. Mr. Newsom replied:

Our position at the time it was suggested that this be inscribed on the Security Council agenda was that the international status of Inner Oman was somewhat obscure, and we did not have sufficient information to state definitely what its character was.

<sup>3</sup> 4 Trenwith, *Treaties, Conventions, etc.*, 4962, 5018; U. S. Treaty Series 762; 45 Stat. 2492.

<sup>4</sup> On the status of Muscat and Oman, see 7 *International and Comparative Law Quarterly* 108 (1958).

<sup>5</sup> Sen. Exec. Rep. 1, 86th Cong., 1st Sess.

The inquiry was made with respect to Article XIV of the treaty, which reads:

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of the United States of America, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands, and of the Sultan of Muscat and Oman and Dependencies.

Note was made of this information when the treaty was before the Senate in Executive Session on April 28, 1959, for advice and consent to it. It follows that the Senate understood the treaty to apply to the territory which the Sultanate of Muscat and Oman controls and administers, and that the United States takes no position with respect to territory claimed by the Sultan or by neighboring states. That is the usual meaning of the word "territory" in bilateral treaties, which cannot undertake to be cognizant of the relations of either party with third parties. In special circumstances the tacit understanding is made explicit.

Two instances may be cited. The Mutual Defense Treaty between the United States and Korea, October 1, 1953,<sup>6</sup> recognizes as a *casus foederis* in Article III "an armed attack in the Pacific area on either of the Parties in territories now under their respective administrative control, or hereafter recognized by one of the Parties as lawfully brought under the administrative control of the other." The Senate had that spelled out in an understanding that specified an external "armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

In the Mutual Defense Treaty between the United States and the Republic of China, December 2, 1954,<sup>7</sup> Article II refers to "territorial integrity"—the now standard phrase—and Article V recognizes the *casus foederis* as "an armed attack in the West Pacific Area against the territories of either of the Parties." Article VI prescribes that these terms

shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America, the island territories in the West Pacific under its jurisdiction. The provisions of Articles II and V will be applicable to such other territories as may be determined by mutual agreement.

With respect to the last sentence, the Secretary of State told the Senate Committee on Foreign Relations on February 7, 1955, that any extension of the treaty "to additional territories would in practical terms amount to an amendment of the treaty and should be submitted to the Senate for its advice and consent."

Alliances made by the United States in recent years employ some precision in defining the territorial *casus foederis* in the case of states the boundaries of which are not regarded as in doubt. Article 4 of the

<sup>6</sup> T.I.A.S., No. 3097; 5 U. S. Treaties 2368; 1 American Foreign Policy, 1950-1955: Basic Documents 897.

<sup>7</sup> T.I.A.S., No. 3178; 6 U. S. Treaties 433; 1 American Foreign Policy, 1950-1955: Basic Documents 945.

Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro, September 2, 1947, describes by latitude and longitude the hemispheric region to which it applies. With respect to individual states, Article 9 specifies that invasion would occur by

trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another state.

Article 6 of the North Atlantic Treaty, April 4, 1949, defined the area in which an armed attack would be restricted as

the territory of any of the Parties in Europe or North America, . . . the Algerian departments of France . . . the occupation forces of any Party in Europe . . . the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or . . . the vessels or aircraft in this area of any of the Parties.

The protocol of accession of Greece and Turkey, October 17, 1951, added the territory of Turkey and the forces, vessels or aircraft of any of the Parties in the Mediterranean Sea. The protocol of accession of Germany, October 23, 1954, did not describe its area.

Article V of the Mutual Defense Treaty with the Philippines, August 30, 1951, and of the Security Treaty between the United States, Australia and New Zealand, September 1, 1951, describe the area affected as "the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction or on its armed forces, public vessels or aircraft in the Pacific." Article VIII of the Southeast Asia Collective Defense Treaty, September 8, 1954, describes the "treaty area" in geographic terms, with a provision that it be amended if other states accede.<sup>8</sup>

#### MARITIME JURISDICTION

##### *Cuban-United States Commission for the Conservation of Shrimp in Eastern Gulf of Mexico—area of jurisdiction subordinate to Commission's responsibility*

A Convention for the Conservation of Shrimp was signed between the United States and Cuba at Havana, August 15, 1958, and promptly ratified by Cuba. In the report to the President for transmission to the Senate, the Acting Secretary of State noted that the convention was called for by reason of the depletion of the principal shrimp fishery which embraced "shrimp grounds lying north of a line drawn from Key West to Loggerhead in the Tortugas insular group and covering an area about 70 miles long and 20 to 25 miles wide." The two governments were concerned with its conservation as a joint fishery.<sup>9</sup> The relatively definite

<sup>8</sup> The articles cited or quoted are in 1 American Foreign Policy, 1950-1955; Basic Documents 791, 792, 813, 853, 871, 874, 879, 914. The reports with the treaties also discuss these articles.

<sup>9</sup> Sen. Exec. B, 86th Cong., 1st Sess., p. 2. The Convention was ratified by the President of the United States on June 12, 1959.

delimitation of the fishery as known to the negotiators is not reflected in the "convention area" as defined in Article I of the convention:

The area to which this Convention applies, hereinafter referred to as "the Convention area," shall be the waters of the Gulf of Mexico off the coast of Cuba and the Florida coast of the United States, including territorial waters, in which are found stocks of shrimp of common concern.

It can be seen from comparing the two areas that the negotiators did not trust the shrimp to co-operate in their own conservation by keeping within their habitual bounds. The problem thus involved in asserting jurisdiction beyond territorial waters is not new and is at the heart of controversies on its extension.

The regulations which the Commission for the Conservation of Shrimp in the Eastern Gulf of Mexico, set up by the convention to consist of equal 3-man Cuban and United States sections, should be more precise. Such regulations (Article III, 2) will bind Parties to co-operate in their execution unless either Party objects within 60 days of the issuance of the regulations. By Article V the United States and Cuba agree upon the following enforcement action outside of territorial waters:

1. Any national or vessel of a Contracting Party which engages in operations on the high seas in violation of regulations which enter into force pursuant to Article III of this Convention may be seized by duly authorized officers of the other Contracting Party and detained by the officers making such seizure and delivered as soon as practicable to an authorized official of the country to which such person or vessel belongs, at the nearest point to the place of seizure or elsewhere as may be agreed upon.

2. The authorities of the country to which such person or vessel belongs alone shall have jurisdiction to conduct prosecutions for violation of the regulations which enter into force pursuant to Article III of this Convention and to impose penalties for such violation, and the witnesses and proof necessary for such prosecutions, so far as any witnesses or proofs are under the control of the seizing Country, shall be furnished with all reasonable promptitude to the authorities having jurisdiction to conduct the prosecutions.

3. Each contracting party shall be responsible for the proper observance of this convention and of any regulations adopted under the provisions thereof in the portions of its waters covered thereby.

*Territorial sea and fisheries—preparation for 1960 Conference—United States opposed to 12-mile limit—efforts to achieve a compromise formula*

Loftus E. Becker, Legal Adviser, Department of State, in an address before the National Cannery Association in Chicago, Illinois, February 21, 1959, made the following statement:

On the tenth of December of last year, the United Nations General Assembly adopted a resolution<sup>10</sup> convening a second Law of the Sea Conference at Geneva in March or April, 1960 to reach agreement on

<sup>10</sup> U.N. Doc. A/Res./1307(XIII), Dec. 10, 1958.



the question of the breadth of the territorial sea and fishery limits. The United States is already actively engaged in consultations with other governments with a view to reaching an agreed position on these questions which will be likely to gain acceptance by a two-thirds majority at the next Conference.

Because of the requirements of our national security interests and our responsibility with respect to the defense of the free world, the United States cannot accept an extension of the breadth of the territorial sea out to twelve miles and will seek in every way possible to reach an agreement which will provide for a narrow territorial sea. The achievement of this objective, vital to the security of ourselves as well as our allies, is of paramount importance. I am convinced, however, that this objective can be achieved through mutual cooperation and by meeting the legitimate economic interests of a number of states which would then support our position for a narrow territorial sea.

The success of our efforts will depend largely on our ability to solve the fisheries question. It seems to me that an arrangement envisaging a narrow territorial sea coupled with an exclusive fisheries zone, which preserves the right of those who have historically fished there to continue to do so, would accrue to everyone's benefit. It would strike a just balance between the interests of the coastal state and the interests of fishermen off another state's coasts. Some of our ablest and most experienced legal and fisheries experts are working full time in order to reach a solution of this problem along these lines. It is hoped that the exact terms of such a compromise can be formulated as a result of explorations within other governments, if possible prior to the 1960 Conference, as we have learned from the last Conference the importance and advantages of pre-Conference agreement on positions of fundamental importance.

In closing, let me state that such an agreement which will undoubtedly entail some sacrifices deserves the support of all of us since I am certain that a failure to agree on these questions of the breadth of the territorial sea and fisheries limits at the next Conference will result in extensive unilateral extensions of the territorial sea with very grave political, economic, and military consequences for the free world. I am sure that you all feel as I do, that it is far better to reach agreement on these two outstanding questions at the next Conference by means of a reasonable accommodation of various conflicting interests than to lose everything to those whose political, economic, and military interests are diametrically and irrevocably opposed to our own.<sup>11</sup>

*Extension of territorial sea rejected—Panama's assertion of 12-mile territorial zone not recognized by United States—rights with respect to Panama Canal not affected*

The Republic of Panama in December, 1958, enacted a law which extended its jurisdiction over territorial waters to a width of 12 miles from the coast. On January 9, 1959, United States Ambassador Julian F. Harrington handed to the Minister of Foreign Affairs a note reading as follows:

<sup>11</sup> 40 Department of State Bulletin 873 (1959).

I have the honor to refer to your note No. 1096 dated December 23, 1958 transmitting a copy of Republic of Panama Law No. 58 of December 18, 1958 which has as its purpose the extension of the territorial sea of the Republic of Panama to a distance of 12 miles from the coast.

I have been instructed to state that the United States Government considers this action of the Republic of Panama is regrettable in view of the recent action of the United Nations General Assembly in voting overwhelmingly to call an international conference to consider the breadth of the territorial sea and fishery matters.

It is the view of my Government, as expressed at the United Nations Law of the Sea Conference and on previous occasions, that no basis exists in international law for claims to a territorial sea in excess of three nautical miles from the baseline which is normally the low water mark on the coast. Furthermore, in the United States view there is no obligation on the part of states adhering to the three-mile rule to recognize claims on the part of other states to a greater breadth of territorial sea.

My Government hopes that the Government of Panama will find it possible to reconsider its action and awaits the further consideration of the question of the breadth of the territorial sea by the international community. In the meantime the Government of the United States reserves all of its rights in the area which is the subject of Republic of Panama Law No. 58 of December 18, 1958.<sup>12</sup>

An unofficial English version of the Panamanian law follows:

Law No. 58

(of December 18, 1958)

By which the Republic of Panamá extends its territorial sea to  
a distance of twelve miles.

The National Assembly of Panamá

Considering:

That the three-mile rule concerning breadth of the territorial sea never had unanimous acceptance;

That at present the great majority of the coastal states of the world, "mindful of geographic, geological and biological factors, as well as the economic necessities of their people and their security and defense," have proceeded to extend beyond three miles the breadth of their territorial sea;

That in the last international meetings on the subject it has been clearly established that International Law admits as legal the power (*facultad*) of the coastal State to fix the breadth of its territorial sea up to a limit of twelve miles, a power of which various nations have made use;

That it is of prime importance for the Republic to extend its sovereign rights over a zone of twelve miles of territorial sea;

That such extension has been recommended by the Panamanian Delegation which took part in the deliberations of the Geneva Conference, whose report appears in the *Memoria del Ministerio de Relaciones Exteriores de 1958*,

<sup>12</sup> *Ibid.* 127.

## Enacts:

*Article 1*—The Republic of Panamá extends its sovereignty, in addition to its continental and insular territory and to its interior waters, over a zone of territorial sea twelve nautical miles in breadth, over the bed and subsoil of the said zone and over the airspace which covers it.

*Article 2*—The Executive Organ will administer the present Law in accord:

- a) With the National Constitution;
- b) With the Conventions concluded in the United Nations Conference on the Law of the Sea, held at Geneva in 1958;
- c) With the international treaties in force; and
- d) With the rights relating (*correspondientes*) to its historical waters.

*Article 3*—This Law abrogates or modifies only those provisions in force which may be in contradiction with the provisions in the above articles.

*Article 4*—This Law will enter into force upon its promulgation.

Done in the city of Panamá, on the fifteenth day of the month of December of one thousand nine hundred and fifty-eight.

The President,

The Secretary General,

Republic of Panamá.—National Executive Organ.—Presidency of the Republic.—Panamá, December 18, 1958.

To be executed and published.

Ernesto de la Guardia, Jr.

The Minister of Foreign Relations,

Miguel J. Moreno, Jr.

The Department of State published the note in view of many inquiries called forth by the announcement of Panama's action in the press. The Department took the occasion to point out "that this Panamanian law cannot affect the rights of the United States with respect to the Panama Canal." In support of this statement it quoted Article XXIV of the Convention of November 18, 1903, between the United States and Panama for the Construction of a Ship Canal,<sup>18</sup> which provides:

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

<sup>18</sup> 33 Stat. 2234; U. S. Treaty Series 431; 2 Malloy 1349. Various articles, paragraphs or sentences of this basic treaty have been superseded, abrogated, amended or modified by the treaties of March 2, 1936, and Jan. 25, 1955 (58 Stat. 1807; Treaty Series 945, and 6 U. S. Treaties 2273; T.I.A.S., No. 3297), but Art. XXIV remains in full effect. For details see *Treaties in Force* . . . January 1, 1959, p. 132, note 3 (Dept. of State Pub. 6762).

## BOUNDARY WATERS

*Diversion of Great Lakes water—Canada protests legislative proposal to divert water from Lake Michigan—effect on Great Lakes navigation and power plants—Chicago sewage problem*

Since the 82d Congress, 1951–1953, bills have been introduced into Congress and hearings held on the subject of diversion of additional waters into the Illinois Waterway from Lake Michigan, one of the Great Lakes wholly within the United States. The Department of State has called these bills to the attention of Canada, the co-riparian of the Great Lakes system, on the score that no riparian should go ahead with exploitation of its part of a system, when a co-riparian may possibly be adversely affected, without consulting the latter and coming to an understanding with it. H.R. 3300, 83d Congress, and H.R. 3210, 84th Congress, were vetoed by the President for the reason, among others, that the diversion of water was authorized without reference to negotiations with Canada. H.R. 2, 85th Congress, which passed the House of Representatives May 22, 1957, was the subject of critical comment in a Canadian aide-mémoire of January 6, 1958, and was not passed by the Senate, though favorably reported from the Committee on Public Works on August 20, four days before adjournment.

H.R. 1, 86th Congress, provides that for one year (instead of the earlier three years) 2,500 cubic feet of water per second shall be diverted from Lake Michigan into the Illinois Waterway by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, an increase of 1,000 cubic feet over the amount of water provided by the decree of the Supreme Court in 1930 (281 U.S. 181–202). A study of the effect of this diversion would be made by the Corps of Engineers and the Public Health Service and a report made as to its value. The Department of State sent a copy of this bill to the Canadian Government on February 9, 1959, in anticipation that the Department would be asked to submit the views of the Canadian Government at hearings in the Congress, as it had on past occasions. On February 20, 1959, the Canadian Government responded with the following aide-mémoire:

On a number of occasions in the past, the Canadian Government has expressed its objections to proposals envisaging increased diversions of water from Lake Michigan at Chicago. Once again, and at the invitation of the Government of the United States through the United States Embassy's Aide Memoire of February 9, 1959, the Government of Canada is anxious to make known its views on legislative proposals now before Congress such as bill H.R. 1, which are intended to authorize an increased diversion of water from the Great Lakes Basin into the Illinois Waterway.

While recognizing that the use of Lake Michigan water is a matter within the jurisdiction of the United States of America, it is the considered opinion of the Canadian Government that any authorization for an additional diversion would be incompatible with the arrangements for the St. Lawrence Seaway and powder development, and with

the Niagara Treaty of 1950,<sup>14</sup> and would be prejudicial to navigation and power development which these mutual arrangements were designed to improve and facilitate.

The point has been made repeatedly by Canada that every withdrawal of water from the basin means less depth available for shipping in harbors and in channels. Additional withdrawals would have adverse effects on the hydro-electric generation potential on both sides of the border at Niagara Falls and in the international section of the St. Lawrence River, as well as in the province of Quebec, and would inflict hardship on communities and industries on both sides of the border.

The Government of Canada therefore protests against the implementation of proposals contained in H.R. 1.<sup>15</sup>

Diversion of Lake Michigan water at Chicago has raised the question of co-riparian rights on a national and international level for fifty years. On the national level six cases, *Wisconsin v. Illinois*, have been before the Supreme Court between 1929 and 1941.<sup>16</sup> The second of those cases, 281 U.S. 179 (1930), with Minnesota, Ohio, Pennsylvania, Michigan and New York, as well as Wisconsin, against Illinois, resulted in a decree dated April 21, 1930, 281 U.S. 696, which reduced diversion of water into the Chicago Drainage Canal for dilution of sewage from 8,500 to 1,500 cubic feet per second. Proposals to Congress to increase that amount have been before that body ever since.

Following the making of arrangements for construction of the St. Lawrence Seaway in 1954, the Department of State has called the attention of Ottawa to the proposed legislation in Washington and has consistently received word that further diversion of Lake Michigan water would be prejudicial to Canadian interests. The United States is concerned with maintaining the co-riparian principle because it has use for it in a situation which is the reverse of that at Chicago. The Columbia River, like the Great Lakes, is international, flowing from Canada into the United States where it is dammed for power. Canada proposes to divert its waters in Canada into the Fraser River for the production of power. Thus the United States on behalf of the Northwest is as much interested in upholding its co-riparian rights as is Canada with respect to the Great Lakes.

Bills in Congress for diversion of water from Lake Michigan put forward the interests of the State of Illinois which run counter to the riparian interests of other States of the United States and of Canada. If or when

<sup>14</sup> Treaty relating to the Uses of Waters of the Niagara River, Feb. 27, 1950, T.I.A.S., No. 2180; 1 U. S. Treaties 694; 132 U.N. Treaty Series 223. The St. Lawrence Seaway was built in accordance with the St. Lawrence Seaway Authority Act of Canada, 1952 R.S.C., c. 242, and the U. S. Act of May 13, 1954, creating the St. Lawrence Seaway Development Corporation, 68 Stat. 92.

<sup>15</sup> 40 Department of State Bulletin 404 (1959).

<sup>16</sup> T. Richard Witmer (ed.), Documents on the Use and Control of the Waters of Interstate and International Streams; Compacts, Treaties and Adjudications 565-592 (1956). For a documented discussion of this problem, see Simsarian, in 32 A.J.I.L. 488 (1938). See also *Missouri v. Illinois* and Sanitary District of Chicago, 180 U. S. 208 (1901) and 200 U. S. 496 (1906).

an Act of Congress should modify the present diversion of water from Lake Michigan, an international understanding with Canada involving the adjustment of co-riparian rights will be indicated.

The facts brought out in hearings on H.R. 1, 86th Congress, to require a study of the effect of diverting 1,000 cubic feet of water per second from Lake Michigan into the Illinois Waterway for one year were summarized by the Committee on Public Works (House Report No. 191), and the House of Representatives passed the bill on March 13, 1959. The committee said: "Since Lake Michigan is not an international body of water, there is no legal obstacle to diversion and the committee feels that any objection which Canada might now have could be resolved by appropriate negotiations between the two countries." The committee felt that the problem was entirely dissimilar from the "very remote possibility" of Canada proceeding with a diversion from the Columbia River. The House apparently adopted the view of the committee that "the value of helping to solve one of the most pressing problems of a great metropolitan area far outweighs whatever slight temporary loss, if any, might be sustained by adjacent areas."

The sewage problem of the Metropolitan Sanitary District of Greater Chicago is the center of this recurring legislative proposal. In 1958 its representatives stated that it was able to treat only 90% of the sewage of a population of 4,500,000 people and industrial wastes equivalent to the sewage of 3,800,000 people. The diversion of 1,500 cubic feet per second was only half enough to supply the dilution ratio specified by the Sanitary District Act of Illinois and insufficient to prevent nuisance conditions. The pumpage for water supply from Lake Michigan amounts to 1,800 cubic feet per second and is not an issue in legislative proposals, though the total diversion of 3,300 cubic feet per second is brought out by riparian opponents.

The effect of a one-year diversion of an additional 1,000 cubic feet per second is reported to affect the outflow from Lakes Michigan, Huron, Erie and Ontario by a reduction of less than a quarter of an inch, which would build up over a period of two years and diminish for fifteen. The committee says the effect on navigation would be negligible, but it is claimed that it would be felt in the St. Lawrence Seaway. The loss with respect to hydroelectric power production in the United States and Canadian plants was estimated at \$36,000 per year for the 15-year period as against their gross annual production of \$50,000,000. On the other hand, the Lockport, Illinois, plant would gain a production valued at \$67,000 for the 15-year period.

#### NATIONALITY OF CLAIMS

##### *Legislative conformity to international law rule—position of domestic tribunal with respect to citizens naturalized after date of loss*

The Foreign Claims Settlement Commission under the Act of 1949 as amended (64 Stat. 12; 69 Stat. 562) has denied claims of persons who were not nationals at the time of injury but had been naturalized at the time the claim could be presented under the law. Dilution of the para-

mount claims of nationals whose ownership of claims was continuous from the date of injury through the date of presentation was one of the reasons given by the domestic tribunal, whose awards are payable from Bulgarian, Hungarian, Italian and Rumanian funds in the hands of the Government. Senate Bill 706 would direct the Commission, whose statutory life expired August 9, 1959, to readjudicate claims of persons as "nationals of the United States" who held, as of September 14, 1947, the day before the Peace Treaties with Bulgaria, Hungary, Italy and Rumania entered into force, bonds "repudiated" within 10 years prior to March 10, 1950.<sup>17</sup> Among the proponents of this legislation is the Conference of Americans of Central and Eastern European Descent, which produced a lengthy petition to the Congress "proposing a policy of full inclusion of naturalized citizens in claims settlements." The Department of State analyzed this petition in a memorandum of February 6, 1959, entitled "The Matter of Nationality with respect to International Claims." Section D of this memorandum is an examination of the action of the Congress in maintaining the rule of international law in the jurisdiction of the domestic tribunal, which Congress could modify by legislation. That section of the memorandum reads as follows:

*D. Action by the Congress.*

In view of the above-mentioned impressive array of pronouncements by Secretaries of State, of learned professors and authors of recognized competence in the field of international law and practice, and of tribunals, including the Permanent Court of International Justice, it is difficult to understand how the proponents of the theories advanced in the petition could expect to succeed in their efforts to convince the Government of the United States that there is no doctrine in international law which requires that, in order to be legally valid, an international claim be national in origin, that is, that the claimant be a national of the claimant state at the time his claim arose. Of course, two nations could as between themselves, as in the case of Belgium and Czechoslovakia referred to above,<sup>18</sup> agree to depart from the doctrine; but that fact cannot, as stated above, create a principle of international law binding on states which are not parties to such an agreement.

The campaign to obtain in the Congress for naturalized citizens, who obtained naturalization *after* their claims arose, treatment equal to that accorded claimants who *were* nationals of the United States at the time their claims arose, began some ten years ago by way of attempts to amend the measure which was approved March 10, as the International Claims Settlement Act of 1949 (64 Stat. 12). These attempts were unsuccessful. As pointed out in Senate Report No. 1794 to accompany S. 3557, 85th Congress, 2d Session, "... bills have been introduced on a number of occasions seeking to modify the present rule which limits claims to citizens at the time of loss. None of these

<sup>17</sup> A hearing entitled "The International Claims Settlement Act" was held May 29, 1959, before a subcommittee of the Senate Committee on Foreign Relations. The report of the Hearing on S. 706, to amend the International Claims Settlement Act of 1949, as amended, 86th Cong., 1st Sess. (68 pp.), contains the texts referred to in this note and other material.

<sup>18</sup> Agreement of Sept. 20, 1952.

has passed." It may be useful to discuss a few of the proposed measures, and the recorded Congressional attitude toward them.

On February 28, 1955, the Foreign Claims Settlement Commission of the United States, with the concurrence of other interested agencies of the Executive, transmitted to the Congress a draft bill to provide, *inter alia*, for the adjudication by the Commission of certain claims of nationals of the United States against Bulgaria, Hungary and Rumania, "in accordance with applicable substantive law, including international law . . . arising out of failure to

(1) restore, or pay compensation for, property, rights, and interests of nationals of the United States as required by article 23 of the treaty of peace with Bulgaria, articles 26 and 27 of the treaty of peace with Hungary, and articles 24 and 25 of the treaty of peace with Rumania. Awards entered pursuant to this subsection shall be in amounts not to exceed two-thirds of the loss or damage actually sustained; . . . .

However, in adopting a revised version of the measure the Committee on Foreign Affairs added the following to the language quoted above:

No claim under this paragraph shall be denied on the sole ground that the natural person who originally suffered the loss was not a national of the United States if on the date of the armistice with the country with respect to which his claim is asserted and continuously thereafter until September 15, 1947, such person was a permanent resident of the United States, and if he had at any time prior to the date of such armistice formally declared his intention of becoming a citizen of the United States and had become a citizen of the United States by September 15, 1947; . . . .

(H.R. 6382, 84th Congress, 1st Session)

Such action was taken by the Committee despite the nationality requirement of the respective treaties, and despite the following statement in the Committee report regarding the significance of the provision retained in the bill regarding adjudication of the claims under principles of "international law."

The inclusion of 'international law' would permit the application of several principles of law which might not otherwise be available to that Commission. One such principle would be that, unless otherwise provided by treaty, a claim may not be asserted by a national of one country (or by his government on his behalf) against another country unless the claimant was a national of the country espousing his claim at the time the loss occurred. The underlying theory is that it is the complaining country which is aggrieved through an injury to one of its nationals. Thus, the United States would not normally espouse a claim against a foreign government on behalf of one of its nationals unless he had been a United States national at the time the loss occurred.

(House Report No. 624, 84th Congress, 1st Sess., p. 13)

In explanation of its decision to delete the language quoted above, which was inserted in the bill by the Committee on Foreign Affairs and passed by the House of Representatives, the Committee on Foreign Relations stated:

The general principle controlling the eligibility of a natural person to file a claim against another government is the familiar rule



of international law that such a claim must be continuously owned by a national of the claimant State from the time the claim arose until the date of its presentation. This principle is followed in the bill as it passed the House with respect to the Russian and Italian claims, as well as for claims based upon nationalization and compulsory liquidation of property in the territory of Bulgaria, Hungary, and Rumania. It is not followed with respect to war damage claims or claims of American stockholders in foreign owned corporations. (See sec. 5 above.) Thus, the bill as approved by the House does not contain a uniform standard of eligibility, and consequently discriminates in principle between various categories of claimants.

In the draft bill originally submitted by the administration to the House Committee on Foreign Affairs, the same principle was applied to claims based upon war damage in those three countries. As reported by that committee, however, and passed by the House, the principle was abandoned for such claims. Instead, section 303 declares that the claimant need not have been an American citizen when the loss was suffered, provided that he was (a) a person who had declared his intention to become an American citizen at the time of the armistice, (b) had become a citizen by September 15, 1947 (the date of the peace treaty), and (c) resided in the United States permanently from the date of the armistice to the date of the peace treaty.

The committee has carefully considered the arguments advanced in support of the proposed extension of eligibility which, if adopted, would mark the first time in the claims history of the United States that a declaration of intention was equated with citizenship. After weighing all pertinent factors, the committee has concluded that such a precedent is not desirable. While sympathetic to the plight of those unfortunate individuals who were not American citizens when they sustained war losses, the committee has had to keep uppermost in view the interest of those individuals who did possess American nationality at the time of loss. It is these persons who have a paramount claim to any funds which may be available. Even without the addition of the class here questioned, the funds will be insufficient to meet the claims of otherwise qualified claimants, except possibly in the case of the Bulgarian and Italian assets. . . .

To include the non-national-in-origin group would only dilute the funds still further, and increase the injustice to American owners. For these reasons, the committee decided to delete the last sentence of section 303, paragraph (1), which would have the effect of limiting the eligible class to claimants who were American citizens at the date the loss was sustained.

(Senate Report No. 1050, 84th Congress, 1st Session, pp. 8-10)

The bill, as thus amended, was passed by the Senate and referred to a committee of conference of the Senate and the House of Representatives. In explanation of the action of the conferees in agreeing to recommend the Senate amendment discussed above, the managers on the part of the House stated:

. . . This amendment restricts the class of individuals eligible to receive awards for war damage claims against Bulgaria, Hungary, and Rumania. Under general principles of international law a

claim against a foreign government must be continuously owned by a national of the claimant state from the time the claim arose until it is presented. The House bill provided for an exception from this rule in cases where the person who suffered the loss was not a national of the United States, but (1) had declared his intention to become an American citizen before the armistice; (2) became a citizen by September 15, 1947; and (3) resided in the United States permanently from the date of the armistice to the date of the peace treaty. The Senate amendment struck out this provision of the House bill, thereby applying the general rule limiting claimants to nationals of the United States. . . .

(House Report No. 1475, 84th Congress, 1st Session)

The bill, amended to delete the amendment contained in the bill as passed by the House of Representatives, was enacted into law. (Public Law 285, 84th Congress, approved August 9, 1955; 69 Stat. 562-575)

The same issue was before the 85th Congress in connection with its consideration of the measure which was enacted as Public Law 85-604, section 404 of which provided for the adjudication of claims of nationals of the United States against Czechoslovakia based on nationalization of property after December 31, 1944, "owned at the time" by nationals of the United States. Section 405 specifically provided:

A claim under section 404 of this title shall not be allowed unless the property upon which the claim is based was owned by a national of the United States on the date of nationalization or other taking thereof and unless the claim has been held by a national of the United States continuously thereafter until the date of filing with the Commission. (72 Stat. 527, 528)

In explaining the reasons for this section, the Report of the Foreign Relations Committee contained the following paragraphs:

Heretofore, in determining claims under the International Claims Settlement Act, the Claims Commission has required that the property on which a claim is based must have been owned by a national of the United States at the time of loss and continuously thereafter until the claim is filed. This criterion has been established by administrative interpretation of applicable law. Section 405 makes the administrative interpretation explicit as regards the Czechoslovakian Claims Fund.

The committee is aware that this provision excludes from the beneficial effects of the law many worthy Americans who became citizens after their property was taken. The committee refers, however, to its report on H.R. 6382 (Rept. No. 1050, 84th Cong., 1st Sess.) in which a similar question was at issue. At that time, the committee stated:

"While sympathetic to the plight of those unfortunate individuals who were not American citizens when they sustained war losses, the committee has had to keep uppermost in view the interest of those individuals who did possess American nationality at the time of loss. It is these persons who have a paramount claim to any funds which may be available."

As it is now, preliminary estimates indicate that even with section 405 limiting claims to those based on American ownership of the

property at the time of loss, funds are likely to be sufficient only to compensate 30 to 50 percent of losses. To add any other group of claimants, contrary to the general practice in the past, would simply dilute what is already inadequate.

(Senate Report No. 1794, 85th Congress, 2d Session, pp. 5-6)

Section 304 of the International Claims Settlement Act of 1949, as amended (69 Stat. 562, 572) relating to claims against Italy, provided as follows:

The Commission shall receive and determine, in accordance with the Memorandum of Understanding and applicable substantive law, including international law, the validity and amount of claims of nationals of the United States against the government of Italy arising out of the war in which Italy was engaged from June 10, 1940, to September 15, 1947, and with respect to which provision was not made in the treaty of peace with Italy.

Section 2 of Public Law 85-604<sup>19</sup> amended the section just quoted by adding at the end thereof the following:

Upon payment of the principal amounts (without interest) of all awards from the Italian Claims Fund created pursuant to section 302 of this Act, the Commission shall determine the validity and amount of any claim under this section by any natural person who was a citizen of the United States on the date of enactment of this title and shall, in the event an award is issued pursuant to such claim, certify the same to the Secretary of the Treasury for payment out of remaining balances in the Italian Claims Fund in accordance with the provisions of section 310 of this Act, notwithstanding that the period of time prescribed in section 316 of this Act for the settlement of all claims under this section may have expired.

In the same Senate Report (No. 1794), the Committee explained the reasons for the amendment (section 2 quoted above) for *conditionally* relaxing the nationality requirements with respect to claims against Italy as follows (*ibid.*, pp. 8-9):

The committee has added a new section to S. 3557 which has the effect of modifying section 304 of the International Claims Settlement Act, as regards claimants against the Italian Claims Fund. As the committee has already noted, the existing practice in claims legislation, and one which the committee endorses, limits claims to those based upon American ownership of a property at the time of loss and continuously thereafter until the time of the filing of the claim. This practice is essential if those who clearly have first claim, as far as the United States is concerned, to the limited funds available are to be compensated for their losses. Further, it should be noted in this connection that the claims of Americans who became citizens after their loss occurred usually are still valid against the responsible foreign government.

However, a special situation has arisen as regards the Italian Claims Funds. In this instance, under the Lombardo Agreement the Italian Government made a lump-sum settlement with the United States Government for the outstanding claims of American

<sup>19</sup> Aug. 8, 1958, 85th Cong. (S. 3557). This section is discussed in a note by Branko M. Peselj, 53 A.J.I.L. 144-151 (1959).

citizens. It now appears that the Italian Fund will be more than adequate to reimburse all claimants 100 cents on the dollar for losses of property which was American-owned at the time of loss and continuously thereafter.

At the same time, however, there are some Americans who were not citizens at the time of loss of their property; and, hence, in accordance with the general practice are not eligible to file valid claims against the Italian Claims Fund. But these citizens are also estopped from pressing their claims against Italy because of the terms of the Lombardo Agreement. They are, in short, left at the present time without legal remedy.

In these circumstances, the committee has made provisions for their claims to be considered as against the Italian Claims Fund, only, however, if after all valid claimants against Italy who were citizens at the time of loss have been fully reimbursed, some money remains in this fund. There is no cost involved in this procedure to the United States. Nor does the procedure do violence to the priority of right which as a matter of general practice should be maintained for those who were citizens at the time of loss.

The most recent action taken in the Congress regarding this problem was on August 12, 1958, when the Senate Judiciary Committee favorably reported S. 411, as amended, providing *inter alia* for the adjudication of certain war damage claims arising in certain European areas during World War II. Section 206 of the measure contained, with a minor exception not here relevant (married women who had recovered American nationality which had been lost as a result of marriage to an alien) the usual requirement of American nationality at the time the loss occurred. In discussing the nationality requirements of the proposed measure, the following was stated at page 11 of the Committee Report (Senate Report No. 2358, 85th Congress, 2d Session):

These provisions of eligibility follow the traditional and generally accepted principle of international law relating to the nationality of claimants asserting claims against governments other than their own. It is believed a strict compliance with the eligibility requirements established by international law is essential since the claims are essentially claims against a foreign government.

At pages 12 and 13 of the petition, reference is made to Public Law 857, 81st Congress, approved September 28, 1950 (64 Stat. 1079) which it is stated "... specifically enjoined the Executive Branch to abandon the 'continuity' principle and seek equal treatment for all persons citizens of the United States on the effective date of the international agreement." That law relates not to nationalization claims such as are under discussion here but, as the law itself recites, to "... agreements to further the amicable and expeditious settlement of *intercustodial* conflicts regarding *enemy property*."

As pointed out in Report No. 1794 of the Foreign Relations Committee (*supra*), measures have been advanced in the Congress "... on a number of occasions seeking to modify the present rule which limits claims to citizens at the time of loss." This campaign, which began with proposed amendments to the measure which was enacted on March 10, 1950, as the International Claims Settlement Act of 1949 (64 Stat. 12) has been uniformly unsuccessful, except with re-

spect to claims against Italy in which it was anticipated that the Italian Claims Fund might be more than adequate to reimburse in full claimants who were American nationals at the time of loss. As explained in the Committee report, in that "special situation" the Congress authorized the consideration of the claims which were not national in origin "*only, however, if after all valid claimants against Italy who were citizens at the time of loss have been fully reimbursed, some money remains in this fund.*" There is no reason whatever to expect that any other existing claims fund, or any other claims fund established pursuant to an *en bloc* settlement, will be adequate to satisfy in full the claims of American nationals who had that status at the time their property was taken. In that situation, reference may be made to the following statement of the Senate Committee on Foreign Relations (*supra*):

To add any other group of claimants, contrary to the general practice in the past, would simply dilute what is already inadequate.

In other words, to permit individuals who were not nationals at the time their claims arose to share in a fund which is inadequate to pay the claims of individuals who were nationals when their claims arose is, in effect, to take away funds from the latter group of claimants who have valid international claims, and to divert them to pay the former group of claimants who do not have valid international claims.

#### CONCLUSION

There is no doubt that generally accepted principles of international law and practice require that a claim be continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of the state asserting the claim.

#### EXTRATERRITORIAL JURISDICTION

*N.A.T.O. Status of Forces Agreement—Army personnel accused of offenses not to be removed from territory of receiving states—consent of foreign authorities to trial in absentia*

"On 24 April 1959, United States Army authorities in NATO Status of Forces Agreement<sup>20</sup> countries, the laws of which permit trials *in absentia*, were directed to retain within the territory of such countries military personnel of their commands who are alleged to have committed offenses subject to the primary or exclusive jurisdiction of those countries until such time as the local authorities have taken final action thereon. The removal of such personnel from the territory of a receiving State prior to the completion of criminal proceedings against them is authorized only when the foreign authorities concerned (1) consent to such removal and also agree to waive their right to try such personnel *in absentia* or (2) consent to such removal but refuse to waive their right to try *in absentia* and the accused after having been fully advised by competent Army military authorities of the possibility that he might be tried *in absentia* and convicted if he departs the foreign territory, consents to trial *in absentia*.

<sup>20</sup> Agreement of June 19, 1951, 4 U. S. Treaties 1792; T.I.A.S., No. 2846; 199 U.N. Treaty Series 67.

"This policy seeks particularly to avoid the involuntary transfer or departure of a serviceman, a civilian employee or dependent who desires to remain within the jurisdiction where he is alleged to have committed an offense in order that he may personally be present for any trial before the foreign court concerned." DA Ltr AGPO-DI 250.1 (21 Apr 59), 24 April 1959, based on JAGW 1959/3778, 22 April 1959.<sup>20a</sup>

#### CONDUCT OF FOREIGN RELATIONS

##### *Communication of Congressional opinion to foreign government—practice of Houses of Congress to influence conduct of foreign affairs—propaganda policy*

For many years it has been the practice of members of both Houses of Congress to introduce resolutions expressive of particular opinions relative to foreign affairs. The Convention on the Provisional Administration of European Colonies and Possessions in the Americas and the Act of Habana, July 30, 1940,<sup>21</sup> were confirmed by a joint resolution, approved April 14, 1941,<sup>22</sup> which, when first introduced in the House of Representatives on June 3, 1940, was intended to be an authorization of the treaties. The Congress tried to abrogate the Treaty of Commerce and Navigation with Russia of December 18, 1832, by a joint resolution approved December 21, 1911,<sup>23</sup> but President Taft anticipated this action by a note of December 17, 1911. Concurrent resolutions, which have their full force only as Congressional acts, are often introduced on subjects of foreign relations, but invariably die. Congressional resolutions on foreign relations are sometimes adopted for what they are worth. A well-known one was that of August 2, 1912,<sup>24</sup> relating to Magdalena Bay, introduced by Senator Henry Cabot Lodge which the Senator afterward claimed was the "doctrine of the Senate," an expansion of the Monroe doctrine. Others have had effects on the internal conduct of foreign relations. Senate Resolution 239, 80th Congress, June 11, 1948, on United States policy regarding the United Nations,<sup>25</sup> was Senator Arthur Vandenberg's contribution to new developments in policy in the United Nations. Diverse action of Congress also gives support to the President's policy. Secretary of State Hull went to Moscow in October, 1943, with the knowledge that Congressman J. William Fulbright's House Concurrent Resolution 25 had passed on September 21, and came away from Moscow with the same assurance derived from Senator Tom Connally's Senate Resolution 192, passed November 5.<sup>26</sup>

The practice of the Legislative Branch of the Government telling the

<sup>20a</sup> Quoted from Judge Advocate Legal Service, July 1, 1959, p. 13 (Department of the Army Pamphlet No. 27-101-11).

<sup>21</sup> 56 Stat. 1273, and 54 Stat. 2491; 35 A.J.I.L. Supp. 28, 18 (1941).

<sup>22</sup> Public Law 32, 77th Cong., 55 Stat. 138. For earlier forms, see H.J. Res. 556 and S.J. Res. 271, 76th Cong.

<sup>23</sup> 37 Stat. 627; 6 A.J.I.L. 190 (1912).

<sup>24</sup> 48 Cong. Rec. 10046; 5 Hackworth, Digest 437-438; 6 A.J.I.L. 938 (1912).

<sup>25</sup> 94 Cong. Rec. 7791, 7846; 43 A.J.I.L. 634 (1949).

<sup>26</sup> 89 Cong. Rec. 7729, 9222; 38 A.J.I.L. Supp. 2 (1944).

Executive what it thinks about certain subjects in foreign relations is public property. Foreign missions accredited to the U. S. Government are well aware of these expressions of opinion and undoubtedly report them to their governments. They have thus played a part in diplomatic business. An instance has now occurred in which a Senate resolution expressing on behalf of public opinion views on a question under negotiation has been formally communicated to one of the parties. The Senate Committee on Foreign Relations consulted the Department of State, the Atomic Energy Commission and the Joint Congressional Committee on Atomic Energy with respect to the resolution, for which it asked prompt attention, "in view of the fact that negotiations for the discontinuance of nuclear weapons tests are presently under way in Geneva." It also felt that by submission of "the contents of the resolution to the Soviet Government such a government-to-government communication was appropriate and would make the views of the American people known to the Soviet Union."<sup>27</sup> All of this was realized when the Minister of Foreign Affairs of the U.S.S.R. received the following note on May 5, 1959:

The Ambassador of the United States of America presents his compliments to the Minister of Foreign Affairs of the USSR and has the honor, under instructions from his Government, to draw the attention of the Soviet Government to Resolution 96 of the Senate of the United States dated April 30, 1959.

#### RESOLUTION

WHEREAS the goal of the people of the United States is a just and lasting peace; and

WHEREAS the peace of the world is threatened by an arms race of major proportions among the leading powers of which key aspects are the continuing development of devastating nuclear weapons and the maintenance of large standing armies by some states; and

WHEREAS for thirteen years negotiations to control and limit armaments and armed forces have not led to agreement; and

WHEREAS representatives of the United States, the United Kingdom, and the Soviet Union are now meeting in Geneva for the purpose of drafting a treaty on the discontinuance of nuclear weapons tests; and

WHEREAS an effective agreement to discontinue nuclear weapons tests would result in a reduction of the hazard from radioactive fallout which contaminates the air that the people of the world must breathe, and which is a matter of grave concern to all mankind; and

WHEREAS an effective worldwide control system is a necessary component of any international agreement on the cessation of nuclear weapons tests in which all states are to have confidence and

WHEREAS an agreement regarding the discontinuance of nuclear weapons tests under an effective control system would provide an opportunity to ease world tensions and realize a small but significant first step toward the goal of the control and reduction of nuclear and conventional armaments and armed forces:

THEREFORE, be it

*Resolved*, That the Members of the Senate support the efforts of the United States to continue to negotiate for an international agreement for the suspension of nuclear weapons tests; and be it further

<sup>27</sup> Sen. Rep. 206, 86th Cong., 1st Sess.

*Resolved*, That the Senate emphatically endorses the principle that an adequate inspection and control system must be part of any such international agreement involving a suspension of nuclear weapons tests; and be it further

*Resolved*, That the Senate requests the President of the United States to submit to the Soviet Government the contents of this resolution so that the desire of the American people speaking through their representatives in the Senate will be known and be made clear for the successful outcome of the negotiations in Geneva for an effective and reliable agreement for the discontinuance of nuclear weapons tests.<sup>28</sup>

#### TREATIES

##### *Accession—International Sugar Agreement of 1958—status of United States as non-signatory prior to accession*

The international regulation of sugar questions began in Europe as early as 1863, and a convention of March 5, 1902,<sup>29</sup> set up a permanent commission which was discontinued in 1919. The trade in sugar was ready for wider supervision at the London International Monetary and Economic Conference of 1933. The International Agreement regarding the Regulation of Production and Marketing of Sugar, London, May 6, 1937,<sup>30</sup> was one piece of salvage from that enterprise of the League of Nations. That agreement entered into force for the United States on September 1, 1937, and it was annually prolonged from 1945 through 1952.<sup>31</sup> It was superseded by the elaborate International Sugar Agreement of October 1, 1953, which entered into force for the United States May 5, 1954,<sup>32</sup> and it has been revised into the International Sugar Agreement, London, December 1, 1958, which the United States participated in making but did not sign because of the intimate relation between the international sugar situation and domestic legislation on the subject.

Experience in the intervals between the conclusion of the three versions of the agreement has made the 1937, 1953 and 1958 agreements quite different in content. Administrative operation of the system rests with the International Sugar Council, in which exporting and importing countries have graduated votes. In 1937 Council votes totaled 100, exporters being assigned 55 and importers 45, with 17 ascribed to the United States; in 1958 exporters and importers were each assigned 1000 votes, 245 being given to the United States as an importing country. The system of the agreement is continuous, since it deals with an annual crop, and the desirability of continuous United States participation is evident, whether or not its internal machinery precludes its having legal status at a given time. The scheme of the agreement to enable the system to work continuously, without entire loss of the co-operation of a party which has not yet com-

<sup>28</sup> 40 Department of State Bulletin 742 (1959).

<sup>29</sup> 95 Brit. and For. State Papers 6.

<sup>30</sup> 4 Trenwith 5599.

<sup>31</sup> 59 Stat. 922.

<sup>32</sup> 6 U. S. Treaties 203; T.I.A.S., No. 3177.



pleted the internal requirements of accession, applies particularly to the United States. The requirements read (Article 41):

(6)—(i) This Agreement shall enter into force on 1 January 1959 between those Governments which have by that date deposited instruments of ratification, acceptance or accession, provided that such Governments hold 60 per cent. of the votes of importing countries and 70 per cent. of the votes of exporting countries in accordance with the distribution established in Articles 33 and 34. Instruments of ratification, acceptance or accession deposited thereafter shall take effect on the date of their deposit.

(ii) For the purposes of entry into force of this Agreement in accordance with sub-paragraph (i) above, a notification containing an undertaking to seek ratification, acceptance or accession in accordance with constitutional procedures as rapidly as possible and if possible before 1 June 1959 received by the Government of the United Kingdom of Great Britain and Northern Ireland on or before 1 January 1959 shall be regarded as equal in effect to an instrument of ratification, acceptance or accession.

(iii) Any notification given in accordance with sub-paragraph (ii) of this paragraph may indicate that the Government concerned will, from 1 January 1959, apply this Agreement provisionally. In the absence of such an indication, the notifying Government shall be regarded as a non-voting observer, provided, however, that such a Government may cease to be an observer if it indicates, before 1 June 1959, that it will apply this Agreement provisionally.

(iv) If any Government giving a notification in accordance with sub-paragraph (ii) of this paragraph fails to deposit an instrument of ratification, acceptance or accession by 1 June 1959, it shall thereupon cease to be entitled to the status of provisional participant or observer, as the case may be. If, however, the Council is satisfied that the Government concerned has not deposited its instrument owing to difficulties in completing its constitutional processes, the Council may extend the period beyond 1 June 1959 to such other date as it may determine.

(v) The obligations under this Agreement of Governments which have deposited instruments of ratification, acceptance or accession by 1 June 1959 or such later date as is determined by the Council in accordance with sub-paragraph (iv) of this paragraph shall apply as from 1 January 1959 for the first quota year, except to the extent that any Government is required by existing legislation to take action inconsistent with this Agreement by reason of it not being in force either fully or provisionally for that Government at that time.

(vi) If at the end of the period of five [*sic*] months mentioned in sub-paragraph (ii), or at the end of any extension of that period, the percentage of votes of importing countries or of exporting countries which have ratified, accepted or acceded to this Agreement is less than the percentage provided for in sub-paragraph (i), the Governments which have ratified, accepted or acceded to this Agreement may agree to put it into force among themselves.<sup>33</sup>

The United States, in order to facilitate the entry into force of the agreement, on January 1, 1959, deposited a notice of intention to seek accession to it. Its status under Article 41 (6) (iii) under these circumstances might be that of either a party applying the agreement provisionally

<sup>33</sup> Sen. Exec. D, 86th Cong., 1st Sess.

or a participant as a non-voting observer. In order not to anticipate the advice and consent of the Senate, the notification claimed the status of a non-voting observer which, by the terms of that subparagraph, would expire June 1. The International Sugar Council, acting under subparagraph (iv), extended that period to October 31.

The President transmitted the agreement on May 20 to the Senate requesting its advice and consent to accession, an unusual procedure.<sup>54</sup> The Committee on Foreign Relations (Executive Report No. 6, 86th Congress, 1st Session) recommended advice and consent to *accession*, which Chairman J. William Fulbright reiterated when he brought up the agreement in Executive Session on July 21, 1959. Nevertheless, the resolution then adopted by a vote of 85 to 2 gave "advice and consent to ratification" of the instrument. Senate Standing Rule XXXVII, which dates from 1884, provides for action on treaties only by a "resolution of ratification," which is generally applicable to bilateral and multilateral instruments. In recent years a flexible procedure for becoming a party to multilateral instruments has developed with provisions for "ratification, acceptance or accession." In the case of the Sugar Agreement, the President asked for accession and the Senate voted for ratification. The discrepancy was neatly bridged in the instrument signed by the President on August 18, 1959, and transmitted to the London depository, which read:

Now, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, having seen and considered the said International Sugar Agreement of 1958, do hereby, in pursuance of the said advice and consent of the Senate of the United States of America, ratify and confirm the same, and every article and clause thereof, and declare the accession of the United States of America to the said International Sugar Agreement of 1958.

*Bretton Woods Agreements—increase of Bank and Fund capital—subscriptions made effective by Act of Congress, not by advice and consent of the Senate*

The International Bank for Reconstruction and Development (I.B.R.D.) and the International Monetary Fund (I.M.F.), as specialized agencies of the United Nations, possess the autonomy necessary for financial institutions. February 2, 1959, the Boards of Governors proposed that the capital of the Fund should be raised 50% and the capital of the Bank 110%, with upward adjustments for Canada, the Federal Republic of Germany and Japan. This proposal called for increasing the quota of the United States by \$1,375,000,000 for the Fund and \$3,175,000,000 for the Bank. The governors, representing 68 member states, decided on the increase on September 1, 1959, for the Bank of September 15, 1959, for the Fund, 75% of the quotas being required.

The Bretton Woods Agreements of July 22, 1944,<sup>54</sup> which established the Bank and Fund were not ratified, but membership was effected upon submission of an instrument showing that a state had the authority of law

<sup>54</sup> 60 Stat. 1401, 1440; T.I.A.S., Nos. 1501, 1502; 2 U.N. Treaty Series 39, 184.

to comply with the obligations of the agreements, the initial requirement being subscription of its quota. The Bretton Woods Agreements Act, approved July 31, 1945,<sup>85</sup> authorized the President to accept membership in both organizations and the Secretary of the Treasury to make the subscriptions "as public-debt transactions of the United States" (Section 7 (b)). Section 4 established the National Advisory Council on International Monetary and Financial Problems, which recommends to the President general policy directives for the guidance of the United States representatives in the Bank and Fund.

The President asked Congress on February 12, 1959, for consent to the increases, and the House Committee on Banking and Currency and the Senate Committee on Foreign Relations reported favorably on a bill which amended the Bretton Woods Agreements Act. In the Act approved June 17, 1959, the total authorized subscription to the Bank and the Fund was raised in Section 7(b) from \$4,125,000,000 to \$8,675,000,000 and amendments to the Bretton Woods Agreements, so far as concerns the United States, were effected by a new section to that act, as follows:

SEC. 16. (a) The United States Governor of the Fund is authorized to request and consent to an increase of \$1,375,000,000 in the quota of the United States under article III, section 2, of the articles of agreement of the Fund, as proposed in the resolution of the Board of Governors of the Fund dated February 2, 1959.

(b) The United States Governor of the Bank is authorized (1) to vote for increases in the capital stock of the Bank under article II, section 2, of the articles of agreement of the Bank, as recommended in the resolution of the Board of Governors of the Bank dated February 2, 1959, and (2) if such increases become effective, to subscribe on behalf of the United States to thirty-one thousand seven hundred and fifty additional shares of stock under article II, section 3, of the articles of agreement of the Bank.<sup>86</sup>

This and similar approvals by 75% of the 67 other members of the Bank and Fund will effect a full amendment of Schedule A to the articles referred to above. If these agreements were ordinary treaties, these changes would be duly recorded in a protocol of amendment.

*Amendment—German debt prepayment—modification of payment schedule by exchange of notes—prepayment provision brought into effect by extraneous conditions*

The agreement with the Federal Republic of Germany of February 27, 1953,<sup>87</sup> regarding the settlement of the claim of the United States for postwar economic assistance, provided for payment of \$1,000,000,000 with interest over a period of 30 years in settlement of Marshall Plan and other assistance programs, which totaled over \$3,000,000,000. Article I(4) of the agreement contains a provision that Germany will make a proportionate prepayment to the United States in the event that the Federal Republic

<sup>85</sup> 59 Stat. 512; as amended, H. Rep. 225, 86th Cong., p. 9.

<sup>86</sup> 73 Stat. 80; Public Law 86-48.

<sup>87</sup> T.I.A.S., No. 2795; 4 U. S. Treaties 893, 896.

makes a prepayment on its corresponding debts to either the United Kingdom or France. The European Payments Union, established by the agreement of September 19, 1950,<sup>38</sup> ended December 27, 1958, and its participants continued in the European Monetary Fund set up under the agreement of August 5, 1955.<sup>39</sup> In the European Payments Union the Federal Republic ended with a balance of 1,026,800,000 units, or dollars, France with a deficit of 484,800,000, and the United Kingdom with a deficit of 378,900,000. Germany elected to use some of its funds to prepay its indebtedness and thus brought Article I(4) of the agreement with the United States into operation.

An exchange of notes between Henry J. Tasca, Chargé d'Affaires at Bonn, and Foreign Minister von Brentano on March 20, 1959, effected an agreement for such a prepayment and consequent modification of the agreement of 1953, as follows:

I have the honor to refer to your Excellency's note of March 20, 1959, which, in agreed translation, reads as follows:

"I have the honor to declare that, in accordance with the agreement of February 27, 1953 between the Federal Republic of Germany and the United States of America regarding the settlement of the claim of the United States of America for post-war economic assistance (other than surplus property) to Germany (hereinafter referred to as the agreement), the Federal Government is ready to conclude the following agreement with the Government of the United States of America.

"1) The Federal Government shall make a prepayment of \$150,000,-000.00 by March 31, 1959 on the principal sum still outstanding under the agreement.

"2) As regards the prepayment to be made by the German Federal Government under paragraph 1 above, the Government of the United States of America agrees that instead of the semi-annual installments of \$23,790,000.00 as stated in paragraph 2, Article 1 of the agreement, the Federal Government shall in 1961, 1962, 1963, 1964, and 1965 only pay semi-annual installments to the amount required under the agreement as interest on the principal sum still outstanding in those years, and in 1966 shall make additional payments in liquidation of the principal sum only inasmuch as the principal sums owed and due under the agreement have not already been settled by the prepayment under paragraph 1 above. 3) The new amortization schedule to liquidate the debt arising out of the post-war economic assistance of the United States of America (other than surplus property), a copy of which is attached, follows from the above.

"If the government of the United States of America agrees with the above provisions, I have the honor to suggest that this note and your Excellency's reply to it should be regarded as an agreement between the two governments, to enter into force on the day of the receipt of your reply."

I have the honor to inform your Excellency that the Government of the United States of America accepts the foregoing provisions and accordingly agrees that your Excellency's note and this reply shall constitute an agreement between the two Governments.<sup>40</sup>

<sup>38</sup> 2 European Yearbook 362.

<sup>39</sup> 3 *ibid.* 213.

<sup>40</sup> 40 Department of State Bulletin 516 (1959); T.I.A.S., No. 4200.

## JUDICIAL DECISIONS

By BRUNSON MACCHESNEY

*Of the Board of Editors*

*Compulsory jurisdiction—application of Article 36, paragraph 5, of Court's Statute to 1921 Declaration of Bulgaria, non-signatory of the Charter*

CASE CONCERNING THE AERIAL INCIDENT OF JULY 27TH, 1955 (ISRAEL v. BULGARIA), PRELIMINARY OBJECTIONS.\* I.C.J. Reports, 1959, p. 127.

International Court of Justice,<sup>1</sup> Judgment of May 26, 1959.

This case turned on the effect of Article 36, paragraph 5, of the Court's Statute, and the Bulgarian Declaration of Acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, ratified August 12, 1921, which reads:

On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally.

Article 36, paragraph 5, of the Statute of the International Court of Justice provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

Bulgaria became a Member of the United Nations in December, 1955. The Court states the facts of the controversy as follows:

It was stated to the Court that on the morning of July 27th, 1955, the civil Constellation aircraft No. 4X-AKC, wearing the Israel colours and belonging to the Israel Company El Al Israel Airlines Ltd., making a scheduled commercial flight between Vienna, Austria, and Lod (Lydda) in Israel, having, without previous authorization, penetrated over Bulgarian territory, was shot down by aircraft of the Bulgarian anti-aircraft defence forces. After catching fire, the Israel aircraft crashed in flames near the town of Petritch, Bulgaria, and all

\* Digested by William W. Bishop, Jr., of the Board of Editors.

<sup>1</sup> Composed for this case of President Klaestad, Vice President Zafrulla Khan, Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos and Spender, and Judges *ad hoc* Goitein and Zourek.

the crew, consisting of seven members, and also the fifty-one passengers of various nationalities were killed.

These facts gave rise to negotiations and diplomatic correspondence between the two Governments which attempted in that way to arrive at a friendly solution. As these diplomatic approaches did not lead to a result which was satisfactory to the Parties to the case, the Government of Israel submitted the dispute to the Court by means of an Application instituting proceedings on October 16th, 1957. Against this Application the Government of the People's Republic of Bulgaria advanced five Preliminary Objections.

Invoking the Bulgarian Declaration of 1921 and Article 36, paragraph 5, the application of the Government of Israel asked the Court

to adjudge and declare that the People's Republic of Bulgaria is responsible under international law for the destruction of the Israel aircraft 4X-AKC on 27 July 1955 and for the loss of life and property and all other damage that resulted therefrom;  
to determine the amount of compensation due from the People's Republic of Bulgaria to Israel;  
in exercise of the power conferred upon it by Article 64 of the Statute of the Court, to decide that all costs and expenses incurred by the Government of Israel be borne by the Government of the People's Republic of Bulgaria.

The Bulgarian Preliminary Objections were to the effect that (1) the Declaration of August 12, 1921, "ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on April 18th, 1946," Article 36, paragraph 5, therefore being inapplicable to Bulgaria and the Court lacking jurisdiction. Additional Preliminary Objections were (2) that in any event Bulgaria had not accepted jurisdiction in respect of acts prior to December 14, 1955, when Bulgaria became a Member of the United Nations;<sup>2</sup> (3) that Israel's claim was inadmissible, since the damage was suffered for the most part by non-Israel insurance companies; (4) that the dispute was subject to the exclusive jurisdiction of Bulgaria and fell essentially within Bulgarian domestic jurisdiction; and (5) that local remedies had not been exhausted in Bulgaria.

Israel asked the Court to dismiss the Preliminary Objections and proceed on the merits.

By a vote of 12 to 4 the Court found "that it is without jurisdiction to adjudicate upon the dispute brought before it on October 16th, 1957, by the Application of the Government of Israel." In its opinion the Court stated:

The Court has to determine whether Article 36, paragraph 5, of the Statute is applicable to the Bulgarian Declaration of 1921.

<sup>2</sup> Bulgaria's Declaration of 1921 was "in relation to any other Member or State which accepts the same obligation." Israel's acceptance of 1950 (ratified in 1951) was limited to "all legal disputes concerning situations or facts which may arise after the date of deposit of the instrument of ratification of this declaration." Israel's Declaration also excepted "any dispute relating to matters which are essentially within the domestic jurisdiction of the State of Israel."

The object of Article 36, paragraph 5, is to introduce a modification in the declarations to which it refers by substituting the International Court of Justice for the Permanent Court of International Justice, the latter alone being mentioned in those declarations, and by thus transferring the legal effect of those declarations from one Court to the other. That Article 36, paragraph 5, should do this in respect of declarations made by States which were represented at the San Francisco Conference and were signatories of the Charter and of the Statute, can easily be understood. This corresponds indeed to the very object of this provision. But is this provision meant also to cover declarations made by other States, including Bulgaria? The text does not say so explicitly.

At the time of the adoption of the Statute a fundamental difference existed between the position of the signatory States and of the other States which might subsequently be admitted to the United Nations. This difference is not expressed in the text of Article 36, paragraph 5, but it derives from the situation which that text was meant to regulate, namely, the transfer to the International Court of Justice of declarations relating to the Permanent Court of International Justice which was on the point of disappearing when the Statute was drawn up. The States represented at San Francisco knew what their own position was under the declarations they had made. They were acting with a full knowledge of the facts when they agreed to transfer the effect of those declarations to the compulsory jurisdiction of the new Court and they had the power to do so. These States were not in the same position with regard to the declarations signed by other States. In the case of some of these there might arise the question of the effect of the war, a question which does not appear then to have been considered. In a more general way, the signatory States could not regard as more or less imminent the admission to the United Nations of any of the other States, their admission being possibly preceded by the lapsing of the declarations of some of them; the question which the signatory States were easily able to resolve as between themselves at that time would arise in a quite different form in the future as regards the other States. The existence of these differences militates against a construction extending the effect of Article 36, paragraph 5, to declarations made by States subsequently admitted to the United Nations, on the mere ground that those declarations were in force at the time of the signing of the Charter or of its entry into force.

Article 36, paragraph 5, considered in its application to States signatories of the Statute, effects a simple operation: it transforms their acceptance of the compulsory jurisdiction of the Permanent Court into an acceptance of the compulsory jurisdiction of the International Court of Justice. This was done in contemplation of the dissolution of the old Court and the institution of a new Court, two events which, while not absolutely coincident, were sufficiently close so far as States signatories of the Charter and of the Statute were concerned. The transformation enacted was in their case contemporaneous with this double event. The position was quite different in respect of declarations by non-signatory States, apart from the possibility, which did not in fact materialize, of a non-signatory State's becoming a party to the Statute before the dissolution of the Permanent Court. Subject to this, the operation of transferring from one Court to the other acceptances of the compulsory jurisdiction by non-signatory States could not constitute a simple operation, capable of being dealt with immediately and completely by Article 36, paragraph 5. Such a transfer

must necessarily involve two distinct operations which might be separated by a considerable interval of time. On the one hand, old declarations would have had to have been preserved with immediate effect as from the entry into force of the Statute, and, on the other hand, they would have had to be transferred to the jurisdiction of the International Court of Justice, a transfer which could only have been operated by the acceptance by the State concerned of the new Statute, in practice, by its admission to the United Nations. Immediate preservation of the declaration was necessary in order to save it from the lapsing by which it was threatened by the imminent dissolution of the Permanent Court which was then in contemplation. If it were not thus maintained in being, a subsequent transfer of the declaration to the jurisdiction of the new Court could not be effected. Thus, the problem of the transfer of former declarations from one Court to the other, which arose in the case of the acceptances of non-signatory States was quite different from that in the case of acceptances by States signatories of the Charter and of the Statute.

In addition to this fundamental difference in respect of the factors of the problem, there were special difficulties in resolving it in respect of acceptances by non-signatory States. These difficulties, indeed, rendered impossible the solution of the problem by the application of Article 36, paragraph 5, as drafted and adopted. Since this provision was originally subscribed to only by the signatory States, it was without legal force so far as non-signatory States were concerned: it could not preserve their declarations from the lapsing with which they were threatened by the impending dissolution of the Permanent Court. Since it could not maintain them in being, Article 36, paragraph 5, could not transfer their effect to the jurisdiction of the new Court as of the date when a State having made a declaration became a party to the Statute. Since these declarations had not been maintained in being, it would then have been necessary to reinstate lapsed declarations, then to transport their subject-matter to the jurisdiction of the International Court of Justice: nothing of this kind is provided for by Article 36, paragraph 5. Thus, the course it would have been necessary to follow at the time of the adoption of the Statute, in order to secure a transfer of the declarations of non-signatory States to the jurisdiction of the new Court, would have had to be entirely different from the course which was followed to achieve this result in respect of the declarations of signatory States. In the case of signatory States, by an agreement between them having full legal effect, Article 36, paragraph 5, governed the transfer from one Court to the other of still-existing declarations; in so doing, it maintained an existing obligation while modifying its subject-matter. So far as non-signatory States were concerned, something entirely different was involved: the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation. Accordingly, the question of a transformation of an existing obligation could no longer arise so far as they were concerned: all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States.

The question of the transfer from one Court to the other of former acceptances of the compulsory jurisdiction is so different, according to



whether it arises in respect of States signatories of the Statute or in respect of non-signatory States, that the date of the transfer, which it is a simple matter to determine in the case of signatory States, in spite of the silence on the point of Article 36, paragraph 5, can scarcely be determined in any satisfactory way in the case of declarations of non-signatory States. If regard be had to the date upon which a non-signatory State became a party to the Statute by its admission to the United Nations or in accordance with Article 93, paragraph 2, of the Charter, the transfer is then regarded as occurring at a date which might be very distant from the entry into force of the Statute, and this would hardly be in harmony with the spirit of a provision designed to provide for the transition from the old to the new Court by maintaining something of the former regime.

On the point now under consideration, the States represented at San Francisco could have made an offer addressed to other States, for instance, an offer to consider their acceptance of the compulsory jurisdiction of the Permanent Court as an acceptance of the jurisdiction of the International Court of Justice. But, in that case, such an offer would have had to be formulated, and the form of its acceptance and the conditions regarding the period within which it must be accepted would have had to be determined. There is nothing of this kind in Article 36, paragraph 5. When this Article decides that, as between parties to the present Statute, certain declarations are to be deemed to be acceptances of the compulsory jurisdiction of the International Court of Justice, this can be easily understood as meaning that the Article applies to the declarations made by the States which drew it up. Such a form of expression is scarcely appropriate for the making of an offer addressed to other States.

Thus to restrict the application of Article 36, paragraph 5, to the States signatories of the Statute is to take into account the purpose for which this provision was adopted. The Statute in which it appears does not establish the compulsory jurisdiction of the Court. At the time of its adoption, the impending dissolution of the Permanent Court and, in consequence thereof, the lapsing of acceptances of its compulsory jurisdiction, were in contemplation. If nothing had been done there would have been a backward step in relation to what had been achieved in the way of international jurisdiction. Rather than expecting that the States signatories of the new Statute would deposit new declarations of acceptance, it was sought to provide for this transitory situation by a transitional provision and that is the purpose of Article 36, paragraph 5. By its nature and by its purpose, that transitional provision is applicable only to the transitory situation it was intended to deal with, which involved the institution of a new Court just when the old Court was being dissolved. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes a party to the Statute of the new Court: there is then no transitory situation to be dealt with by Article 36, paragraph 5.

To the extent that the records of San Francisco Conference provide any indication as to the scope of the application of Article 36, paragraph 5, they confirm the fact that this paragraph was intended to deal with the declarations of signatory States. Those of non-signatory States, in respect of which special provisions would have been necessary, were not envisaged.

This point had not been dealt with by the Washington Committee of Jurists. A Sub-Committee, sitting on April 13th, 1945, had merely

drawn attention to the fact that many nations had previously accepted compulsory jurisdiction under the Optional Clause and added "that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances in force for the purpose of this Statute." This reference to a special agreement clearly indicated that in order to preserve these acceptances under a new system, the consent of States having made such declaration would be necessary: the contemplating of such an agreement indicated that the Conference could not substitute its decision for that of the States not there represented.

At the San Francisco Conference, the provision which became paragraph 5 of Article 36 was proposed by Sub-Committee D and discussed and adopted by Committee IV/1, on June 1st, 1945. In this Committee, the statements made mainly indicated the preference of many delegations for the Court's compulsory jurisdiction and their regret that it did not appear to be possible to adopt it. As to the meaning to be attributed to the provision which was to become paragraph 5 of Article 36, the Canadian representative said: "In view of the new paragraph . . . as soon as States sign the Charter, the great majority of them would be automatically under the compulsory jurisdiction of the Court because of the existing declarations." The representative of the United Kingdom having for his part said that he thought "that some forty States would thereby become automatically subject to the compulsory jurisdiction of the Court," this optimistic estimate was corrected by the Australian representative in the terms thus recorded in the minutes: "He desired to call attention to the fact that not forty but about twenty States would be automatically bound as a result of the compromise. In this connection he pointed out that of the fifty-one States that have adhered to the optional clause, three had ceased to be independent States, seventeen were not represented at the Conference and about ten of the declarations of other States had expired." The representatives of the United Kingdom and of Australia, referring to the meaning which they attached to the paragraph which subsequently became paragraph 5, were indicating the number of States to which, in their opinion, this provision would be applicable. The Australian representative, whose statement followed that of the representative of the United Kingdom, set out to correct the latter's estimate of the number of declarations which would thus be affected and, for this purpose, he rejected those of the seventeen States which were not "represented at the Conference." This statement clearly shows that in the view of the Australian representative, paragraph 5 was not intended to be applicable to the declarations of States not represented at the Conference. This statement, though it related to a point in the paragraph of cardinal importance, was not disputed by the representative of the United Kingdom or by any other member of the Committee. The conclusion to be drawn is that, in the view of the members of the Committee, the States not represented at the Conference remained outside the scope of the matter being dealt with by paragraph 5 and that that paragraph was intended to be binding only upon those States which, having been represented at the Conference, would sign and ratify the Charter and thus accept the Statute directly and without any probable delay.

This is confirmed by the report of Committee IV/1, approved by the Committee on June 11th, 1945. The report, having stated that the Committee proposed solutions for certain problems to which the creation of the new Court would give rise, sets out under (a) what is

provided in Article 37, under (b) what is provided in paragraph 4 (which was to become paragraph 5) of Article 36, and adds: "(c) Acceptances of the jurisdiction of the old Court over disputes arising between parties to the new Statute and other States, or between other States, should also be covered in some way and it seems desirable that negotiations should be initiated with a view to agreement that such acceptances will apply to the jurisdiction of the new Court. This matter cannot be dealt with in the Charter or the Statute, but it may later be possible for the General Assembly to facilitate such negotiations." Thus a clear distinction was drawn between what could be dealt with by Article 36, paragraph 5, and what could only be dealt with otherwise, that is, by agreement, outside the provisions of the Statute, with the States absent from the San Francisco negotiations. If that did not refer exclusively to the declarations of such States, at least there is no doubt that it did refer to them and that they were principally referred to: the use of the word "acceptances" confirms this, if confirmation is necessary, and this word, which appears once only in the French text, appears twice in the English text of which indeed it is the first word.

This confirms the view that Article 36, paragraph 5, was designed to govern the transfer dealt with in that provision only as between the signatories of the Statute, not in the case of a State in the position of Bulgaria.

Finally, if any doubt remained, the Court, in order to interpret Article 36, paragraph 5, should consider it in its context and bearing in mind the general scheme of the Charter and the Statute which founds the jurisdiction of the Court on the consent of States. It should, as it said in the case of the *Monetary gold removed from Rome in 1943*, be careful not to "run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (*I.C.J. Reports 1954, p. 32.*)

Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. But when, as in the present case, a State has for many years remained a stranger to the Statute, to hold that that State has consented to the transfer, by the fact of its admission to the United Nations, would be to regard its request for admission as equivalent to an express declaration by that State as provided for by Article 36, paragraph 2, of the Statute. It would be to disregard both that latter provision and the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed.

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Even if it should be assumed that Article 36, paragraph 5, is not limited to the declarations of signatory States, the terms of that provision make it impossible to apply it to the Bulgarian Declaration of 1921. The Government of Israel, in order to base the jurisdiction of the Court upon the combined effect of the Bulgarian Declaration of 1921 and Article 36, paragraph 5, of the Statute, has construed that provision as covering a declaration made by a State, which had not participated in the San Francisco Conference, which is not a signatory

of the Statute and only became a party thereto much later. The Court will also consider the matter from this angle and accordingly enquire whether the conditions, required by Article 36, paragraph 5, for a transfer from the Permanent Court of International Justice to the International Court of Justice of acceptances of compulsory jurisdiction relating only to the former, are satisfied in the present case and whether the Bulgarian Declaration must therefore "be deemed . . . to be an acceptance of the compulsory jurisdiction of the International Court of Justice."

The declarations to which Article 36, paragraph 5, refers created for the States which had made them the obligation to recognize the jurisdiction of the Permanent Court of International Justice. At the time when the new Statute was drawn up, it was anticipated—and events confirmed this—that the Permanent Court would shortly disappear and these undertakings consequently lapse. It was sought to provide for this situation, to avoid, as far as it was possible, such a result by substituting for the compulsory jurisdiction of the Permanent Court, which was to come to an end, the compulsory jurisdiction of the International Court of Justice. This was the purpose of Article 36, paragraph 5. This provision effected, as between the States to which it applied, the transfer to the new Court of the compulsory jurisdiction of the old. It thereby laid upon the States to which it applied an obligation, the obligation to recognize, *ipso facto* and without special agreement, the jurisdiction of the new Court. This constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation.

In the case of a State signatory of the Charter and of the Statute, the date at which this new obligation arises, the date at which this transfer from the jurisdiction of one Court to that of another Court is effected, is not directly determined. It could only be linked to the signing of the Charter by an interpretation somewhat out of keeping with the provisions of Article 110 of the Charter which, for the date of the entry into force of the Charter and, consequently, of the Statute, have regard to the dates of the deposit of ratifications. Neither of these dates can be taken as fixing the birth of the obligation here under consideration in the case of a State not a signatory of the Charter but subsequently admitted to the United Nations. Until its admission, it was a stranger to the Charter and to the Statute. What has been agreed upon between the signatories of these instruments cannot have created any obligation binding upon it, in particular an obligation to recognize the jurisdiction of the Court.

This was the position of Bulgaria. Article 36, paragraph 5, could not in any event be operative as regards that State until the date of its admission to the United Nations, namely, December 14th, 1955.

At that date, however, the Bulgarian Declaration of 1921 was no longer in force in consequence of the dissolution of the Permanent Court of International Justice in 1946. The acceptance set out in that Declaration of the compulsory jurisdiction of the Permanent Court of International Justice was thereafter devoid of object since that Court was no longer in existence. The legal basis for that acceptance of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, ceased to exist with the disappearance of that Statute. Thus, the Bulgarian Declaration had lapsed and was no longer in force.

Though the Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations, and

though the Bulgarian Declaration of 1921 had lapsed before that date, can Article 36, paragraph 5, nevertheless have had the effect that that Declaration must be deemed as between Bulgaria and Israel to be an acceptance of the compulsory jurisdiction of the International Court of Justice? That depends upon the date to which Article 36, paragraph 5, refers when it speaks of declarations "which are still in force," "*pour une durée qui n'est pas encore expirée*." In expressing itself thus, Article 36, paragraph 5, neither states nor implies any reference to a fixed date, that of the signature of the Charter and of the Statute, or that of their original entry into force. These were events to which Bulgaria, which became a party to the Statute only as a result of its admission to the United Nations in 1955, was not privy; it would be permissible to have reference to those dates in respect of the application of Article 36, paragraph 5, only if that provision had referred thereto expressly or by necessary implication; nothing of the kind is stated or implied in the text.

There is nothing in Article 36, paragraph 5, to reveal any intention of preserving all the declarations which were in existence at the time of the signature or entry into force of the Charter, regardless of the moment when a State having made a declaration became a party to the Statute. Such a course would have involved the suspending of a legal obligation, to be revived subsequently: it is scarcely conceivable in respect of a State which was a stranger to the drafting of Article 36, paragraph 5. There is nothing in this provision to show any intention of adopting such an exceptional procedure. If there had been such an intention, it should have been expressed by a direct clause providing for the preservation of the declaration, followed by a provision for its subsequent re-entry into force as from the moment of admission to the United Nations: nothing of the kind is expressed in the Statute.

Article 36, paragraph 5, is expressed in a single sentence the purpose of which is to state that old declarations which are still in force shall be deemed as between the parties to the present Statute to be acceptances of the compulsory jurisdiction of the International Court of Justice. The provision determines, in respect of a State to which it applies, the birth of the compulsory jurisdiction of the new Court. It makes that subject to two conditions: (1) that the State having made the declaration should be a party to the Statute, (2) that the declaration of that State should still be in force.

Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that, at that time, that declaration was still in force. The second condition stated in Article 36, paragraph 5, is therefore not satisfied in the present case. Thus, even placing itself on the ground upon which the Government of Israel bases its claim, the Court finds that Article 36, paragraph 5, is not applicable to the Bulgarian Declaration of 1921.

This view is confirmed by the following considerations:

On the one hand, the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved; it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired: it is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another to revive an undertaking which has already been extinguished.

On the other hand, Article 36, contrary to the desire of a number of delegations at San Francisco, does not make compulsory jurisdiction an immediate and direct consequence of being a party to the Statute. If Bulgaria, which at the time of its admission to the United Nations was under no obligation of that kind in consequence of the lapse of its Declaration of 1921, were to be regarded as subject to the compulsory jurisdiction as a result of its admission to the United Nations, the Statute of the Court would, in the case of Bulgaria, have a legal consequence, namely, compulsory jurisdiction, which that Statute does not impose upon other States. It is difficult to accept an interpretation which would constitute in the case of Bulgaria such a derogation from the system of the Statute.

In seeking and obtaining admission to the United Nations, Bulgaria accepted all the provisions of the Statute, including Article 36. It agreed to regard as subject to the compulsory jurisdiction of the Court, on the one hand, those States parties to the Statute which had made or would make the declaration provided for by paragraph 2 and, on the other hand, in accordance with paragraph 5, those States which, at the time of their acceptance of the Statute, were bound by their acceptance of the compulsory jurisdiction of the Permanent Court. At the time when Bulgaria sought and obtained admission to the United Nations, its acceptance of the compulsory jurisdiction of the Permanent Court had long since lapsed. There is nothing in Article 36, paragraph 5, to indicate any intention to revive an undertaking which is no longer in force. That provision does not relate to the position of Bulgaria at the time of its entry into the United Nations; Bulgaria's acceptance of the provision does not constitute consent to the compulsory jurisdiction of the International Court of Justice; such consent can validly be given by Bulgaria only in accordance with Article 36, paragraph 2.

Article 36, paragraph 5, cannot therefore lead the Court to find that, by the operation of this provision, the Bulgarian Declaration of 1921 provides a basis for its jurisdiction to deal with the case submitted to it by the Application filed by the Government of Israel on October 16th, 1957.

In the circumstances, it is unnecessary for the Court to proceed to a consideration of the other Preliminary Objections to the Application raised by the Government of the People's Republic of Bulgaria.

Vice President Zafrulla Khan agreed to the judgment, but pointed out that Article 36, paragraph 5, was not limited to original signatories, but included any non-signatory which might have become a party to the Statute of the International Court of Justice before dissolution of the Permanent Court.

Judges Badawi and Armand-Ugon concurred in the result, but gave separate opinions, each to the effect that Article 36, paragraph 5 applied *only* to states which had accepted the jurisdiction of the Permanent Court for *definite periods of time*, and did not include those which, like Bulgaria, had accepted without time limit.

Judges Lauterpacht, Wellington Koo, and Spender gave a long joint dissenting opinion.<sup>3</sup> They said:

<sup>3</sup> Judge *ad hoc* Goitein gave a separate dissenting opinion. He pointed out that Art. 36, par. 5, was specifically designed to preserve the declarations of acceptance of

According to paragraph 5 of Article 36, as cited above, the following two conditions must be fulfilled for the transfer to the International Court of Justice of the declarations of acceptance made with respect to the Permanent Court: (1) the declarant State must become a party to the Statute of the International Court of Justice; (2) its declaration must be "still in force," that is to say, the period for which it has been made must not have expired. By virtue of these conditions the obligations of the Declaration made by Bulgaria on 29th July, 1921, were transferred to the International Court of Justice on 14th December, 1955, when she became a party to the Statute of the International Court of Justice. On that day, paragraph 5 became applicable to Bulgaria. We are of the view that, so far as that provision is concerned, the Court, contrary to the conclusions of the First Preliminary Objection of the Government of Bulgaria, is competent to adjudicate upon the application of the Government of Israel brought before the Court in reliance upon its declaration of acceptance of 17th October, 1956.

To the express conditions, as stated, of paragraph 5 of Article 36 of the Statute, the present Judgment of the Court adds two further conditions: (1) the declarant State must have participated in the Conference of San Francisco; (2) the declarant State must have become a party to the Statute of this Court prior to the date of the dissolution of the Permanent Court, namely, prior to 18th April, 1946. . . .

Upon that text of paragraph 5 of Article 36 the principal contention of the Government of Bulgaria engrafted a new text. The Government of Bulgaria contended, in effect, that the Court must omit from the text of Article 36, paragraph 5, the words "which are still in force" and replace them by other words. It was contended that the Court must read the relevant part of Article 36, paragraph 5, as follows: "Declarations made under Article 36 of the Statute of the Permanent Court shall be deemed as between the parties to the present Statute who have become parties thereto prior to the dissolution of that Court to be acceptances of the compulsory jurisdiction of the International Court of Justice. . . ." We are unable to accept that emendation of a clear provision of the Statute. We are unable to do so for two reasons: The first is that the interpretation thus advanced is contrary to the clear terms of paragraph 5; the second is that the interpretation is contrary to the manifest purpose of that provision.

Tracing the drafting of the Statute, they stated that "It was specifically contemplated that the continuity of the two Courts should be given expression by recognizing the continuity of the compulsory jurisdiction at

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compulsory jurisdiction despite the termination of the Permanent Court, saying: "The Permanent Court would be dissolved: the declarations would survive. That is why Article 36 (5) was enacted, and there is nothing in the paragraph that even hints that the declarations in question should survive only until the dissolution of the Permanent Court. . . .

"Before December 1955, when Bulgaria was admitted as a Member of the United Nations, she had two clear courses open to her: to refuse to become a Member of the United Nations, or to denounce her Declaration of 1921. She chose to become a Member: she did not renounce her Declaration. Whether the States at San Francisco had authority or not to enact Article 36 (5), Bulgaria ratified what had been done there when she became a Member of the United Nations without denouncing her Declaration."

that time existing." From the records of the San Francisco Conference of 1945 they concluded:

It is thus clear that the purpose of paragraph 5 was to provide "for the continuing validity of the existing adherences" to the Optional Clause. Far from contemplating that any of the then existing declarations of acceptance should disappear with the dissolution of the Permanent Court, the authors of paragraph 5 had in mind the maintenance of the entire group of declarations of acceptance which were still in force and in accordance with their terms, irrespective of the dissolution of the Permanent Court. That purpose was expressed in the widest possible terms intended to eliminate any real or apparent legal difficulties.

As for the "still in force" language, they said:

We consider that the words "which are still in force," when read in the context of the whole paragraph, can only mean, and are intended to mean, the exclusion of some fourteen declarations of acceptance of the compulsory jurisdiction of the Permanent Court which had already expired and the inclusion, irrespective of the continuance or dissolution of the Permanent Court, of all the declarations the duration of which has not expired. At the Conference of San Francisco there were present a number of States that had in the past made Declarations of Acceptance which, not having been renewed, had lapsed and were therefore no longer in force. This applied, for instance, to the Declarations of China, Egypt, Ethiopia, France, Greece, Peru, Turkey and Yugoslavia. It was clearly necessary, by inserting the expression "which are still in force," to exclude those States from the operation of paragraph 5. That interpretation is supported by the French text which is as authoritative as the English text and which is even more clear and indisputable than the latter. The words "*pour une durée qui n'est pas encore expirée*" (for a duration which has not yet expired) must be regarded as determining the true meaning of the English text in question. The fact that the Chinese, Russian and Spanish texts of that paragraph approximate to the English text does not invalidate or weaken the obvious meaning of the French text. Those three texts were translated from the English version, whereas the French text was that of one of the two official working languages adopted at the San Francisco Conference. However, while the French text removes any doubt whatsoever as to the meaning of these words, there is in effect no reasonable doubt about them also so far as the English text is concerned. There is no question here of giving preference to the French text. Both texts have the same meaning. The French text is no more than an accurate translation of the English text as generally understood. Or, rather, in so far as it appears that the final version was first formulated in the French language, the English text is no more than an accurate translation from the French.

The Joint Dissent continued:

We do not attach decisive importance to the question, with regard to which the parties were sharply divided, of the date to which the expression "which are still in force" must be attached. That may be either the date on which the Charter entered into force, namely, 24th October, 1945, or the date on which the declarant State has become



a party to the Statute of the International Court of Justice. It may be said, in support of the first alternative, as urged by the Government of Israel, that normally a legal instrument speaks as of the date on which it enters into force. However, there is also substance in the view that that expression ought, more properly, to be attached to the date on which the particular State becomes bound by the obligations of the Statute. Retroactive operation of a provision ought not to be assumed without good cause; normally, it is the date of the State becoming a party to the instrument which determines, in relation to that State, the date of the commencement of the operation of its various provisions.

We do not consider that any practical consequences, detrimental to the contentions of either party, follow from the adoption of one of these alternative dates in preference to another. In our view, the validity of paragraph 5 did not lapse on the dissolution of the Permanent Court; its purpose was to render that dissolution irrelevant in the matter of the transfer of declaration; the intention was that it should become operative as soon as a declarant State becomes a party to the Statute—unless its declaration was not longer in force by reason of having expired in conformity with the concluding passage of paragraph 5. Accordingly, the main contention of the Government of Israel is not defeated if the expression “which are still in force” is attached to the date on which Bulgaria became a party to the Statute. On that date—or from that date—her Declaration of 1921, saved from extinction by virtue of paragraph 5 of Article 36, became fully operative.

Accordingly, we reach the conclusion that, having regard both to the ordinary meaning of their language and their context, the words “which are still in force” refer to the declaration themselves, namely, to a period of time, limited or unlimited, which has not expired, regardless of any prospective or actual date of the dissolution of the Permanent Court. So long as the period of time of declarations made under Article 36 of the Statute of the Permanent Court still has to run at the time when the declarant State concerned becomes a party to the Statute of the International Court of Justice, those declarations fall within the purview of Article 36, paragraph 5, of the new Statute and “shall be deemed to be acceptances of the compulsory jurisdiction of the International Court for the period which they still have to run and in accordance with their terms.”

Arguing that the San Francisco documents show “that the provisions of Article 36, paragraph 5, of the new Statute operate independently of the Permanent Court and that such operation is not affected by its dissolution,” they stated:

There is a further consideration of a practical nature which precludes the interpretation of the words “which are still in force” as being directed to the contingency of the dissolution of the Permanent Court. If that were the true interpretation of these words, there would have existed a distinct possibility of the object of paragraph 5 being frustrated. The States participating in the Conference of San Francisco, having decided upon the creation of a new Court, were anxious to see the old Court terminated. Of the fifty-one States attending the San Francisco Conference, thirty-one were parties to the old Statute and, with a few exceptions, were Members of the League of Nations. There existed the possibility of the League of Nations

meeting and dissolving itself and the Permanent Court before the coming into force of the Charter of the United Nations and the Statute of the new Court. Moreover, the attainment of twenty-nine ratifications of the Charter on October 24th, 1945, including the ratifications of five permanent members of the Security Council, could not have been foreseen with any degree of certainty. It might have been achieved at a later date, possibly after the dissolution of the League and of the old Court. In either eventuality, Article 36, paragraph 5, would have become a dead letter. For in that case, according to the contention of Bulgaria, all the declarations would have lapsed with the dissolution of the Permanent Court and the extinction of the old Statute, and would no longer be in force.

The intention of paragraph 5 of Article 36 was to eliminate the difficulties connected with the impending dissolution of the Permanent Court and likely to interfere with the continued validity of the declarations. The Bulgarian contention, accepted by the Court, introduced these considerations as an integral part of Article 36. The unqualified language of paragraph 5 suggests that any real or apparent legal difficulty ensuing from the fact that the declarations were annexed to the Statute of the Permanent Court and any other legal difficulties, real or apparent, which did or did not occur to the authors of paragraph 5 were met by the comprehensive provision laying down that these declarations shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the new Court. It is exactly some such obstacles which the authors of Article 36 wished to neutralize. This was the purpose of paragraph 5. They said in effect: Whatever legal obstacles there may be, these declarations, provided that their period of validity has not expired—that is provided that they are still in force on the day of the entry of the Charter into force or on the day on which the declarant State becomes a party to the Statute—shall continue in respect of the International Court of Justice. . . .

There is a deceptive element of simplification in some such notion as that the Conference of San Francisco decreed certain measures or that it had no power to decree them—for instance, to deprive the declarations of acceptance of their consensual character or to attach them to something which had ceased to exist. The only step which the Conference did take and could take in this connection was to establish a text. That text did not bind any State. Any signatory of the Charter was free to refuse to ratify it. Any State subsequently contemplating membership of the United Nations was free to treat it as an offer which it was at liberty to accept or to reject. The validity and binding force of the Charter and any of its provisions are due not to the decision of the Conference of San Francisco but to the very will of the States which subscribed voluntarily to its obligations in 1945 and in subsequent years. Like any other Member of the United Nations, Bulgaria, in adhering to the Charter, of her own free will, accepted its obligations, including those of paragraph 5 of Article 36 of the Statute. In doing so, she supplied that very consensual link which, it is asserted, is essential to the declarations of the Optional Clause. She also supplied the consensual link necessary for the modification—however slight in the present case—of her Declaration of Acceptance. . . .

The second main ground by reference to which the First Preliminary Objection is upheld is that paragraph 5 of Article 36 applies only to original Members of the United Nations. . . .

There is nothing in paragraph 5, or in the preparatory work of the Conference of San Francisco, or in general principles of international law, or in the various provisions of the Charter to substantiate the view that that paragraph applies only to original Members of the United Nations in the sense of Article 3 of the Charter. Unless otherwise expressly provided, the provisions of the Charter apply in equal measure to every State which becomes a Member of the United Nations. In relation to Members of the United Nations, whatever may be the date of their adherence, no provision of the Charter can be *res inter alios acta* so as to bind some but not other Members. The proposition that the rights and obligations of the Charter vary in this respect as between the various Members of the United Nations is contrary to the entire structure of the Charter and the relevant principles, generally accepted, of international law on the subject. In practice, any such proposition, if accepted, would lead to serious consequences.

Neither can the suggestion be accepted that paragraph 5 does no more than to give expression to an agreement reached *inter se* between the States which participated in the Conference of San Francisco. The Charter nowhere embodies particular agreements between particular Members. Any such method would be wholly alien to its purpose and character. The provisions of the Charter are of general application. The same applies to the Statute, which is part of the Charter. . . .

There was no question at the Conference of San Francisco of the participant States imposing upon future Members of the United Nations any obligations against their will. What the authors of the Charter were entitled to do, and what in fact they did, was to provide that it should be a condition of membership—whether on the part of the original Members or of States subsequently adhering to the Charter—that the existing declarations in the matter of the Optional Clause should continue in accordance with their terms. All Members of the United Nations, whatever the date of their membership, were to be placed in this respect on an equal footing.<sup>4</sup>

*Interpretation of Netherlands-Belgian Boundary Convention—status quo—proof of mistake—acquisition of sovereignty in derogation of treaty*

CASE CONCERNING SOVEREIGNTY OVER CERTAIN FRONTIER LANDS (BELGIUM/NETHERLANDS).<sup>\*</sup> I.C.J. Reports, 1959, p. 209.

International Court of Justice,<sup>1</sup> Judgment of June 20, 1959.

An Agreement of March 7, 1957, between Belgium and The Netherlands provided:

*Article I.* The Court is requested to determine whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium or the Kingdom of the Netherlands.

<sup>4</sup>The Joint Dissent alluded to views expressed by Judge Manley Hudson, in 41 A.J.I.L. 10 (1947), and 40 *ibid.* 34 (1946), concerning the effect of Art. 36, par. 5.

<sup>\*</sup>Digested by William W. Bishop, Jr., of the Board of Editors.

<sup>1</sup>Composed for this case of President Klaestad, Vice President Zafrulla Khan, and Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos and Spender.

These plots<sup>2</sup> lie near the frontier north of the Belgian town of Turnhout, where the Belgian commune of Baerle-Duc is made up of a series of isolated plots enclaved within the Netherlands commune of Baarle-Nassau, which is in turn non-continuous.

Before the separation of Belgium from The Netherlands, unsuccessful attempts were made to fix the boundary between these communes so as to eliminate enclaves. In 1836 the burgomasters of the two communes tried to determine exact boundaries between them for tax purposes, establishing the "Communal Minute" dated November 29, 1836, but not actually signed until March 22, 1841, which was done in two originals to be deposited in the respective communal archives. The Netherlands produced what purported to be one of the originals, which reads (in translation) that "Plot Numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau." The Baerle-Duc (Belgian) original could not be produced. The Treaty of London of April 19, 1839, provided for a Mixed Boundary Commission to fix the boundary between Belgium and The Netherlands. On November 5, 1842, the two governments signed a boundary treaty (effective February 5, 1843), Article 14 of which provided:

The status quo shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.

Article 70 stipulated that the Mixed Boundary Commission should "draft the convention . . . in accordance with the foregoing provisions."

The work of this Commission resulted in a Boundary Convention dated August 8, 1843, ratifications of which were exchanged October 3, 1843. This provided that the frontier "is defined in an exact and invariable way by a Descriptive Minute," which together with detailed maps "shall remain annexed to the present Convention and shall have the same force and effect as though they were inserted in their entirety." The convention further provided that with regard to the communes of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) "the status quo is maintained in virtue of Article 14 of the Treaty of 5 November 1842." The Descriptive Minute first refers to this Article 14, and then says of the Communal Minute signed March 22, 1841, that "The above-mentioned Minute, noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article." But the Descriptive Minute actually made a part of the Boundary Convention departed from the text of the copy of the Communal Minute produced by The Netherlands, and instead read (in translation):

Plots numbers 78 to 90 inclusive belong to the commune of Baarle-Nassau.

Plots numbers 91 and 92 belong to Baerle-Duc.

Plots numbers 93 to 111 inclusive belong to Baarle-Nassau.

The Belgian Government relied on this to show that plots 91 and 92 were Belgian. The Netherlands contended that the Boundary Convention of

<sup>2</sup> About 14,378 hectares or 35 acres in area.

1843 did not determine what the *status quo* was, but left this to the Communal Minute under which sovereignty was recognized and vested in The Netherlands. It added that if the Boundary Convention purported to determine sovereignty over the disputed plots, it was vitiated by mistake and did not carry out the intention of the parties. The Netherlands further submitted that even if the convention determined sovereignty over the disputed plots and was not vitiated for mistake, yet acts of sovereignty exercised by The Netherlands since 1843 displaced the legal title flowing from the convention and established Dutch sovereignty over the plots.

By a vote of 10 to 4 the Court found that sovereignty over the two plots belonged to Belgium.

Looking at the history of the work of the Mixed Boundary Commission and the task assigned to the Commission, the majority opinion concluded that the Commission had intended to make definite allocation of these two plots to Belgium. From the language in the preamble of the Boundary Convention to the effect that the two parties, "wishing to fix and regulate all that relates to the demarcation of the frontier," appointed their commissioners, *et cetera*, the Court reasoned that:

This statement represents the common intention of the two States. Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention.

The Court reaches the conclusion that the Boundary Convention was intended to determine, and did determine, as between the two States, to which State the various plots in each commune belonged. Under its terms, the disputed plots were determined to belong to Belgium.

The Court said that the Descriptive Minute of the Boundary Convention stated that the Communal Minute signed March 22, 1841, "is transcribed word for word in the present article." In fact it was not so transcribed, but differed in attributing the plots to Belgium. The Court stated:

The Court does not consider that a mere comparison of these two documents establishes any such mistake. Under the terms of the Boundary Convention, sovereignty over the disputed plots is vested in Belgium. The only question is whether a mistake, such as would vitiate the Convention, has been established by convincing evidence.

To succeed on the basis of the alleged mistake, the Netherlands must establish that the intention of the Mixed Boundary Commission was that the Descriptive Minute attached to and forming part of the Convention of 1843 should set out the text of the Communal Minute contained in the copy produced by the Netherlands, and that this intention was defeated by the transcription in the Descriptive Minute of a different text, which, contrary to the text of that copy and the intention of the Mixed Boundary Commission, attributed the disputed plots to Baerle-Duc instead of to Baerle-Nassau.

The duty of the Mixed Boundary Commission was to determine and fix the limits of the possessions of the two States. So far as the two communes were concerned, the essence of its task was to determine the *status quo*. In order to discharge its duty, the Commission, directly

and through sub-commissions, made examinations on the spot, had recourse to researches, records and surveys, verified the findings of the sub-commissions and carefully checked its own labours.

Examining the records of the Boundary Commission, the Court added:

The Court draws the conclusion from these documents that the two copies of the Communal Minute held by the Netherlands and Belgian Commissions were at variance on the attribution of the disputed plots to the two communes. There is no satisfactory explanation how a text—which according to the copy of the Communal Minute produced by the Netherlands consists of one paragraph reading “plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau”—could have by mistake been broken up into three separate paragraphs giving a different attribution to the disputed plots.

As to the mistake, the Court concluded:

In the view of the Court, apart from a mere comparison of the text of the Descriptive Minute with the copy of the Communal Minute produced by the Netherlands, all attempts to establish and to explain the alleged mistake are based upon hypotheses which are not plausible and which are not accompanied by adequate proof.

The Boundary Convention of 1843 was the result of several years of labour, with members of the Mixed Boundary Commission not only in contact with the respective communal administrations but also with the Governments of the respective States. According to information furnished to the Court, copies of the text of the Communal Minute to be incorporated in the Descriptive Minute, and which was in fact incorporated therein, were signed by the secretaries of each commune. The actual text transcribed was accordingly known to both communes and both States. The Convention was confirmed by the Parliament of each State and ratified in accordance with their constitutional processes. Its terms have been published in each State. For almost a century the Netherlands made no challenge to the attribution of the disputed plots to Belgium.

The Court is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect to the disputed plots are not affected on that account.

The Court continued:

The final contention of the Netherlands is that if sovereignty over the disputed plots was vested in Belgium by virtue of the Boundary Convention, acts of sovereignty exercised by the Netherlands since 1843 have established sovereignty in the Netherlands.

This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.

As to the question whether Belgium ever relinquished its sovereignty over the disputed plots, it is to be observed that Belgium military staff maps since their first publication in 1874 have shown these plots as Belgian territory. The plots were included in Belgian survey records from 1847 to 1852, when one plot for some reason was struck out but

restored about 1890, since which time both have continued to appear therein. Transfer deeds relating to one of the plots were entered in the Records of the Survey authorities at Baerle-Duc in 1896 and 1904.

In 1843, the plots were uncultivated land, of which one was described by the Netherlands as being in 1860-1863 "a clearing of heathland." The Netherlands state that since 1866 the use to which both plots have been put has changed a number of times, although the nature and dates of these changes are not stated. Prior to 1906 some transfers of land were recorded in the Office of Baarle-Nassau. In 1906 some houses were erected upon part of plot 91 and thereafter further transfers of lands were recorded in that Office. Since that time also, registrations of births, deaths and marriages of inhabitants of these houses have been entered in the Baarle-Nassau Communal Register. It is stated by Belgium that these houses, constructed round the Baarle-Nassau (frontier) station built by the Netherlands Government, were occupied by Netherlands officials.

Some time after their erection, a Belgian inspector of survey, having visited Baarle-Nassau, found that plots 91 and 92, entered in the Belgian survey, were also entered in the Netherlands survey. Official Belgian enquiries were then initiated, and finally, in July 1914, the Director of the Survey at Antwerp informed the Belgian Minister for Finance that he thought it necessary for the matter to be submitted to the Belgian Ministry for Foreign Affairs. The First World War then intervened. In December 1919 the file was transmitted to that Ministry.

Following examination by that Ministry, the Belgian Minister at The Hague in August 1921 drew the attention of the Netherlands Government to the fact that the two disputed plots and two other plots belonging to Baerle-Duc were entered in the survey documents of both States. The Netherlands Minister for Foreign Affairs replied on 6 October 1922, when he acknowledged that the two other plots were Belgian and should be struck out of the Netherlands survey documents, but for the first time it was claimed that the Communal Minute had been inaccurately reproduced in the Descriptive Minute and that plots 91 and 92 belonged to the Netherlands. Since then, sovereignty over these two plots has been the subject of dispute between the two States.

The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the communal register of Baarle-Nassau, on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium.

Belgium's reply is that it was quite unaware that tax was being collected; that neither plot was under Belgian law liable to its land tax, since both plots were until recent years uncultivated and one of them was State property. This explanation is disputed by the Netherlands Government.

Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerle-Duc before a Breda tribunal in 1851. These proceedings were concerned with a proposed sale of a large area of heathland over which the commune of Baerle-Duc claimed to have certain rights of usufruct. This area included part of the disputed plots.

A further act relied upon by the Netherlands is the sale by the Netherlands State, publicly announced in the year 1853, of the heath-

land above referred to. The Belgian Government states that the fact that this area included a part of the disputed plots escaped its notice.

The Netherlands also claims that Netherlands laws, more particularly in regard to rents, were applied to houses built on the plots.

Finally, the Netherlands places reliance upon the grant of a railway concession which related to a length of line, a small portion of which passed through the disputed plots.

The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.

During the years 1889 to 1892 efforts were made by the two States to achieve a regular and continuous frontier line between them in this region through exchanges of territory. A new Mixed Boundary Commission, which met during those years, finally prepared a Convention which was signed by the plenipotentiaries of the two States in 1892, but which was never ratified. Under the terms of the Convention, Belgium agreed to cede to the Netherlands, *inter alia*, the two disputed plots. The Netherlands urged that this should not be read against it since the Convention was not ratified and since little importance had attached to the two plots in question and it had allowed itself to be misled by the text of the Descriptive Minute and the significance of any cession was not the subject of consideration.

The unratified Convention of 1892 did not, of course, create any legal rights or obligations, but the terms of the Convention itself and the contemporaneous events show that Belgium at that time was asserting its sovereignty over the two plots, and that the Netherlands knew it was so doing. In a letter of 20 August 1890, the Belgian Minister for Foreign Affairs had informed the Netherlands Minister in Brussels that an enclave, intersected by the railway from Turnhout to Tilburg, had been omitted from the list of territories to be ceded by Belgium to the Netherlands. This enclave comprised the disputed plots; they were incorporated in the Convention of 1892 and subsequently specifically covered by a separate Declaration of December of that year. The Netherlands did not in 1892, or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty.

Having examined the situation which has obtained in respect of the disputed plots and the facts relied upon by the two Governments, the Court reaches the conclusion that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished.

Judges Lauterpacht<sup>3</sup> and Spiropoulos<sup>4</sup> gave brief statements of their

<sup>3</sup> Judge Lauterpacht said: "The circumstances of the adoption, in 1843, of the Descriptive Minute must, to some extent, be in the nature of conjecture. In particular, it has not been proved possible to state a direct conclusion as to the authenticity or otherwise of the cardinal piece of evidence, namely, of the only existing copy of the



reasons for believing that the land belonged to The Netherlands. Judges Armand-Ugon<sup>6</sup> and Moreno Quintana<sup>6</sup> gave dissenting opinions.

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Communal Minute produced by the Netherlands. Moreover, while the Commissioners who drafted the Descriptive Minute enjoyed wide powers, they had no power to endow with legal efficacy a document in which they purported to transcribe word for word the Communal Minute and to observe the *status quo* but in which they actually modified the Communal Minute and departed from the *status quo*. The law knows of no such power. For these reasons, I am of the opinion that the relevant provisions of the Convention must be considered as void and inapplicable on account of uncertainty and unresolved discrepancy.

"... it seems proper that a decision be rendered by reference to the fact, which is not disputed, that at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty. It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands territory and that, therefore, it was natural that Netherlands administrative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly."

<sup>4</sup> Judge Spiropoulos found the status of the plots "extremely doubtful" and preferred the Dutch hypothesis, which he thought "the less speculative."

<sup>5</sup> Judge Armand-Ugon pointed to the Communal Minute as "of cardinal importance," and said that Belgium could not explain the absence of its original, but did not challenge the authenticity of the Dutch original. He thought the records of the Mixed Boundary Commission showed the clear intention to adopt the Communal Minute without alteration on the relevant point, particularly as there was no evidence in the records of any intention to make this change and deliberately award the plots to Belgium. He added that: "For almost one hundred years the Convention of 1843 was applied in a manner which does not conform with the text of the Communal Minute included in Article 90 of the Descriptive Minute; although that article regards the plots as Belgian, these same plots have actually been submitted to Netherlands sovereignty." Only in 1890 was the divergence apparently raised by Belgium. He further stated that "the Netherlands Government has exercised preponderant governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government in this respect has created an indisputable right of sovereignty in favour of the Netherlands Government. There is no evidence that Belgium claimed restitution of the parcels before 1921, or that any Belgian activities occurred thereon."

<sup>6</sup> Judge Moreno Quintana regarded the question as one of interpretation of the Boundary Convention, since the real intention of the parties should control. Finding a mistake in the "transcription" of the Communal Minute in Article 90 of the Descriptive Minute of the Boundary Convention, he said: "A mistake of fact—as the most qualified writers in international law teach us—vitiates the consent of the Parties to a legal instrument such as a treaty. This defect in consent involves the total or partial nullity of the instrument in question." This nullity was confined to the provision concerning these two plots in question.

*Nationality of claimant—interpretation of Italian Peace Treaty and Bancroft Nationality Treaty, U. S.-Württemberg*

U.S.A. EX REL. FLEGENHEIMER v. ITALY.\*

Italian-U. S. Conciliation Commission.<sup>1</sup> September 20, 1958.

Albert Flegenheimer sought cancellation of his sale of stock in an Italian company to another Italian company March 18, 1941, for the sum of \$277,860.60, at a time when the actual value of the shares was from four to five million dollars, claiming that as a Jewish person he had feared application to him of the 1938 Italian anti-Semitic legislation. This claim was based on Article 78, paragraph 3, of the Italian Peace Treaty,<sup>2</sup> and Article III, section 16 (b) of the Lombardo-Lovett Agreement.<sup>3</sup> The Italian Government answered that Flegenheimer was not a "United Nations national" within the definition of Article 78, paragraph 9(a), of the Peace Treaty.<sup>4</sup> On August 6, 1954, the representatives of the United States and Italy on the Conciliation Commission found themselves unable to agree on the case, and resorted to the third member as provided for by Article 83 of the Treaty of Peace.

Albert Flegenheimer was born in Württemberg, Germany, in 1890, the son of Samuel Flegenheimer. Samuel had been born in 1848 in Baden, Germany; moved to the United States in 1864 or 1866; was naturalized as an American citizen November 7, 1873; returned to Germany in 1874 to live in Württemberg; and was naturalized in Württemberg August 23, 1894. He lived there until his death in 1929. Albert and his two older brothers were included in the father's 1894 naturalization in Württemberg. Albert lived in Germany until 1937, apparently unaware of his father's one-time American citizenship until after the Nazis took power in 1933. Between 1933 and 1939 Albert and his brother Eugene contacted several American Consulates in Europe, and the American Embassy in Paris, seeking to find out whether they might have preserved American citizenship through their father, but received negative or ambiguous information.

\* Digested by William W. Bishop, Jr., of the Board of Editors.

<sup>1</sup> Established under Art. 83 of the Treaty of Peace with Italy, 61 Stat. 1245; T.I.A.S., No. 1648; 42 A.J.I.L. Supp. 47 (1948). In this case the members were A. J. Matturri, Antonio Sorrentino, and G. Sauser Hall ("Third Member"). For earlier decisions of this Commission, see 50 A.J.I.L. 150 (1956), and 51 *ibid.* 436 (1957).

<sup>2</sup> The paragraph reads: "The Italian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war."

<sup>3</sup> T.I.A.S., No. 1757; 42 A.J.I.L. Supp. 146, 150 (1948).

<sup>4</sup> Art. 78, par. 9(a): "As used in this Article:

"(a) United Nations nationals means individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

"The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy."

In November, 1937, Albert Flegenheimer was notified that as a Jewish person he must dispose of his property under penalty of total confiscation, sold his property at a nominal price, and was told to leave Germany. Traveling on a German passport, he went to Italy, and, after the 1938 Italian anti-Semitic laws, went to Switzerland and then in 1939 to Canada, still using a German passport. At the American Consulate in Winnipeg, Canada, he filed on November 3, 1939, his first formal claim to American citizenship. The Board of Special Inquiry of the Immigration and Naturalization Service of the United States, after hearing him, decided on November 22, 1939, that he was not an American citizen. While he was in America, the German Government decreed forfeiture of his German citizenship, April 29, 1940. After he was admitted to the United States for temporary sojourn, and after the United States had entered the war, the Immigration and Naturalization Service on February 24, 1942, ordered that Flegenheimer be given the status of an American national. The Department of State refused him a passport to travel to Europe on May 14, 1946; but granted him an American passport October 24, 1946.

After the present proceedings were brought before the Conciliation Commission, Flegenheimer asked issuance of a certificate of United States nationality. Despite a negative finding by the examining officer, the Acting Assistant Commissioner, Inspection and Examinations Division, found him to be an American citizen, and caused the certificate of nationality to be issued to him July 10, 1952.

The Conciliation Commission found unanimously <sup>5</sup> in favor of the Italian Government, concluding that, although claimant Albert Flegenheimer "acquired by filiation the nationality of the United States, at birth, in Wurttemberg," he "acquired German and Wurttemberg nationality as the result of his naturalization in Wurttemberg on August 23, 1894, and thereby lost, after five years' residence in his new <sup>6</sup> home country, his American nationality, under the Bancroft Treaty concluded on July 2, 1868, between the United States of America and Wurttemberg." The Commission found that "he never re-acquired his American nationality after reaching majority"; and that, although stateless after the forfeiture of his German nationality, "he did not prove that he was treated as enemy by the Italian authorities during his stay in the countries at war with Italy, Canada first and later the United States." The Commission regarded itself as not bound by the certificate of nationality, and held that Flegenheimer was not a United Nations national within the meaning of the Peace Treaty and the Lombardo-Lovett Agreement. The petition filed on his behalf was rejected as inadmissible.

The first question of law was whether the Commission had power to disregard the certificate of American nationality. It stated:

<sup>5</sup> The Commission stated that "The dispositions of this decision are adopted by unanimous vote, although on some points of law the Representative of the United States of America is not in agreement."

<sup>6</sup> *Sic.* It was "new" in the sense of being newly his country of allegiance, but he had been born there and had until then always lived there.

24. It is clear that the afore-mentioned provision of the Treaty of Peace, in explaining the meaning of "United Nations nationals" refers to an unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality.

... the Commission will have to admit or reject, at the international level, a nationality, the existence or inexistence of which shall be established, in its opinion in full compliance with the law, at the national level.

25. Nevertheless, the Commission recalls that, according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned "national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures" (P.C.I.J. Decision of May 25, 1926, case relating to certain German interests in Upper Silesia, series A, No. 7, p. 19).

The result is that, in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They are statements made by one of the Parties to the dispute which, when denied, must be proved like every other allegation. It is the duty of this Commission to establish Albert Flegenheimer's true nationality, at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or of law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality of the United States; these investigations are necessary in order to decide whether the international action, instituted in his behalf, fulfills the conditions required by the Treaty of Peace from which the Commission cannot deviate. It must therefore freely examine whether an administrative decision, such as that taken in favor of Albert Flegenheimer in the United States, was of such a nature as to be convincing.

The profound reason for these broad powers of appreciation which are guaranteed to an international court for resolving questions of nationality, even though coming within the reserved domain of States, is based on the principle, undenied in matters of arbitration, that complete equality must be enjoyed by both Parties to an international dispute. If it were to be ignored, one of the Parties would be placed in a state of inferiority vis-a-vis the other, because it would then suffice for the Plaintiff State to affirm that any given person is vested with its nationality for the Defendant State to be powerless to prevent an abusive practice of diplomatic protection by its Opponent.

The right of challenge of the international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfill its legal function and remove the inconveniences specified.

Arguing that the certificate "constitutes legally valid proof of his nationality," the United States Agent cited the cases of *Rau*,<sup>7</sup> *Meyer Wilder*-

<sup>7</sup> Decided Jan. 14, 1930, by the German-Mexican Claims Commission, 1931-1932 Annual Digest, Case 124.

*mann*,<sup>8</sup> and *Pablo Najera*,<sup>9</sup> and instructions by Secretary of State Blaine to the United States Commissioner on the Spanish American Commission of 1871 in connection with the *Buzzi* case.<sup>10</sup> In contrast, the Italian Agent cited other instructions of American Secretaries of State concerning the same commission.<sup>11</sup> The decision stated:

29. In fulfilling its duties, the Commission can draw its authority from a long series of arbitral precedents, as well as from important qualified legal writings distinctly affirming the power of investigation by the international court in matters of nationality.<sup>12</sup>

. . . The majority of international tribunals has thus accepted this concept. . . .

30. The foregoing point of view is, in any event, that which has been upheld on many occasions by the Agents of the Government of the United States during international proceedings. . . .<sup>13</sup>

31. Abundant doctrine in international law confirms the power of an international court to investigate the existence of the nationality of the claimant, even when this is established *prima facie* by the documents issued by the State to which he owes allegiance and in conformity with the legislation of said State. This opinion is supported, in particular, by distinguished American authors of international law, such as the late professors Borchard and Hyde. . . .<sup>14</sup>

34. The Commission, in conformity with the case law of international tribunals, holds that it is not bound by the provisions of the national law in question, either as regards the manner or as regards the form in which proof of nationality must be submitted. . . .<sup>15</sup>

35. The Commission, on the basis of the research made in jurisprudence and authoritative doctrine, holds that its powers of investigation as to whether Albert Flegenheimer validly acquired United States nationality are all the less disputable in that no American judgment of naturalization has been introduced during these proceedings but a mere administrative statement which, according to the international practice commonly followed, is subjected to the valuation of every court, whether national or international, to which the question of the validity of a nationality is submitted.

<sup>8</sup> *Wildermann v. Heritiers Stinnes*, German-Rumanian Mixed Arbitral Tribunal, June 8, 1926, 6 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 485, 493.

<sup>9</sup> Decided Oct. 19, 1928, by French-Mexican Claims Commission, 1927-1928 *Annual Digest* 301.

<sup>10</sup> 3 *Moore's Arbitrations* 2592, 2618.

<sup>11</sup> *Ibid.* 2599, 2620.

<sup>12</sup> Discussing the *Medina* case before the U. S.-Costa Rican Claims Commission, decided Dec. 31, 1862, 3 *Moore's Arbitrations* 2587; the *Salem* case between the United States and Egypt, June 8, 1932, 2 *Int. Arb. Awards* 1184; the *Hatton* case, Sept. 26, 1928, before the U. S.-Mexican General Claims Commission, 4 *ibid.* 329, *Opinions* (1928-29), p. 6; Nielsen's opinion in the *Naomi Russell* case before the Special Claims Commission (U. S.-Mexico), April 24, 1931, 4 *Int. Arb. Awards* 805; and the *Flutie* cases decided by the American-Venezuelan Commission of 1903, *Ralston, Venezuelan Arbitrations of 1903*, p. 38. The Commission cited several further cases.

<sup>13</sup> Citing *Hunt's Report of the American and Panamanian General Claims Arbitration under Conventions of 1926 and 1932*, pp. 663 and 723; and 8 *Moore's Arbitrations* 2600.

<sup>14</sup> Citing Borchard in 1931 *Annuaire de l'Institut de Droit International* 277 (I); and 2 Hyde, *International Law* 1130-1131 (2nd ed., 1945).

<sup>15</sup> Here the Commission found its conclusion in harmony with that of the Franco-Mexican Commission in the *George Pinson* case, 5 *Int. Arb. Awards* 327, 371.

The Commission nevertheless considers that the observations made by the commentators of the Medina case cannot be ignored, and that international jurisdictions must act with the greatest caution and exercise their powers of investigation only if the criticism directed by one Party against the allegations of the other, not only are not manifestly groundless, but are of such gravity as to cause serious doubts in the minds of their Members with regard to the reality and truth of the nationality invoked.

36. In the instant case, the grounds for doubt in connection with Albert Flegenheimer's nationality are so numerous and so patent, that the Commission could allow him to benefit by Article 78 of the Treaty of Peace with Italy only if all the doubts, raised in its mind over the facts on the basis of which the certificate of United States nationality was issued, were dispelled.

These facts are first of all connected with the validity of Samuel Flegenheimer's naturalization in the United States from which flows the acquisition *jure sanguinis*, of his son Albert's American nationality; subsequently with the loss by the latter of his American nationality as a result of his naturalization together with his father in Wurttemberg in 1894, when he was still a minor; with the long sojourn of the interested party, as a German national, in Germany from 1904 to 1937, with his entry into Canada on February 10, 1939 before the outbreak of World War II, on a German passport which was renewed to him a few days later by the German Consulate at Winnipeg, and then in 1941 by the Swiss Consul in that city, who had taken over the protection of German interests.

The Commission's grounds for doubt are further increased when acquiring knowledge, from the documents in the record, of the fact that all inquiries for information made by Albert Flegenheimer at consular offices and even at an Embassy of the United States in Europe in connection with his American nationality only resulted in negative or dubious answers; that, if he succeeded in obtaining an authorization of making, at the outset, only temporary sojourns in the United States, his case gave rise to conflicting decisions by the State Department and by the Immigration Service of the Department of Justice of the United States; that at the time of the inquests to which he was subjected by American officials, he made statements which are not entirely consistent; that the authorization which was accorded to him to enter the United States as a German national was only modified by a decision of the Immigration and Naturalization Service of February 24, 1942, in the sense that he was thereafter qualified as a citizen of the United States, but that the subsequent inquests which resulted in this amendment of the record of his entry, are defined as irregular by the American counsel for the Italian Government in these proceedings. . . .

37. This Commission owes it to itself, as it owes it to the two States who have placed their confidence in it so as to assure a correct application of Article 78 of the Treaty of Peace with Italy, to make an objective search for the truth and to clarify the legal position which, as far as the Commission, in its capacity as an international organ, is concerned is Albert Flegenheimer's factual position. . . .

From the standpoint of form, international jurisprudence has admitted, without any divergence of views, that consular certificates as well as certificates issued by administrative bodies which, according to the national legislation of the subject State do not have absolute probative value, are not sufficient to establish nationality before in-

ternational bodies, but that the latter are nevertheless entitled to take them into consideration if they have no special reasons for denying their correctness.

From the standpoint of merit, even certificates of nationality the content of which is proof under the municipal law of the issuing State, can be examined and, if the case warrants, rejected by international bodies rendering judgment under the Law of Nations, when these certificates are the result of fraud, or have been issued by favor in order to assure a person a diplomatic protection to which he would not be otherwise entitled, or when they are impaired by serious errors, or when they are inconsistent with the provisions of international treaties governing questions of nationality in matters of relationship with the alleged national State, or, finally, when they are contrary to the general principles of the Law of Nations on nationality which forbid, for instance, the compulsory naturalization of aliens. It is thus not sufficient that a certificate of nationality be plausible for it to be recognized by international jurisdictions; the latter have the power of investigating the probative value thereof, even if its *prima facie* content does not appear to be incorrect. This is particularly true before international arbitral or conciliation commissions who are called upon to adjudicate numerous disputes following troubled international situations, that are the outcome of war, internal strife or revolutions.

The Commission next found that Albert Flegenheimer did acquire United States nationality *jure sanguinis*, despite Italian contentions that the father, Samuel, had no intention to reside permanently in the United States at the time of naturalization, that Samuel's motives were to escape German military service and thus the naturalization was fraudulent, and that by his return to Germany soon after naturalization Samuel lost his American citizenship, even if it had been acquired in good faith. Refusing to apply retroactively later American naturalization statutes, the Commission found that at the crucial time any lack of intent to reside permanently in the United States would not impair naturalization, nor did the motives for which the candidate sought naturalization. During the period between 1874 and 1890, and indeed prior to 1907, United States law did not provide for loss of citizenship (or presumption of loss) on the ground of residence abroad. Since Samuel was an American citizen at the date of his son's birth in 1890, the son Albert became a citizen under the Act of February 10, 1855.

The Commission then discussed whether Albert lost United States nationality through naturalization with his father in Württemberg, and found that he did. To reach this result the Commission applied the "Bancroft Treaty" of 1868 between the United States and Württemberg. Concerning these treaties, the Commission said:

45. The so-called Bancroft Treaties constitute a pattern of agreements concluded by the United States with a large number of European and American States with a view to settling certain nationality conflicts, and, in fact, to put a stop to the malpractices committed by European emigrants who acquired American nationality for the sole purpose of avoiding their military duties in the respective countries, and later returned thereto when in possession of United States citizenship papers, without any intention of returning to this latter country.

. . . All these treaties go under the general name of Bancroft Treaties, even though they were not all negotiated by this diplomat, because they have certain common features. But they do not contain provisions that are wholly alike; there are two types of Bancroft Treaties and even those concluded with the five afore-mentioned German States do not belong to the same category. They can therefore be interpreted one for the other only with caution because many of them have certain peculiarities which are not to be found in the treaties concluded with other States.

Finding that the Bancroft Treaties of the United States with Baden and with Württemberg remained in force after the formation of the German Empire in 1871, the Commission stated:

46. The right of the Italian Government to find support in the Bancroft Treaties was denied by the Government of the United States for two reasons: in the first place because the Treaties are no longer in force; and in the second place because as far as Italy is concerned they are a *res inter alios acta* in view of the fact that she was not a party thereto.

Neither of these two objections is founded.

It cannot be denied that the Bancroft Treaties between the United States and the German States expired on April 6, 1917 as the result of the fact that the United States entered World War I, by virtue of the rules of the Law of Nations which provide that treaties between States are cancelled by the outbreak of war between the signatory States, with the exception of treaties concluded in contemplation of war and of collective treaties which are merely interrupted between the belligerent States, but continue to deploy their effects between neutral and belligerent States. They [the Bancroft Treaties] were not subsequently resumed.

The Bancroft Treaties nevertheless fully deployed their effects until April 6, 1917 (Hackworth, Digest of International Law, III, p. 334 and V, p. 386), that is, during the whole of the critical period during which Samuel Flegenheimer changed nationality for the first time in the United States, and a second time in Württemberg, hence from 1874 to 1894. Their provisions may have exercised influence, first on the loss of Samuel Flegenheimer's Baden nationality as the result of his naturalization in Pittsburgh, the validity of which is admitted by the Commission, and, subsequently, on his own American nationality and on the American nationality of his son Albert Flegenheimer, whose *jure sanguinis* acquisition of United States nationality is likewise admitted by this Commission. . . .

The objection raised that Italy has no title to invoke the Bancroft Treaties because she was not a party thereto is also unfounded. It is a foregone conclusion that Italy is obligated to bear the heavy burdens of reparation and restitution which she accepted under the Treaties of Peace of 1947, only if the persons involved are nationals of one of the "United Nations." . . . She has a right to require that the "United Nations" nationality be established in each case, and to oppose all rebuttal evidence against the allegations of the opponent Parties. That if this rebuttal evidence flows from conventional provisions concluded with a third State, there is no reason why Italy should not invoke them, preliminarily, insofar as they create objective conditions which can be forced not only upon her but on every other State as well. In other words, the treaty is as legitimate a source of nationality vis-a-vis third States as the provision of municipal law of a State which



is not a party to an international dispute and which is invoked by one of the States engaged in this controversy. No distinction should be made according to whether a rule establishing the nationality of a person is contained in the municipal law of a State or in a treaty concluded by the State with another State. . . .

48. The Parties to this dispute are in complete disagreement on the meaning of the Bancroft Treaties. The Agent of the United States and his Counsel consider them as agreements whose essential purpose is to eliminate disputes between States in connection with the diplomatic protection of persons naturalized in a State and returning subsequently to their country of origin, while the Agent of the Italian Republic and his Counsel consider them mainly as conventions governing the nationality of the subjects of one of the contracting States residing in the other, and containing therefore provisions on the acquisition and the loss of title to citizenship of persons whose legal position the signatory States have agreed to settle.

In order to determine their exact scope, it is indispensable to go back to the origin of these Treaties; their conclusion was due to the initiative of the Government of the United States.

As the United States owed its prosperity to a constant flow of European immigrants, beginning with the XIXth century, it was concerned with attaching legally and in a final manner all this new population to the territory wherein it resided. It forcefully affirmed the right of every individual to change his nationality and to expatriate. In this policy of assimilation of aliens the United States clashed with the law of numerous European States which were desirous of preserving, often for military reasons, their emigrated nationals, either because these States constantly followed the principle of perpetual allegiance, or because they subjected the loss of the nationality of origin to governmental authorization (acts of manumission) which was frequently refused to individuals who were still liable to military service in their home country, or, further, because they did not admit that naturalization abroad entailed, by operation of law, the loss of the nationality of origin of their nationals and required the fulfillment of formalities (application for expatriation, specific renunciation) in order to liberate the naturalized individuals from all ties and bonds with the State of origin.

The United States set out with the idea that the naturalization of all aliens established in its territory was to entail immediately the loss of their previous nationality; it inversely admitted that naturalization of its nationals abroad directly caused the loss of American nationality.

Contrasting the language of treaties like that with Baden,<sup>16</sup> providing for renunciation of the acquired nationality by mere action by the individual without any specified period of residence in his old country, the Commission said that in treaties like that with Württemberg,<sup>17</sup>

The result is that these treaties have a direct bearing on nationality, that they do away with dual nationality, as the citizenship of origin is

<sup>16</sup> 1 Malloy 53; Art. IV of this treaty provided: "The emigrant from the one State who, according to the first article, is to be held as a citizen of the other State, shall not on his return to his original country be constrained to resume his former citizenship; yet if he shall of his own accord reacquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country."

<sup>17</sup> 2 Malloy 1895.

undeniably lost by a naturalization abroad accompanied by a five-year residence, because in case of return to the former country, the person concerned must become naturalized in order to re-acquire it. . . .

After a careful analysis of these conventional texts, the Commission is convinced that the Bancroft Treaties with the Grand Duchy of Baden and Wurttemberg, in the relationship with the United States, not only had the purpose of regulating the diplomatic protection of naturalized persons but of determining their nationality as well.

Finding that Samuel Flegenheimer lost his American citizenship by reason of the United States treaty with Württemberg, rather than that with Baden, the Commission stated :

He thus took up permanent residence in Wurttemberg as an American national, and it is likewise in this quality, and not as a former Baden national, that he applied for and obtained Wurttemberg naturalization in 1894, following an uninterrupted residence of twenty years. As the result of this naturalization he directly and finally lost his United States nationality by virtue of Article 1, para. 2 of the Bancroft Treaty of July 27, 1868 concluded between the United States and Wurttemberg, wherein it is provided that :

Reciprocally: citizens of the United States of America who have become or shall become naturalized citizens of Wurttemberg and shall have resided uninterruptedly five years within Wurttemberg shall be held by the United States to be citizens of Wurttemberg and shall be treated as such.

In the foregoing text, like in the corresponding text of the Treaty with the Grand Duchy of Baden of July 19, 1868, the expressions "shall be held" and "shall be treated" do not have the meaning of a mere interruption of the American nationality and of the loss of title to the diplomatic protection of the United States, but of a complete annulment of the title to the nationality of that State, by virtue of the Treaty itself. The Commission must reach this conclusion when faced with the Protocol signed at Stuttgart, on the same date as the Treaty, July 27, 1868, which, although making specific reference to Article 4 of the Treaty, explains very clearly that naturalized persons, in application of Article 1, lose, as a result of their naturalization, their preceding naturalization; Part III of this Protocol reads as follows:

It is agreed that the fourth article shall not receive the interpretation, that the naturalized citizen of the one State, who returns to the other State, his original country, and there takes up his residence, does by that alone recover his former citizenship; nor can it be assumed, that the State, to which the emigrant originally belonged, is bound to restore him at once to his original relation. On the contrary it is only intended, to be declared, that the emigrant so returning, is authorized to acquire the citizenship of his former country, *in the same manner as other aliens* in conformity to the laws and regulations which are there established. Yet it is left to his own choice, whether he will adopt that course, or will preserve the citizenship of the country of his adoption. With regard to this choice, after a two years residence in his original country, he is bound, if so requested by the proper authorities, to make a distinct declaration, upon which these authorities can come to a decision as the case may be, with regard to his being received again into citizenship or his further residence, in the manner prescribed by law.

The Commission could interpret this document established by common agreement of the High Contracting Parties, in no other way than as a recognition of the principle constantly defended by the American authorities in their relationship with foreign States, namely that the nationality of origin is lost *ipso jure*, by virtue of the Bancroft Treaty concluded with Wurttemberg; it draws the conclusion therefrom that even a Wurttemberg national, if naturalized in the United States, when returning to reside in his country of origin, can re-acquire the nationality of this latter country only like any other alien, this means without the slightest doubt that he had lost that nationality as a result of his naturalization in the United States, by virtue of Article I of the aforesaid Treaty, and that, in application of the principle of reciprocity which is at the basis of the Bancroft Treaties, this is all the more so in the case of an American who secures naturalization in Wurttemberg.

The Commission is of the opinion that Article 4 of the Bancroft Treaty with Wurttemberg of July 27, 1868, is not applicable to the instant case; it reads as follows:

If a Wurttemberger naturalized in America renews his residence in Wurttemberg without the intention to return to America he shall be held to have renounced his naturalization in the United States. . . . The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other.

Samuel Flegenheimer never fell under the provisions of this Article, because he was not a Wurttemberg national naturalized in the United States, but an individual of Baden origin. On the other hand, the Bancroft Treaty of July 19, 1868 with the Grand Duchy of Baden (Art. 4) fails to recognize this loss of American naturalization as the result of the return to reside in the country of origin without *animus revertendi* to the United States; it only provides for a new naturalization in the country of origin accompanied by a voluntary renunciation of the naturalization secured in the United States; but this provision also was inapplicable to Samuel Flegenheimer who could not be qualified as a Baden national returning to his country of origin. The two treaties are not complementary and the provisions of one cannot be invoked in order to make good the inapplicability of the provisions of the other. It is therefore by virtue of Article I, para. 2 of the Treaty between Wurttemberg and the United States that Samuel Flegenheimer and the members of his family, under his control and guardianship as a husband and a father, lost their American nationality.

52. Samuel Flegenheimer's naturalization in Wurttemberg was formally extended, by the very act under which he secured said naturalization, to his wife and to his minor children, namely, Joseph who was then 18 years old, Eugen who was 6 and Albert who was 4. The three of them, through their father, lost, under the Bancroft Treaty concluded between the United States and Wurttemberg, the American nationality they had acquired *jure sanguinis*. The collective effects of Samuel Flegenheimer's naturalization on the members of his family, under his control and guardianship as a husband and as a father, are explicitly confirmed by the excerpt from the Register of families of the Schwäbisch-Hall district, as well as by a statement, introduced in the record, of the Government of the district of his domicile in Wurttemberg (Königliche Kreisregierung) of August 23, 1894. They fulfilled the conditions of domicile required by the Treaty of July 27,

1868; although Albert was only four years old on the date of the naturalization of his father, he too falls under the provisions of this Treaty. The Protocol annexed thereto explicitly provides in Part I (1):

It is of course understood, that not the naturalization alone, but a five years uninterrupted residence is also required, before a person can be regarded as coming within the treaty; but it is by no means requisite, that the five years residence should take place after the naturalization.

It is therefore immaterial whether the five-year uninterrupted residence is placed before or after the grant of naturalization; it is in any event established that Albert Flegenheimer resided uninterruptedly for more than five years in Wurttemberg, since birth and immediately after his naturalization. One could admit that he lost title to United States nationality only in 1895, a chronological verification that is devoid of all pertinence for the purpose of settling this dispute.

53. Moreover, the Bancroft Treaty of July 27, 1868, like the others, does not specifically decide the question of the extension, to the minor children of an American national, of the loss of United States nationality by the head of the family who secured naturalization in Wurttemberg. As the collective effects assigned to a naturalization under the laws of a State do not have as a necessary corollary an expatriation with collective effects in the State of origin, the laws of which may have adopted, by way of hypothesis, the principle of individual expatriation, the question must be settled by an interpretation of the Treaty that is binding on the two Parties.

A literal interpretation of Article 1, para. 2 of the Treaty between Wurttemberg and the United States of July 27, 1868, leads to the recognition that all of Samuel Flegenheimer's minor children, who were naturalized with him, lost by this fact, like him, their American nationality.

The starting point of the *processus* of all interpretation of an international treaty is the text on which the two Parties have agreed; it is evident that the main point of an international agreement lies in the concordant intent of such Parties and that, without this concordance, there are no rights or obligations which arise therefrom. . . .

International jurisprudence has made an extensive application of this rule of interpretation. . . .

The Treaty of July 27, 1868 does not afford any exception to the rule of the loss of American nationality following the naturalization in Wurttemberg of minor children included in their father's change of nationality. There is therefore no ground for inserting it in the text of the Treaty and taking it for granted; "*ubi lex non distinguit, nec nos distinguere debemus*." Such is the wisdom of centuries.

A teleological interpretation of the aforesaid Treaty does not lead to a different result. As the genesis of the Bancroft Treaties discloses, the main concern of the United States in concluding these treaties was to put a stop to the evil usage and inconveniences of dual nationality, by adopting the rule that every naturalization in the United States accompanied by a permanent residence, entailed as a consequence, automatically, the loss of the former allegiance; and the United States succeeded in obtaining this result only by admitting, in its turn, by way of reciprocity, that American nationality would not continue to exist following naturalization, accompanied by permanent residence, of an American national abroad. Therefore, the principal purpose of these

treaties is to link every naturalization in a State, the seriousness and sincere character of which is proved by a durable residence, with expatriation in the other State.

A search for the agreed intent of the contracting Parties, at the time the Bancroft Treaties were concluded, does not lead to another result.

As for an alleged right of the naturalized child to elect American nationality upon reaching majority, provided he returns to the United States, the Commission declared:

Although this right of election was not included in any positive law, at that time, it was considered as a legal rule constantly admitted and sanctioned by the Supreme Court in the *Perkins v. Elg* case in 1939, subject to the provisions contained in international treaties.

This right of option was never analyzed very thoroughly by American jurists, so that it was not possible to establish whether for the minor children involved, it is a question of loss of American nationality under a resolving condition of option and of return to the United States, or of reintegration in their American nationality suspensively conditioned upon option and return to the United States. In the first case, these minors would lose their American nationality as a result of the naturalization of their father abroad, and would only be vested with the nationality of their father during the whole of their minority, but could re-acquire their American nationality by an option entailing the cancellation of the loss which had previously occurred; in the second case these minor children would maintain their nationality during their minority, they would thus have simultaneously the quality of American nationals and of nationals of the country of naturalization of their father, but would still be required to elect in favor of American nationality and to return to the country of their birth; failing the option, they would lose this latter citizenship and would remain vested only with the nationality acquired by their naturalized father.

The Commission must note that the Treaty of 1868 with Wurttemberg contains no reservation in favor of this right of option. If it had been the intent of the contracting parties to admit it, they would have introduced certain provisions in their agreement which the Commission cannot presume. It is in fact the custom of introducing in international conventions, directed at combating or preventing dual nationality, special rules if the right of option is reserved to minor children naturalized with their parents in one of the contracting countries, as is particularly the case in the Franco-Swiss Convention of July 23, 1879, and of establishing, very accurately, this right of option which must be made use of within certain time limits and before certain designated authorities.

The gap of the Treaty in this connection leads the Commission to note that Wurttemberg has always applied, in its municipal law, the principle of naturalization and expatriation with collective effects, and that the same principle was generally followed by the United States until 1939.

The Commission distinguished the decision in *Elg v. Perkins*<sup>18</sup> in favor of the minor's right to elect American citizenship upon coming of age, saying:

<sup>18</sup> 307 U. S. 325 (1939); 33 A.J.I.L. 773 (1939).

This Commission believes that this precedent, the importance of which it does not deny, is applicable, in the interpretation of an international treaty to the specific case of election of American nationality by a minor child born in the United States territory, of parents who were naturalized in the United States, and later taken by them to their country of origin where the latter re-acquired, by virtue of a special applicable authorization of the Bancroft Treaty, their nationality of origin, under conditions established at the discretion of the Government of that country, hence without a naturalization procedure; election of nationality must be accompanied by a return to the United States shortly after the minor child reaches majority.

None of these particular circumstances have occurred in the instant case. Albert Flegenheimer's position in fact differs from that which appeared in the *Perkins v. Elg* case, on essential and numerous points.

Albert Flegenheimer had been born abroad, not in the United States; he had lived in Germany until he was 47 instead of coming to the United States within a year after majority; in contrast to Miss Elg, he apparently did not make any election of American citizenship until he was 49, and then "under the pressure of political events and in the furtherance of his business"; and the Bancroft Treaty with Sweden conferred a discretionary power for "establishing the conditions of reintegration of a naturalized person in her nationality of origin, whereas the Bancroft Treaty with Wurttemberg contains very clear and precise provisions to the contrary, namely, the naturalized person who returns to his country of origin can recover the nationality thereof only 'in the same manner as *other aliens* in conformity to the laws and regulations which are there established.'" The Commission added that, unlike the *Elg* case, Albert Flegenheimer was not vested with dual nationality, and concluded that "the *Perkins v. Elg* case is not applicable to his case by reasons of fact and of law."<sup>10</sup>

The Commission summarized its decision on the crucial nationality point as follows:

The Commission, taking as a basis the Bancroft Treaty concluded on July 27th, 1868, between the United States and Wurttemberg, is of the opinion that Albert Flegenheimer lost his American nationality through the naturalization of his father in Wurttemberg, in 1894, and that he never subsequently recovered it, either because he did not have a legal possibility to do so by virtue of laws which were applicable at the time of his naturalization in Germany, or, in the hypothesis most favorable to him, because it must be admitted that the right of election he claims he had in favor of American nationality was exercised too late by him.

The Commission can therefore dispense with entering upon the remedy of law based on expatriation, resulting from an absence of *animus redeundi*, of persons naturalized in the United States, as the result of prolonged residence in their country of origin or in another foreign State.

<sup>10</sup> The Commission discussed *Rueff v. Brownell*, 116 F. Supp. 298 (D.N.J. 1953), and rejected its applicability to the instant case.

Going on to examine other Italian defenses, the Commission refused to apply here any theory that "effective nationality" was required in order to have a claim under the Peace Treaty; and said that if in fact he were an American citizen, Albert's rights would not be diminished under any theory of "apparent nationality" because of his use of a German passport.<sup>20</sup>

The Commission also rejected the theory that Flegenheimer was a "United Nations national" under the second paragraph of Article 78, paragraph 9(a), as a person "treated as enemy," since no actual treatment as an enemy by Italian authorities could be shown. The United States argued that this term mean not necessarily "treatment" as enemies, but that it was enough if they were considered as such under the legislation in force in Italy during the war. This American contention was based on the fact that, although in the English and French texts the words used were "treated" and "*traités*," in the equally authentic Russian the word was "*rassmatrivat*," which could only mean "considered" since there was another Russian expression for "treated." In the Italian translation (not authentic under Article 90 of the Treaty), the word used, "*considerate*," was said to be an exact translation of the Russian rather than of the French and English. Rejecting this argument, the Commission found that it would not be proper to "take the Italian translation to corroborate one of the three authenticated originals, nor to contend that the Italian Government is bound by the Italian text" (at least in the absence of something amounting to estoppel). It said:

It cannot be denied that the interpretation of the text of a treaty can be made only by using the versions that have been declared to be authenticated originals by the Treaty itself.

When the texts of an international treaty prepared in different languages cannot be exactly reconciled with one another, the Commission, according to the teachings of international law, believes that

<sup>20</sup> Seeking to restrict the theory of the International Court of Justice in the *Nottebohm Case*, [1955] I.C.J. Rep. 4, 49 A.J.I.L. 396 (1955), the Commission limited the theory of "effective or active nationality" to cases of dual nationality, saying: "There does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity, and the persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business center is located, would be exposed to non-recognition, at the international level, of the nationality with which they are undeniably vested by virtue of the laws of their national State, if this doctrine were to be generalized."

As for "apparent nationality," the Commission said it "cannot be considered as accepted by the Law of Nations." Instead, "Barring cases of fraud, negligence or serious errors which are not proved in the instant case, the Commission holds that there is no rule of the Law of Nations, universally recognized in the practice of States, permitting it to recognize a nationality in a person against the provisions of law or treaty stipulations, because nationality is a legal notion which must be based on a state law in order to exist and be productive of effects in international law; a mere appearance cannot replace provisions of positive law governing the conditions under which a nationality is granted or lost, because international law admits that every State has a right, subject to treaty stipulations concluded with other States, to sovereignly decide who are its nationals."

adjustment should be made on the basis of all the texts stated to be authenticated originals by the Parties.

"Considered" in the Russian included "treated" in the French and English. "The true and proper meaning of all international treaties should always be found in the purpose aimed at by the Parties." The Russian text did not seem to answer the intent as well as the narrower term "treated," since paragraphs 1 through 4 of Article 78 were drawn up "for the purpose of assuring restoration to persons injured by exceptional war measures introduced in Italian legislation":

A restoration of property, rights and interests is not conceivable unless these were previously injured in such a manner as to engage the responsibility of the Italian State, subject only to material and direct war damages caused by military operations.

Particularly with reference to paragraph 3,

The meaning to be given to the Article in question is hence one of concrete, effective treatment, meted out to a person by reason of his enemy status, and not by abstract considerations envisaging the mere possibility of subjecting him to a course of action by the State of such a nature as to cause injury on the grounds that such a person would fulfill the conditions for being considered, under the terms of a legal provision of municipal law, as an enemy person.

Reviewing the facts concerning the transfer of stock now sought to be set aside, the Commission was not satisfied that the claimant had actually been "treated as an enemy" by the Italian authorities.

#### NOTES

##### *Admiralty—Carriage of Goods by Sea Act—bills of lading—liability of carrier's agent for negligence*

A shipper sued the stevedore for negligence in handling cargo. The stevedore, agent of the carrier, claimed limitation of liability under Section 4(5) <sup>1</sup> of the Carriage of Goods by Sea Act and under the terms of the bill of lading, although neither included specifically agents of the carrier. The Supreme Court held unanimously that the stevedore was not protected by the limitations. *Robert C. Herd & Company v. Krawill Machinery Corp.*, 359 U. S. 297 (U. S. Sup. Ct., April 20, 1959, Whittaker, J.).

##### *Treaties—desertion—within American port*

Spanish Navy seamen on shore leave in San Diego crossed into Mexico before their leave expired. American naval authorities, after facilitating the return of the seamen to the United States, proposed to turn them over to the Spanish Navy under Article XXIV of the Treaty of 1902.<sup>2</sup> The seamen brought *habeas corpus* proceedings. The District Court refused a writ. On appeal, the decision was reversed on the ground that the treaty was inapplicable, since the desertion did not occur in an American port.

<sup>1</sup> 46 U.S.C. § 1304 (5).

<sup>2</sup> 33 Stat. 2117.



*Medina v. Hartman*, 260 F. 2d 569 (U. S. Ct. A., 9th Cir., July 17, 1958, Chambers, Ct. J.).

*Tax treaties—permanent establishment*

In *C.I.R. v. Consolidated Premium Iron Ores, Limited*, 265 F. 2d 320 (U. S. Ct. A., 6th Cir., April 10, 1959, Cecil, D.J.), a Canadian corporation was held not to have a permanent establishment in the United States within the meaning of the Tax Convention and Protocol between the United States and Canada.<sup>3</sup>

*Diplomatic immunity—perjury—witnesses*

In *Diehl v. U. S.*, 265 F. 2d 344 (U. S. Ct. A., Dist. of Col., Jan. 15, 1959, *Per Curiam*), witnesses having diplomatic immunity were held competent to testify in a criminal trial.

*Tariffs—effect of proclamation terminating trade agreement on earlier proclamation under Tariff Act*

In *Barclay & Company v. United States*, 167 F. Supp. 264 (U. S. Customs Court, 1st. Div., Oct. 9, 1958, Wilson, J.), a Presidential Proclamation terminating the Trade Agreement with Mexico was held to have merely suspended and not superseded a prior proclamation under the Tariff Act, and that Section 350(a)(2) of the Tariff Act of 1930, as amended,<sup>4</sup> was not applicable to terminating proclamations.

*Extradition—offenses within treaty—sufficiency of complaint*

A complaint for extradition charged the defendant with a "crime of fraud." The court held the complaint insufficient to notify defendant and that the offense charged was not an offense included within Article 2(19) of the 1899 Treaty with Mexico.<sup>5</sup> In *Re Wise*, 168 F. Supp. 366 (U. S. Dist. Ct., S.D., Texas, Oct. 31, 1957, Allred, D.J.).

*Admiralty—Jones Act—joinder with maritime claims*

In *Bartholomew v. Universe Tankships, Inc.*, 263 F. 2d 437 (U. S. Ct. A., 2d Cir., Jan. 9, 1959, Medina, Ct.J.), the test of "substantial" contacts was said to govern the applicability of the Jones Act,<sup>6</sup> and the doctrine of pendent jurisdiction to justify the sending of a seaworthiness count to the jury along with the Jones Act count in a case without diversity on the civil side of the district court. Lunbard, Ct.J., concurring, took the position that the Jones Act itself authorized a seaworthiness count as an action for damages for personal injury. See also *Bobolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236 (U. S. Dist.

<sup>3</sup> 56 Stat. 1399.

<sup>4</sup> 19 U.S.C.A. § 1351.

<sup>5</sup> 31 Stat. 1818.

<sup>6</sup> 46 U.S.C. § 688.

Ct., S.D.N.Y., Nov. 18, 1958, Irving R. Kaufman, D.J.), in accord on pendent jurisdiction, and holding that American ownership and control of a foreign corporate owner of a foreign flag vessel is, by itself, sufficient for jurisdiction under the Jones Act. On the latter point, *semble* accord, *Rodriguez v. Solar Shipping, Ltd.*, 169 F. Supp. 79 (U. S. Dist. Ct., S.D.N.Y., Aug. 13, 1958, Cashin, D.J.).

*Warsaw Convention—limitation of liability—governmental set-off not compliance with statute of limitations*

In a suit for air freight charges, the U. S. Government counterclaimed for loss on an earlier shipment, which was made on a government form without a statement subjecting the shipment to the limitations of liability of the Warsaw Convention.<sup>7</sup> The court held the carrier was not entitled to the limitations of liability. The carrier claimed that Government rights were lost by its failure to sue within two years as required by Articles 28 and 29 of the Convention. The court held that governmental set-off within two years was not effective to toll the statute of limitations. *Flying Tiger Line, Inc. v. United States*, 170 F. Supp. 422 (U. S. Ct. of Claims, Feb. 11, 1959, Madden, J.).

*Requisition of ship contracts and shipyards—convention with Norway*

A convention of March 28, 1940, between Norway and the United States<sup>8</sup> provided for the disposition of Norwegian claims on behalf of Hannevig for requisitions during and after World War I by the Court of Claims with the consent of Congress. The Court of Claims held, unanimously, that there was no adequate proof of alleged oral contracts; that rights under actual contracts were effectively released; and that the requisition orders did not include actual shipbuilding facilities. *In Re Government of Norway*, 172 F. Supp. 651 (U. S. Ct. of Claims, April 14, 1959, Jones, C.J.).

*Treaties of friendship—workmen's compensation laws discriminating against aliens*

The claimant, a British subject about to become non-resident, was awarded one-half of a scheduled award under Section 17 of New York's Workmen's Compensation law. The claimant appealed on the basis of Article X of the Jay Treaty<sup>9</sup> and Articles II and V of the Convention of 1899.<sup>10</sup> The claim was rejected on the ground that these treaties did not apply to workmen's compensation laws. *Heaton v. Delco Appliance Div., General Motors Corp.*, 180 N.Y.S. 2d 173 (Sup. Ct., App. Div., 3d Dept., Dec. 2, 1958, Herlihy, J.).

<sup>7</sup> 49 Stat. (2) 3000 *et seq.*

<sup>8</sup> 62 Stat. 1798.

<sup>9</sup> 8 Stat. 116.

<sup>10</sup> 31 Stat. 1939.

## BRITISH AND COMMONWEALTH DECISIONS \*

*Taxation—United Kingdom income tax—checks drawn on American account sold to authorized dealer not income*

*Thomson (Inspector of Taxes) v. Moyes*, noted in 53 A.J.I.L. 189 (1959), affirmed by the Court of Appeal, [1959] 2 W.L.R. 577, 1 All E.R. 660 (Jenkins and Romer, L.J.J., Pearce, L.J., dissenting, March 9, 1959).

*Conflict of laws—foreign legislation—effect of foreign legislation on contract of guarantee governed by English law—liquidation of guarantor corporation—new entity exempt from guarantor's liability—retroactive legislation—debt due after exemption granted*

The Court of Appeal reversed the decision previously digested in 53 A.J.I.L. 187 (1959), on the ground that the action had been based on rights which arose after Decree 3504 of the Greek Government had come into effect. Thus when the cause of action arose the guarantor of the bonds was no longer in existence so as to be held liable thereon, nor could the National Bank of Greece and Athens, S.A., be deemed its successor, for Decree 3504 expressly stated that it was not. The Court of Appeal distinguished *National Bank of Greece and Athens, S.A. v. Metliss*, [1958] A.C. 509, on the ground that when that action had been brought, Decree 3504 had not been issued and the National Bank was deemed the successor to the guarantor bank. The plaintiffs were relying on Greek law as creating the new entity as successor to the guarantor bank. They must thus also accept Greek law as determining the liabilities of such new entity. There were no contractual ties between the plaintiffs and the National Bank, on which the plaintiffs could rely. *Adams & Others v. National Bank of Greece and Athens, S.A.*, [1959] 2 W.L.R. 800, 2 All E.R. 362 (Court of Appeal, Lord Jenkins, Morris and Ormerod, L.J.J., April 29, 1959).

*Taxation—evasion of foreign revenue laws—presumption of advancement—equitable relief*

A British subject and his American wife had a joint account in an American bank into which the husband made all deposits. Securities had been bought in the wife's name so as to evade the withholding tax to which the alien husband would have been liable. When the parties became estranged, the wife sold the securities. In an action to recover the proceeds thereof, Wynn-Parry, J., held that the purchase of the securities in the name of the wife raised the presumption of an advancement in her favor which could only be rebutted by proving the attempt to evade U. S. taxes. Had this been a U.K. tax, the husband would not have been able to raise this point when claiming equitable relief. Although it is a foreign tax which

\* These decisions and the American Enemy Property and Nationality Cases were prepared by Egon Guttmann, Esq., LL.B., LL.M. (London), Ford Graduate Fellow, Northwestern University School of Law.

the husband tried to evade, a court of equity will not assist him in the breach of the law of a friendly country when he is seeking equitable relief. *Re Emery's Investments Trust. Emery v. Emery*, [1959] 2 W.L.R. 461, 1 All E.R. 577 (Ch. D., Wynn-Parry, J., Feb. 27, 1959).

*Taxation—double taxation—estate duty—part of estate outside New Zealand*

Part of the estate consisted of shares in a trading company and were situated in New South Wales, Australia. In assessing the exemption from double taxation granted by the New Zealand Estate and Gift Duties Act, 1955, Section 35(1), N.Z. Act 105, 1955, the amount of estate duty to be deducted from payments in New Zealand is the amount payable in New Zealand in respect of foreign property, and not the amount of duty payable in Australia. In view of the initial tax-free exemptions, this amount is to be ascertained by taking the total value of the estate and assessing the rate of duty payable in relation thereto, deducting at such rate from the duty payable in respect of foreign assets. *Pollock v. Commissioner of Inland Revenue*, [1959] N.Z.L.R. 559 (Sup. Ct., McGregor, J., Feb. 18, 1959).

AMERICAN CASES ON ENEMY PROPERTY

*Enemy Property. Legerlotz v. Rogers*, 266 F. 2d 457 (D. C., April 16, 1959), the Attorney General's order revoking the return of enemy property after the signing of the Blum-Byrnes Agreement between the U. S. and France [63 Stat. 2507 (1949)] cannot be reviewed by the court; *Bosh v. Rogers*, 169 F. Supp. 877 (D. C. Feb. 2, 1959), a naturalized Haitian of German extraction, who voluntarily resided in Germany during war, is an "enemy" under the Act and not entitled to return of his property; *G.M.O. Niehaus & Co. v. U. S.*, 170 F. Supp. 419 (Ct. Cl., Feb. 11, 1959), property acquired by a German after Dec. 31, 1946, is not subject to vesting order; *Kimiko Arita v. Rogers*, 173 F. Supp. 17 (D. Hawaii, Feb. 26, 1959), Japanese resident in Hawaii who only visited the U. S. mainland when husband was interned there, and visited Japan for a short while after the war, was a permanent resident of Hawaii and not of Japan or any territory of an enemy of U. S., including occupied territories between Dec. 7, 1941, and May 4, 1954, and is thus entitled to the return of seized property; *Rogers v. Hertlein*, 172 F. Supp. 610 (E.D.N.Y., April 21, 1959), a debt of an American agent of an enemy alien to his principal can be the subject matter of a vesting order.

AMERICAN CASES ON NATIONALITY

*Citizenship. Eng v. Dulles*, 263 F. 2d 834 (2d Cir., Feb. 16, 1959), evidence is insufficient to show applicants to be natural children of citizen father, who neither supported nor acknowledged them until after application; *Gonzales-Jasso v. Rogers*, 264 F. 2d 584 (D. C., March 5, 1959), admission of having voted in foreign election, though made on oath, can be retracted, and burden remains on U. S. to prove expatriation; *Tugade*

v. *Hoy*, 265 F. 2d 63 (9th Cir., March 30, 1959), Philippine Independence Act, 1934, 48 Stat. 456, and Presidential Proclamation No. 2696, U.S.C.A. § 1281a, made thereunder, are not unconstitutional, though resulting in plaintiff becoming an alien; *Wong Kwai Sing v. Dulles*, 265 F. 2d 131 (9th Cir., April 6, 1959), testimony containing improbabilities and discrepancies was properly rejected; *Reyes v. Neelly*, 264 F. 2d 673 (5th Cir., April 22, 1959), burden of proving citizenship is on claimant, so that where the basis of citizenship is birth in U. S. and this is destroyed by contrary evidence, the certificate of citizenship fails (note strong dissenting judgment); *Eng Wee Lem v. Dulles*, 266 F. 2d 550 (2d Cir., May 1, 1959), testimony of alleged parents was false in material respect, and conduct of alleged parents was not demonstrative of a parental relationship, thus the claim was rejected; *Lee Hon Lung v. Dulles*, 171 F. Supp. 830 (D. Hawaii, April 10, 1959), decision of a Board of Special Inquiry is not *res judicata* but requires clear, unequivocal and convincing evidence to rebut it.

*Deportation.* *De Souza v. Barber*, 263 F. 2d 470 (9th Cir., Jan. 30, 1959), deportation 26 years prior to last unlawful entry cannot be attacked collaterally in deportation proceedings based on present unlawful entry; *Wong Hing Goon v. Brownell*, 264 F. 2d 52 (9th Cir., Feb. 18, 1959), appellant who failed to prove blood relationship to U. S. citizen, when seeking admission to U. S., could be deported and there is no discretion in Attorney General, for he was not an alien "within the United States" under § 243(h); *Cavallaro v. Lehmann*, 264 F. 2d 237 (6th Cir., Feb. 18, 1959), alien is deportable if, at date of entry, he is within the class of excludable aliens; suspension of deportation order is a matter of grace, not of right; *Kimm v. Hoy*, 263 F. 2d 773 (9th Cir., Feb. 19, 1959), refusal to answer whether alien was or had been a member of the Communist Party amounted to failure to prove affirmatively "good moral character"; *U. S. v. Murff*, 264 F. 2d 926 (2d Cir., March 3, 1959), deportable Chinese seaman refused admission to Formosa could only be deported to Chinese mainland if Communist Government would accept him; *Cakmar v. Hoy*, 265 F. 2d 59 (9th Cir., March 23, 1959), the exercise of the Attorney General's discretion is only reviewable to see whether procedural due process was followed; *Tugade v. Hoy*, 265 F. 2d 63 (9th Cir., March 30, 1959), though the Philippines at the date of entry was not a foreign country, alien is deportable; a statute making drug addicts or persons unlawfully possessing or trafficking in drugs deportable has retroactive effect; *Exarchou v. Murff*, 265 F. 2d 504 (2d Cir., April 15, 1959), a right of voluntary departure is in discretion of Attorney General and denial of such right is not to be arbitrary or capricious; it is the good character of the alien which is relevant and not his reputation of good character; *Niukkanen v. McAlexander*, 265 F. 2d 825 (9th Cir., May 19, 1959), a dues-paying, card-carrying, actively participating member of the Communist Party had "meaningful association" so as to be deportable; *Tahir v. Lehmann*, 171 F. Supp. 589 (N.D. Ohio, Jan. 2, 1959), injustice of deportation of long-resident alien is an argument for Congress; the court must enforce a

statutory enactment and has no discretion; *Kazanov v. Murff*, 170 F. Supp. 182 (S.D.N.Y., Feb. 11, 1959), alien need only prove time, place and manner of entry, the burden of proving deportability being on the immigration authority; *Mesina v. Hoy*, 170 F. Supp. 502 (S.D. Calif., Feb. 19, 1959), the Attorney General has discretion whether to institute deportation proceedings on latest illegal entry or to reinstate previous deportation order; *Rizzi v. Murff*, 171 F. Supp. 362 (S.D.N.Y., March 16, 1959), an alien is entitled to a fair hearing before denial of voluntary departure, but not to a right of appeal against such denial; *Chong Chak v. Murff*, 172 F. Supp. 151 (S.D.N.Y., April 17, 1959), a country only needs to show willingness to accept an alien, not to guarantee that he will never be deported from such country.

*Naturalization.* *Tak Shan Fong v. U. S.*, 259 U. S. 102 (March 23, 1959), naturalization of alien Korean War veteran requires lawful entry into U. S. followed by one-year residence prior to service, though such residence need not continue to remain lawful; *Gilligan v. Barton*, 265 F. 2d 904 (8th Cir., April 23, 1959), a finding of fact that petitioner knew that application for exemption from military service disbars him from citizenship was left to the trial judge; *Petition for Naturalization of Rabanal*, 169 F. Supp. 918 (D. Md., Jan. 15, 1959), a Philippine national, admitted to permanent residence in Hawaii, where he filed petition, can be naturalized on U. S. mainland which he entered as a non-immigrant; *Petition for Naturalization of Rosenbaum*, 171 F. Supp. 141 (S.D.N.Y., March 2, 1959), filing an intention to become naturalized gave "a right in process of acquisition" which was preserved by the Immigration and Nationality Act, 1952, so that there was no need for two and one-half years' continuous residence, nor did a delay of seven years after filing involve a forfeiture of such right; *Petition for Naturalization of Meng Chung Yang*, 171 F. Supp. 898 (D. C., April 13, 1959), a plea of lack of comprehension of effect of application for exemption from military service was accepted; petitioner should have been originally classified as a student so as not to have had to make such application; *Petition for Naturalization of Louis Bronkovitch*, 172 F. Supp. 319 (D.Md., April 20, 1959), an illiterate enemy alien, inducted into the Army during World War II, who orally answered that he did not want to fight and was discharged, made no intelligent choice between exemption and citizenship, for none existed at that time, nor was his oral answer an application for exemption on ground of alienage; *Petition of Kauffmann*, 148 A. 2d 925 (Sup. Ct. Pa., March 16, 1959), since the draft board can reclassify and the Service accept a person who made application for exemption, such application cannot make a person "permanently ineligible" without giving him the right to reconsider.

*Denaturalization.* *U. S. v. Frank Costello*, 171 F. Supp. 10 (S.D.N.Y., Feb. 20, 1959), admissions before a Grand Jury warrant revocation of naturalization obtained by means of fraudulent, false and misleading statements, though activities concealed were no longer offenses; *U. S. v. Galato*, 171 F. Supp. 169 (M.D. Pa., Feb. 25, 1959), deliberate misrepresentation and falsehood in naturalization proceedings warrant denaturalization,

though the truth, if told, might not have resulted in a refusal of citizenship; *U. S. v. Rossi*, 171 F. Supp. 451 (N.D. Calif., March 16, 1959), assumption of identity of brother prior to admission to U. S. with no intention to deceive does not warrant denaturalization.

*Miscellaneous.* *Madox v. U.S.*, 264 F. 2d 243 (6th Cir., Feb. 18, 1959), where no administrative steps have been taken to revise national service classification, a renunciation of citizenship and claimed allegiance to a foreign flag does not make such classification incorrect.

## BOOK REVIEWS AND NOTES

*Académie de Droit International. Recueil des Cours, 1956.* Vols. I and II (Tomes 89 and 90 of the Collection). Leyden: A. W. Sijthoff, 1957. Vol. I: pp. x, 721, Index; Vol. II: pp. x, 978, Index. Fl. 40 each.

The lectures at the 1956 session of the Hague Academy of International Law, reprinted in these volumes, were delivered by scholars from Australia (one), Belgium (one), France (three), Greece (one), Italy (two), Portugal (one), Switzerland (two), The Netherlands (one), the United Kingdom (one), and the United States (one). Professor Ago's lectures, although delivered at the 1955 session, are published in the second volume "because of special circumstances" and without setting a precedent. The lectures are reviewed in the order in which they were published.

Charles Chaumont ("Nations Unies et Neutralité," Vol. I) regards neutrality as an application of the "competence of peace" which is the correlative of "competence of war." Since the League of Nations introduced the concept of collective security the classic concept of neutrality (abstention and impartiality) has undergone a change which affects a change in the "competence of war," whereas the other component of neutrality, namely, neutral rights of trade and commerce were wiped out by the belligerents in both world wars. As a result impartiality became incompatible with League membership, but not abstention, as evidenced by Switzerland's exceptional position in the League. The admission of Austria in 1955 to the United Nations once again raised the question of the compatibility of a status of permanent neutrality with the system of collective security of the United Nations. A summary review of the pertinent articles of the Charter leads the author to contend that abstention is compatible with Article 2, paragraph 5, as well as with Article 43. Following Lalive, the author argues that Article 48 clearly offers the Security Council the opportunity to respect the neutrality of Members. This would be so particularly in the case of Austria, which was admitted in full knowledge of its status of neutrality recognized by the great Powers minus China.

Concluding, the author is of the opinion that a permanently neutral state derives even advantages from membership in the United Nations, as its neutrality is then recognized, respected and supervised by the Organization. However, in some cases or in some regions, neutrality may be the most effective means of United Nations action, for both this and neutrality have the same supreme goal: peace.

Julius Stone ("Problems Confronting Sociological Enquiries concerning International Law," Vol. I) outlines the task of a sociology of international law both in its ideal scope and depth and its present limited possibility. There is no doubt about the significance of the task, for he regards systematic sociological inquiries about international law "as indispensable for the human future, at any rate in so far as the human future is deemed



to depend on the role of international law." But, he warns, "to recognize the urgent need to establish this body of knowledge . . . is not to prove that it is or can be established." A sociology of international law is concerned with "the extra-legal factors which determine its contents and growth" and therefore its central problem consists in "the clarification of the relation between state entities and the play of interests and attitudes and behavior of human beings within and between the several state domains." If the study of international law is to become "homocentric" it must concern itself with human communication within and between state communities; it must not be centered, as it has been, on the "depersonalized state entity, and abstract social mechanisms" and regard international law as rules governing relations between "state apparatus." A sociology of international law assumes then, with Max Huber, that there exists a "sociological substratum," or, in Stone's definition, that there are "extra-legal data, knowledge of which is relevant to understanding of the role of that law, and its stability, change and breakdown in the course of its development." It assumes further than "this substratum is cognoscible, capable of being known to a degree permitting communication concerning it." The first assumption can hardly be denied. The second, to which is devoted a major portion of Stone's lectures, highly philosophical and abstract in language, is more than dubious. In view of the formidable difficulties inherent in the second assumption, it is Stone's contention

that a sociology of international law must renounce for the time being any tasks which involve the explanation of the contents, or of the phases of stability, change and breakdown, of international law in terms of the claims and attitudes of human beings generally who make up the various State communities.

However, some progress might be made on a less basic, perhaps intermediate level of inquiry. Stone suggests studies of the motivations causing observance as well as non-observance of international law by foreign offices. This feasible study or range of studies is distinguished from McDougal's proposal for a reconstruction of traditional international law in terms of a law of human dignity, which Stone regards as "chimerical." Also suggested are problems of more mundane character, such as limits of lawful naval operations against enemy and neutral merchant vessels, the law of international claims, some problems of international organization. Also feasible and desirable are historical studies of some branch of international law "which we know to have grown or broken down within a limited span of years, and to examine the process of growth or disruption in detail, not only on the diplomatic level, but on the level of national policy making and administration within each State, and of its ramifications within the economic and political life of each State, and the relations between States." Work along parallel lines should be undertaken in the main centers, and not in exclusively "like-minded" states, and only by "the bravest, clearest and firmest intellects" and by international lawyers who have equipped themselves "competently in all the disciplines relevant to an understanding of the sociological substratum of international law."

One key to the solution of the problem of a sociology of international law is communication. Stone has probably endeavored to communicate his thoughts to the listener and reader. This reviewer freely admits that a good deal of the philosophical discourse with which Stone interlaced his observations on international law is beyond his ken. In spite of occasional breakdowns of communication, this is an earnest plea for the pressing need to explore with greater objectivity than has often been the case both the superstructure and the substratum of international law. A perfect job may go beyond our reach, but this must not discourage us from exploring the points of strain and strength in the current body of international law and organization.

Professor Philip C. Jessup ("Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations," Vol. I) boldly, but with consummate skill, offers an introductory study to a baffling by-product of the growth of modern political international organization. Following Dean Rusk, the term "parliamentary diplomacy" refers to multilateral negotiations within an international organization, characterized by public debate conducted in accordance with fixed rules of procedure and issuing in formal conclusions. These rules of procedure are without any question, as the author insists, in the nature of international law, but subordinate to the constitutional law of the organization and, subject to that proviso, binding upon its members. They are "international legislation," albeit *pro foro interno*. Professor Jessup reviews and compares rules of procedure prevailing in international assemblies, the committee system, the rôle of the presiding officer, the right to speak, the requirement of seconding a motion (absent in the United Nations), the problem of correcting a vote, obstruction (filibuster), voting rules, points of order, order of voting on resolutions, amendments, and related matters. He also includes some problems specific to the United Nations such as domestic jurisdiction, the application of Article 18 of the Charter in elections and in voting on substantive motions and amendments thereto. This exceedingly lucid and informative survey is richly documented with references to actual situations which have arisen in the United Nations, largely in the General Assembly during its first decade.

The object of parliamentary diplomacy appears to be "to secure international support for a policy which it (a government) advocates." Professor Jessup insists that "Parliamentary Diplomacy is a true type of diplomacy," but is it? Diplomacy is concerned with negotiations aiming at agreed results. Parliamentary diplomacy, by contrast, seems to have for its object, as Jessup's prime example, the Chinese Piracy Case of 1954, shows, the scoring of technical advantages, particularly in cold war situations, which do nothing or little to advance problems towards agreed solutions. And this object is largely achieved through the skillful manipulation of the rules of procedure. Preoccupation with the rules of procedure, confusing frequently, as Professor Jessup shows, the presiding officer as well as the delegates, and neglect of the objectives, powers and limitations of the U.N. organs and of the United Nations itself, these seem to be also among the characteristics of parliamentary diplomacy.

Professor Jessup has opened up new lines of research and thought. They will need to be explored thoroughly before a considered judgment can be made on parliamentary diplomacy and its rôle in contemporary international organization.

Professor Fernand Van Langenhove, formerly permanent representative of Belgium to the United Nations, develops in his lectures once again the so-called "Belgian thesis" with reference to Chapter XI of the U.N. Charter ("Le Problème de la Protection de Populations Aborigènes aux Nations Unies"). In the Belgian view, Chapter XI of the Charter is merely a continuation of Article 23 (b) of the League Covenant, which consecrated the principle that the Members of the League of Nations "undertake to secure just treatment of the native inhabitants of territories under their control." All states, and not merely the so-called colonial Powers, should act pursuant to Chapter XI and submit reports to the United Nations. This would extend application of Chapter XI to India, Pakistan and states in Africa and the Western Hemisphere which between them control about 100 million people within the meaning of this chapter. This point is argued on the basis of a wealth of scientific and official documentation, mostly of the I.L.O., which has for years been involved in various aspects of the problem of treatment of aboriginals, wherever they may live or, more correctly, vegetate. There is a good deal of merit from a juridical as well as moral point of view in the Belgian thesis, but the majorities which determine the activities of the United Nations have so far refused to yield to the frequent appeals addressed to them by representatives of Belgium, France, United Kingdom and other Members.

The principal course of lectures was delivered by Professor Gaetano Morelli ("*Cours Général de Droit International Public*," Vol. I). Professor Morelli, after a brief discussion of the international juridical order, analyzes from a theoretical point of view the sources and the classification of international law, the relation between international law and municipal law, the subjects of international law and their capacity, unions of states and the concept of "juridical acts." The primary source of international law is custom, the secondary is treaties, and general principles appear as a tertiary source; the latter are conceived to embrace the general principles of municipal law. Analogy is not considered an independent law-creating process, but is itself based on customary international law. Morelli takes a very strict view of treaties as a source of international law, and is of the opinion that even a treaty which was binding on all existing subjects of international law would still not create common or general international law because it would not be binding, as customary international law is, on future subjects.

Regarding the relation of international law to municipal law, Morelli follows Triepel, Anzilotti and the Italian School in general in rejecting the monistic construction of the Vienna School and adopting the dualist view. He discusses the relation in terms of *renvoi*, incorporation, adoption, *et cetera*, but does not mention the Anglo-American principle that international law is part of the law of the land. The dualistic construction de-

termines the author's view regarding the subjects of international law. He rejects categorically the widely held view that individuals are or may become subjects of international law, because only states are members of the international community. Accordingly the law of international river commissions and of the European Coal and Steel Community, which directly governs rights and obligations of individuals, is not international law but municipal law common to the participating states or the internal law of the community. The rules governing conduct of war on land and sea, the concept of crimes against peace and humanity, are all in the domain of municipal law, since individuals can only violate municipal and not international law. The author is hardly aware here of the paradox; if individuals can violate only municipal law, then in case of unneutral service not prohibited by the neutral state whose national the individual is, the individual would be subject, on the high seas, to the municipal law of the belligerent. Still in the dualist line of thought he argues, in discussing international unions, that the bureau established pursuant to the 1883 Convention concerning Protection of Industrial Property is not an international agency, but a domestic institution of the participating states because the registration of trademarks with the bureau produces effects directly in the municipal law of these states. And for the same reason it would seem, the author contends, international unions lack international personality. Even organs of the United Nations are construed as organs common to the Members, but not as international organs and their activities are attributed to the Members. The significance of Morelli's lectures consists in sharp conceptual distinctions, and the weakness results from the neglect of state practice and judicial decisions, both international and national.

Vasco Taborda Ferreira's "Private International Law according to Portuguese Doctrine and Practice" (Vol. I), escapes the competence of the reviewer.

In the second volume, three papers are devoted to the European Coal and Steel Community. Max Kohnstamm, from 1952 to 1956 Secretary of the High Authority, gives a lucid, crisp and informative summary of the accomplishments and potential of the Community in the economic and political fields. M. J. de Soto's paper on the "International Relations of the Community" is divided into three parts: general, relations with states, and relations with international organizations. He accepts as a starting point Reuter's definition of the external competence of international organizations as comprising

the right to participate generally in international relations, to maintain relations with non-member States, to enjoy the active and passive right of legation if only in "para-diplomatic" form, to enter into international agreements, and to defend its interest and incur international responsibilities.

This capacity, limited only by the objectives of the Community, is exercised by the High Authority which is represented by its President. Henry Rieben is concerned with one of the controversial aspects of the Community,

namely, the "Cartelization of European Heavy Industry," which is largely outside the purview of this JOURNAL.

Professor Rudolf L. Bindschedler ("*La Protection de la Propriété Privée en Droit International Public*") thoughtfully examines some aspects of the problem of expropriation. It is a sober analysis based on doctrine and state practice. Clearly its starting point is the 19th-century liberalism, the heyday of respect for private property both at home and abroad, in domestic as well as international law. But Bindschedler is well aware of the practice which, beginning with the Mexican and Soviet nationalizations, ceased to conform in any respect to the classic orthodoxy of liberalism. He argues that this practice has not hardened into new rules of international law. The author denies any difference in kind between expropriation and nationalization, although the latter raises the resulting problems to a different order of magnitude. He also correctly, it is believed, states that expropriation is in principle legal, though in some specific cases may contravene international commitments. A state which expropriates, *i.e.*, transfers property title, incurs the obligation to pay prompt, adequate and effective compensation. If, however, compensation is not paid promptly, it becomes liable for moratory interest. The author discusses the elements which constitute adequate, that is, complete, compensation. He accepts as a fact that the capacity to pay and effectuate transfer has a legitimate place in determining "promptness" and "effectiveness" of compensation. Global settlements have often proved to be the only possible ones and they provided only for partial compensation. In a Communist country there is lacking the incentive to fair settlements which motivates countries like France and the United Kingdom, namely, to maintain the confidence of exporters of capital. The underdeveloped countries would have to rely on some methods of public and international financing if they desire to keep their economy free from foreign control or influence.

Professor Emile Giraud, in a thoughtful study, "*La Révision de la Charte des Nations Unies*," concludes that a revision of the Charter in accordance with Article 108 or 109 has little chance of success, but that nevertheless it is desirable to think about it. He is more hopeful that desirable changes may be brought about by a liberal and courageous interpretation of the Charter. He pleads for a greater rôle of international law. As he sees it, one of the cardinal defects of the Charter is the imbalance resulting from the complete prohibition of the use of force (Article 2, paragraph 4) and the absence of a system of compulsory settlement of disputes. He suggests that a state which refuses to submit a dispute to the International Court of Justice should be deprived of the protection of Chapter VII. He also advocates a more frequent and regular resort to the device of advisory opinions. This would restore respect for the jurisdiction of the Members, which after all remain sovereign states. However, his lifelong and intensive study of international relations has convinced him that the real remedy lies in the field of politics. In order to restore a balance of force in the world, he proposes creation of balancing

military and political powers and, in the first place, a reconstruction of the power of Europe which possesses political maturity and has rid itself of a virulent imperialism and nationalism. Various procedures for the revision of the Charter are discussed, along with some specific functions of the United Nations, such as admission of states to membership, collective security and settlement of disputes.

In a thoroughly documented study, "*Droit International et Communautés Fédérales dans la Grèce de la Cité—5ième—3ième siècles B.C.*," Professor George Ténèkidés develops the thesis that a true, if regionally limited, law of nations existed between the sovereign Greek cities and even between them and neighboring states. If this was not always recognized, the reason may well be that the Greeks never sharply distinguished law from justice or morality and that, due to the absence of specifically juridical institutions, they did not produce specific juridical concepts. Of substantial interest are the analyses of laws governing treaties, the protection of aliens, the settlement of disputes, the organization of security, and particularly the development of Greek federalism. Public opinion favored integration by consent, but opposed integration by force. The emergence of the bipolarity Athens *vs.* Sparta, each inspired by desire to integrate the cities by force, brought about a complete disintegration of ancient Hellas. Perhaps there is a lesson in this for our time.

Clive Parry, in "Some Considerations upon the Protection of Individuals in International Law" (Vol. II), questions the traditional view that the responsibility of states is based upon a delict or wrong caused to the person or property of aliens or to foreign states directly. He suggests that the possibility be considered "that the responsibility of states for injuries to individuals is *sui generis* rather than delictual in character." He appears to argue that the traditional view that a state is injured in or through the person or property of its nationals—which postulates a link based on international law—should be revised; or that the subject be altogether removed from the realm of international law. The basis of a claim, he suggests, is rather "a delict of the classical *jus gentium*—of a generalized system of municipal law" which is implied in the "minimum standard rule." The government of the injured individual would then be enforcing a claim arising directly from a violation of this generalized system. On the other hand, he postulates "a law of direct international wrongs" committed by one state against another. In such cases it is possible to speak of direct responsibility and its basis is a violation of international law. In the case of injuries suffered by individuals, the author seems to doubt that, strictly speaking, there is any responsibility at all; rather, there is merely what Cheng has called "assumed responsibility" that is "a purely contractual obligation." Mr. Parry discusses briefly the nationality aspects of claims and offers some interesting observations concerning the *Nottebohm Case*. This course of lectures is a closely reasoned, albeit iconoclastic, contribution to the problem of responsibility of states.

Professor Giuseppe Sperduti ("*L'Individu et le Droit International*," Vol. II) steers a middle course between those who affirm that individuals

are merely objects, and those who affirm that they are subjects, of international law. He bases his analysis of the position of Individuals on the "explanatory" principle of effectiveness. Only those individuals who are integrated into the international social organization (arbitrators, officials of international organizations) are addressees of norms of international law. Otherwise, individuals are subject to municipal law which, in turn, incorporates norms of international law. However, inasmuch as individuals through their acts may injure or satisfy internationally protected interests of states, they are also "material" subjects of international law. The states are bound to prevent such injury and, if necessary, to punish guilty individuals. In this fashion he explains piracy as well as the punishment of war criminals after World War II. This was a case of reprisals, and he argues, as Morelli does, that the International Military Tribunal was a domestic tribunal common to the participating states. This is a case also of making the facts fit a preconceived theory, rather than fit the theory to the facts.

The author is somewhat more generous in appraising the status of individuals in situations where they have the right of petition. The most advanced stage was reached with the 1950 Rome Convention on Human Rights. In such situations the governing treaties are construed as conferring certain interests upon third parties, *i.e.*, the individuals, and this interest then becomes a legitimate interest which entitles the beneficiary individuals to insist, through petitions, that the states carry out faithfully the obligations which they have contracted among themselves. One cannot but be impressed with the concern of the author to stress the semantic originality of his theory *vis-à-vis* his compatriots and other writers and the lack of a substantive contribution regarding the actual place of individuals in the evolving pattern of international relations.

Roberto Ago's theory of spontaneous law, "*Science Juridique et Droit International*," has already been critically examined in this JOURNAL.<sup>1</sup> Its starting points are the well-known and always perplexing questions of the legal nature of international law and of the basis or reason for its binding force. Its culmination is an emphatic affirmation of the former and the categorical rejection of the latter as absurd and unscientific. The train of reasoning is as impressive as is the learning and consummate analytical skill of the author. The key to Ago's theory is his concept of the "positivity" of law. He maintains that it is a capital error to identify positive law with law "posited" by a formal source or a "normative fact." There is a body of law which has no such source, but which is nevertheless "law in force." This is Ago's "spontaneous law," the existence of which is an objective historical fact that the science of law must not disregard. In the hierarchy of norms, not of sources, spontaneous law is at the pinnacle. Positive law is found deductively; spontaneous law, inductively. What then is spontaneous law? It is identic with customary law, both national and international. It is recognized by its manifestations: practice or usage

<sup>1</sup> Josef L. Kunz, "Ago's Theory of a 'Spontaneous' International Law," 52 A.J.I.L. 85-91 (1958).

and *opinio juris*. These manifestations must not be transformed into elements of a law-creating procedure. Ago recognizes the outstanding merit of positivism: the rigorous separation of law from subjective ideas of justice or principles derived from reason. He accepts also Kelsen's fundamental norm, inasmuch as this doctrine makes explicit the need for a norm which itself is not "positive." But this norm must not be a hypothesis; it must be the spontaneous law which delegates the formal law-creating processes, but itself is not the product of any such process. Ago suggests the use of the term "law in force" as more suitable and more comprehensive than the traditional term "positive." The latter, together with the spontaneous law, is the "law in force." Ago rejects Kelsen's concept of law as a coercive legal order and its far-reaching consequence, which makes the legal character of international law dependent upon a frankly political or philosophical preference or choice between the "just war" doctrine and its concomitant, community monopoly of force, on the one hand, and the nineteenth-century doctrine that states have an unlimited right to resort to force, on the other.

There is no room here for a critique of Ago's theory. It must be pointed out, however, that it contains intuitive or *a priori* elements of its own. Unless Ago is prepared to condemn his brand of customary international law to a perpetual "twilight existence" (to use Judge Cardozo's words), its existence as law cannot depend solely upon the intuitive perception of the observing jurist but must rely upon the externalized acceptance by the members of the international community or of its organs. It is submitted that the practice of states in its various forms, in the final analysis, furnishes the externalized manifestation of the "jural quality" (Judge Cardozo's words) of the norm, whether it germinated spontaneously or otherwise.

The papers in these volumes cover a wide range of topics of substantial interest. In some of them one would wish to find less doctrinal vanity and more substance with respect to the subject at hand.

LEO GROSS

*Droit International Public*. By Paul Reuter. Paris: Presses Universitaires de France, 1958. pp. 444.

Professor Paul Reuter of the Paris Law Faculty, one of the most original and talented younger scholars writing on the Continent in the field of international law and organization, has now published a sequel to his *Institutions Internationales* which appeared in French in 1955 and in English in 1958.<sup>1</sup> Both the *Institutions Internationales* and the present *Droit International Public* are tailored for use by French law students in the first and third years of their law study, respectively, under the new program of instruction instituted by the Ministerial Decree of 1954. While this special purpose obviously circumscribed the author's freedom in selecting and organizing his material, it did not impair the value of the two volumes for a broader audience. In the present volume, a remarkably lucid con-

<sup>1</sup> *International Institutions* (London, George Allen and Unwin, Ltd.).



ceptual analysis is tempered by a consistent recourse to judicial decisions and practice of states. The choice of these materials, as well as the selected bibliography following each chapter, shows a great deal of thought and discretion. Of particular value is the analytical treatment of the most recent materials, such as the decisions of the International Court of Justice and the Franco-Italian Conciliation Commission and of the problems arising before the United Nations and other international organizations. As the author of the classic work on the European Coal and Steel Community, Adviser to the French Ministry of Foreign Affairs, and a successful practitioner before the new Court of the Communities, Professor Reuter is one of the few scholars able to initiate in the present volume the pioneering task of integrating the unique concepts of the new Communities into the system of public international law.

The relationship between municipal and international law and the sources of international law were dealt with in the *Institutions Internationales* summarily and with emphasis on the historical-political aspects. The treatment of these topics is substantially expanded in the first part of the present volume (Chapters I and II) with some interesting material added covering the most recent French constitutional developments. Of the problems concerning the state as the subject of international law those relating to state territory are considered (Chapter III). Chapter IV on state responsibility presents one of the clearest treatments of this important topic known to this reviewer. The sections on determination of damages and on nationality of companies in connection with international claims are of particular interest. The rule of prior exhaustion of local remedies is analyzed both as a rule of procedure and as a rule of substance (page 169). In the section on state responsibility for breach of contract, contracts between states and aliens are classified according to whether they were concluded with a view to being governed by international law, the national law of the contracting state, or the national law of a third state.

Part II, under the heading "International Communications," which reflects the scheme prescribed by the Ministry of Education, deals first with the regime of the high seas, territorial sea, contiguous zone, continental shelf, *et cetera* (Chapter I). The author interprets the inconclusive outcome of the 1958 United Nations Geneva Conference concerning the width of the territorial sea as an indirect rejection by the Conference of any claims to a territorial sea belt exceeding twelve miles in width, with no position taken on claims from three to twelve miles. As to the presently applicable rule, he refers to Gidel in denying the validity of any claim of sovereignty beyond the three-mile width unless it can be sustained on the basis of the opinion by the International Court in the United Kingdom-Norway *Fisheries* Case or unless it is accepted by the state against which it is advanced. Chapters II and III give a brief survey of the principal international agreements concerning international rivers, railroad, road, and air transport, posts and telecommunications.

The third and last Part deals with types and solutions of international conflicts. An interesting introduction touches upon the transformation of conflicts involving essentially private interests or governmental departments in capitalist and socialist economies into conflicts between states. The following three chapters deal with the pacific settlement of disputes, use of force (including a sketch of the law of neutrality) and settlement of disputes within international organizations. The author distinguishes, within international organizations, between relations among member states, on the one hand, and the relations between the organization and certain groups of individuals (staff employees, suppliers, those subject to its administrative powers, *et cetera*), on the other. While the first relationship tends to be governed by international law and is not easily made subject to judicial process, the other becomes regulated by internal rules and invites such process. In the lively and realistic appraisal of United Nations practice, this reviewer was struck by the evolution of Professor Reuter's thought on the Uniting for Peace Resolution. In his *Institutions Internationales* he states that "many authors have challenged its legality under the Charter" (page 277). In the present volume he says, with a surprising absence of qualification, that it is "certainly contrary to the Charter" (page 397), adducing the formalistic argument based on Article 11, paragraph 2, of the Charter, which provides that questions "on which action is necessary shall be referred to the Security Council" by the Assembly. This argument, of course, has been answered by an equally formalistic argument that this provision applies only where "action" *by the Security Council* "is necessary." However, an argumentation on this level with reference to a broad multilateral treaty-constitution, such as the Charter, surely is not very fruitful. Again, while one would readily agree with the author's view that the importance of the United Nations Emergency Force in the Middle East as a precedent must not be exaggerated (page 424), the Force has had more than an observation function (being authorized to apprehend infiltrators),<sup>2</sup> and its presence in the area has had a substantial stabilizing effect.

The relative brevity and terseness of style dictated by the principal objective of this volume, if anything, makes it an even more useful contribution to the literature in this field.

ERIC STEIN

*Völkerrecht*. Vol. I. By Georg Dahm. Stuttgart: W. Kohlhammer Verlag, 1958. pp. xx, 730. DM. 49.

While we have in the German language the modern and brilliant treatise on *International Law* by Alfred Verdross, no comprehensive work in this field has been published since 1945 by a German of the Federal Republic of Germany. The comprehensive work under review will perhaps close this gap. This first volume will soon be followed by a second, probably of equal length, and both will be restricted to the international law of peace.

<sup>2</sup> U.N. Doc. A/3694.

The first volume contains no history of international law or its science, no general philosophical or methodological discussions, but goes immediately into *medias res*. It deals with the general foundations of international law, the state, the international organs of the states, people and territory. Each and every problem within these different chapters is dealt with in a broad, comprehensive and up-to-date manner. Fundamentally the author considers the present-day international law as the law of a period of transition from the "classic" international law, dealing only with the rights and duties of sovereign states, as it prevailed until 1914, to a new international law which, the author hopes, will be a better and more effective "supra-national" law. With the common sense which characterizes this book, the author fully recognizes how strongly the present-day international law is still bound up, in its very foundation, with the classic law of nations. Traditional international law is by no means neglected; new developments, whether new rules or mere tendencies, whether progressive or retrogressive, are treated and explained. But the author is neither an Utopian nor a wishful thinker; nor is he writing *de lege ferenda* as a politician of international law, but as a legal scholar showing the positive international law of today as it is, not as it ought to be.

The very detailed treatment of each and every problem is based on great knowledge, and a sound critique and balancing of opposed opinions of writers and court judgments. The author's method fulfills in the highest degree the postulate which this reviewer has defended for many years, namely, a combination of theoretical reasoning and fullest use of literature in all the principal languages, with an equally full use of treaties, of the practice of states and of municipal and international, arbitral and judicial, decisions. The array of cases is imposing, and they are always quoted, as in the common law countries, not at second hand, but directly from the court reports. The work stands as a testimony to great scientific labor, research and judgment. In the majority of problems, this reviewer is in agreement with the author's statements. Naturally, in a book of such vast dimension, points of disagreement are bound to occur. While, unfortunately it is not possible to go into details within the framework of a book review, the reviewer could mention as examples two points of disagreement: Theoretically, this reviewer cannot agree with the author's view (page 3) that the internal law of international organizations is not a part of international law. As to a point of positive international law, this reviewer cannot agree with the author's statement (page 137) that recognition "too late" of an effective *de facto* government constitutes a violation of international law; no rule of positive international law to this effect can be shown.

The comprehensive and detailed character of this book will render it capable, apart from study, of fulfilling the functions of a work of reference; exactly because of that we earnestly hope that the second volume will contain a detailed general index, as well as a table of cases quoted. While this reviewer cannot approve everything in the book under review,

enough has been said, we believe, to justify the conclusion that it is a very valuable addition to the literature of international law.

JOSEF L. KUNZ

*International Law: An Introduction to the Law of Peace.* By Kurt von Schuschnigg. Milwaukee: Bruce Publishing Co., 1959. pp. xvi, 512. Index. \$6.95.

His experiences at the hands of Hitler might well have left the former Austrian Chancellor discouraged, if not cynical, about the value of international law. Instead, in this textbook intended for the non-specialist, Dr. Schuschnigg finds that "the rediscovery of universal international law with the Charter of the UN" and the near universality of that organization have produced in the last decade "the greatest progress ever made in the history of International Law" (page 430). This does not mean that weaknesses are underestimated. Rather, Dr. Schuschnigg attributes recent progress to the renewal of interest in natural law after two world wars (pages 9, 38). Establishment of mechanisms for settling disputes, however seldom used, and of forums for appeal to world opinion, are viewed as representing progress over the methods of the heyday of positivism. Not international law, but positivist legal thought "lost contact with reality" (page viii), for positivism rendered principles of justice subject to nationalization (page 427). International law requires a concept of community, a uniting of law and ethics, and the Christian concept of human dignity (pages 5, 12-13). Even though a subsidiary element in adjudication, general principles of law and justice are the source of treaties and customs (pages 42-43, 45-46).

In ascertaining the rules of international law, the author relied chiefly on Brierly, Briggs, Fenwick, Hackworth, Kelsen, Lauterpacht's Oppenheim, and Verdross. The bibliography, listing articles as well as books, is useful. Occasionally one meets a surprise, such as errors in the date of Oppenheim's first edition (page 71) and in stating Jay's official post in 1774 (page 298), or characterization of the Munich negotiations as "international adjudication, at least in a formal sense" (page 155). But such slips are few and minor.

WESLEY L. GOULD

*Praktische Fälle aus dem Völkerrecht.* By Ignaz Seidl-Hohenveldern. Vienna: Springer-Verlag, 1958. pp. xii, 150. Index. 2.15.

This little volume was conceived as a companion to Professor Verdross' treatise on *International Law*. The selection of cases was determined by the conformity of their decisions with the opinions expounded by Verdross in his treatise. More emphasis was placed on decisions of domestic than of international tribunals in order to convince the student that international law had some practical significance. This is not a casebook. No texts of decisions are given. The cases are presented as problems to which the

student is supposed to find the answer. These are given at the end of the volume. Although this is more a problem than a case-method approach, it does indicate some concern for the law in action. It is incomprehensible why the editor confined his selection to cases of which the "opinion" coincides with that of his teacher.

LEO GROSS

*International Law.* (Nutshell Series.) By N. March Hunnings. London: Sweet & Maxwell Ltd., 1959. pp. xi, 103. Index. 7s. 6d.

The author of this slender volume realizes that the field of public international law is so vast that it would seem to preclude compression into a few pages; but he hopes that he has been able to supplement the larger textbooks by "a clear and brief outline of the most important aspects of international law." The verdict of the reviewer is that he has done so admirably, and that the numerous references to judicial decisions of the World Court are sufficient warning to the reader that he is only getting a nutshell's worth of information. It is suggested, however, that the space given to the old laws of war and neutrality could be condensed almost to the vanishing point. Contraband and blockade have just lost their meaning as legal rules.

C. G. FENWICK

*Comunicazioni e Studi.* Vol. IX, 1957. Milan University, Institute of International and Foreign Law. Milan: Dott. A. Giuffrè, 1958. pp. ii, 498. L. 3500.

The ninth volume of this annual Italian publication, directed by Roberto Ago, is again excellent. It contains many valuable book reviews, reports on the Italian science of international law in 1956 (Capotorti, pages 255-298), on the activity of the International Court of Justice in 1957 (Citarrella, pages 299-323), and on problems of international law (Fabozzi, pages 325-366) and of conflict of laws (Bianchi, pages 367-411) in 1956 decisions of Italian courts. Among the articles, one by Ballarino deals with the general problems of conflict of laws in recent German doctrine (pages 117-200); the others are devoted to international law. Limentani Calabi writes historically on international arbitration and territorial annexation in ancient Hellas (pages 239-253); Badiali investigates the structure of trusteeship agreements and the vexed problem of the "states directly concerned" (pages 73-115); Conforti treats the Conventions on the Law of the Sea (pages 201-238). There is an article in French on a special problem of the International Labor Organization (Wolf, pages 47-71). The first article, in French, by L. Kopelmanas (pages 1-45) on recognition, denies any legal value to that institution and concludes that its complete abandonment by international practice would seem to correspond best to the real needs of international relations. In this context he shows sympathy for the Estrada Doctrine; but it should not be overlooked, as

Philip C. Jessup stated long ago, that even under this doctrine a government must still make a decision, even without formal recognition or non-recognition, whether or not to continue diplomatic relations with the revolutionary *de facto* government.

JOSEF L. KUNZ

*Le Droit International de la Mer.* Vol. I. (Études d'Histoire Économique, Politique et Sociale, XXVI.) By Olivier de Ferron. Geneva: Librairie E. Droz; Paris: Librairie Minard, 1958. pp. 240. Sw. Fr. 16.

This first volume of a review of the international law of the sea is to be supplemented, but the general plan of the work is not indicated except for a passing reference to a more complete treatment of the resources of the sea later. In general, the 175 pages of text in this volume might well have been a series of lectures largely focused on the 1958 Geneva Conference on the Law of the Sea and the preparatory work of the International Law Commission. The author has not been concerned to undertake new researches in the sources, but has generally confined himself to comments on standard works and to references to well-known cases and events. In the Introduction, throughout the body of the book and in the conclusions, the author points to the trend toward invasions of the freedom of the seas. He sees the emergence of new law founded on the primacy of the economic and political interests of coastal states. He correctly points out how the newer states are taking a lead in this direction in protest against what they consider to be a regime imposed by the great Powers. He stresses also the dangers of excessive regionalism. In his exploration of the development of the international law of the sea, the author devotes considerable attention to the theoretical problem of the manner in which customary law is formed. The first sections of Chapter VIII, dealing with unilateral acts and declarations, seem somewhat confused until the reader reaches the synthesis which begins in Section 91.

The author appreciates the fact that the way in which the International Law Commission and the Geneva Conference dealt with the idea of a contiguous zone contributes to confusion, but for his own part he does not always clearly distinguish between claims to the territorial sea and claims to the right to exercise some jurisdiction on the high sea. He does, however, do full justice to such distinctions in an admirable discussion of the Truman Proclamations of 1945 and the subsequent contrasting claims of some of the Latin American states. The reviewer is unable to share his concept that the sovereignty which a state has over its territorial sea is a sovereignty "*sui generis*." The existence of the right of innocent passage, although not a servitude, does not negate sovereignty any more than an actual servitude on land or the restrictions of a neutralization regime, such as that in Switzerland. The reviewer also cannot accept the blending of civil and criminal jurisdiction in the discussion of collisions at sea (Section 81).

The American reader is bound to be struck by inadequacies in the statements of events in United States history and by very numerous typo-

graphical errors in reproducing English names and expressions. Thus, in several references to the liquor-smuggling treaties there is no mention of the fact that they were negotiated for the *quid pro quo* of permitting foreign ships to bring in liquors as sea-stores under seal. The modern United States position on the theory of restricted sovereign immunity is ignored. The Monroe Doctrine is said to have been declared by the Congress. United States court decisions are sometimes mentioned, but the official source is rarely cited. The so-called Harvard Research in International Law is cited in a variety of curious ways.

Articles by Leonard and Vallance on the whaling conventions are listed in the highly classified bibliography under "*Ouvrages Généraux*." Hackworth's *Digest* is listed as being in two volumes and the date of publication is not correct. The *I'm Alone* is not listed in the Annex containing "*Décisions de Justice*," but is apparently referred to on page 113 as "*L'Malone*." Errors of this type are unfortunately so numerous and so blatant as to leave the reader with an unfavorable impression.

PHILIP C. JESSUP

*Il Regime Giuridico dei Mari: Contributo alla Ricostruzione dei Principi Generali.* By Benedetto Conforti. Naples: Dott. Eugenio Jovene, 1957. pp. 308. Lire 2000.

This study, which appears as Number 28 of the Publications of the Law Faculty of the University of Naples, deals with the international law of the sea as viewed by an Italian scholar late in 1957, on the eve of the 1958 Geneva Conference. He analyzes the views of writers<sup>1</sup> and the practice of states, as well as the recent work of the International Law Commission, concerning territorial waters, the high seas, and so-called contiguous zones. His emphasis is on the exercise of jurisdiction over "coastal phenomena," such as control of fishing, enforcement of customs regulations, exploitation of resources of the continental shelf, maintenance of neutrality in time of war, *et cetera*, whether these phenomena take place on the high seas or within territorial waters.

Referring to the impossibility of showing general acceptance of any particular line clearly separating the territorial waters subject to the littoral state's sovereignty from the "free" high seas, he deplores the fact that modern doctrine nevertheless tries to evaluate coastal phenomena in spatial terms. He would, instead, think in terms of particular functions,<sup>2</sup> and recognize varying limits of control for different purposes, instead of maintaining a rigid dichotomy between territorial waters and the high seas. In his work the author treats of the historical development of the concepts of territorial waters and high seas, the present international practice, and the need for substituting a "functional hypothesis" for traditional notions

<sup>1</sup> The text and footnotes indicate the author's familiarity with, and use of, the Western European and American literature in the field.

<sup>2</sup> Cf. E. D. Dickinson, "Jurisdiction at the Maritime Frontier," 40 Harv. Law Rev. 1 (1926).

based on a single dividing line at a fixed distance from shore. The stress on theory and logical analysis will be a somewhat unfamiliar feature for many American readers, but the volume gives an adequate treatment of the past and present international law of the fields covered. This book should also serve to call our attention further to the extensive but somewhat neglected monographic literature on international law now appearing in Italian.

WM. W. BISHOP, JR.

*The United States and the Treaty Law of the Sea.* By Henry Reiff. Minneapolis: University of Minnesota Press, 1959. pp. 451. Index. \$8.00.

This is an unusual book and an unusually good one. Professor Reiff of St. Lawrence University has made available the results of some thirty-five years of "grubbing for data." He writes with style, clarity and a sense of humor, all of which make even more valuable a very scholarly study of masses of complex detail. A detailed Table of Contents; a skillful index; a twelve-page appendix containing a check list of United States treaties classified by the subject matter of the text; and a similarly classified bibliography of official documents, as well as a list of secondary sources, make the book easier to use. Many will want to use it for reference, especially those interested in international organization as one of the keys to the operation of the modern international state system. But its appeal is wider, since it contains much of special value to international lawyers, to historians and, as the author suggests, to anyone concerned with "a social science of the sea." The scientists and government officials and staffs of international organizations concerned with transportation, communications, exploitation of resources (from subsoil petroleum to birds), humanitarian and scientific programs, including health and many other subjects, will find this book a highly convenient place in which to trace the historical evolution of international solutions and their interrelationships.

Considering what the subject of the book is, one hesitates to say that the author is immersed in his subject, but he is definitely in love with it. "We rejoice in our new conquests of the sea," he writes "but the sea is making hostages of us all." He takes the sea as a connecting link, but once the ocean tide laps the shore of a subject, Professor Reiff is apt to make an interesting excursion inland. It must have been difficult to decide when to pause and when to sail on to some other shore. In general this reader found the choices wise, although individual preferences would vary, as, for example, when he deals with ships flying the United Nations flag, but stops short of noting the use of its symbol on land, *e.g.*, on jeeps in Palestine or Lebanon, whereas he shortly does digress to talk about troubles over Soviet representation in the International Labor Organization. The author's choice of arrangement of his materials might also raise some question until one has read the book and appreciated the skill with which the different parts are constructed separately but linked together.



After two chapters which may be considered general and introductory, the rest of the book is divided into four chapters which divide the story chronologically: "From Independence [of the United States] to the Great War"; "Between the Great Wars"; "Since World War II"—divided into one chapter on "Transportation and Communications" and one on "Health, Resources, and Other Developments." Since each of the several topics or fields is covered separately for each period, there would be danger of repetition, but the author has handled that problem well. In some instances he escapes from chronology and follows a subject through to conclusion, as in the interesting treatment of mine clearance, which he covers in detail because so little has been written about the international efforts to clear the seas of mines after the two World Wars. From one chapter to another the reader gets a better knowledge of the workings of ITU, WMO, WHO, IMCO and others. At this point one might note Professor Reiff's exhaustive examination of sources in all sorts of official documents, printed or mimeographed, supplemented where necessary by personal correspondence with officials. He concedes that the search before 1914 was somewhat antiquarian and gladly acknowledges the useful current sources. Much of the official material found in Congressional Hearings and in documents of government bureaus and agencies other than the Department of State is too little used in most of the writings on international law and organization.

Professor Reiff has not tried to go into all the legal intricacies of problems arising on the seas, *e.g.*, in regard to conflicts of law, both civil and criminal, and details of jurisdictional precepts. But his thorough study of fishery problems of course takes him into the complexities of the debate over the breadth of the territorial sea. He properly exposes the fallacy of the extravagant pretensions of some of the Latin American states. There is a good section on atomic wastes, nuclear tests and missile ranges. The work of the International Law Commission is reviewed in some detail and the 1958 Geneva Conference on the Law of the Sea is included.

In short this is a good book for reading, a rewarding book for study and an unduplicated source book for reference.

PHILIP C. JESSUP

*La Plataforma Continental y los Problemas Jurídicos del Mar.* By Humberto López Villamil. Madrid: Talleres Gráficos, 1958. pp. xii, 348.

Three years ago, at the meeting of the Inter-American Council of Jurists at Mexico City, a number of Latin American states took extreme positions in respect to the breadth of the territorial sea and related problems, notably the protection of local fisheries and the continental shelf.

Numerous expositions of the different points of view followed the meeting of the Council, outstanding among which is the present volume by the Professor of International Law at the University of Honduras. After a brief historical introduction, the author analyzes successively the scope of the traditional freedom of the seas, the conflicting views with respect to

the breadth of the territorial sea, the claims for contiguous zones, the protection of fisheries, the continental shelf, and related topics. Students will find it convenient to have proposals of the International Law Commission of the United Nations discussed side by side with resolutions of the Inter-American Council of Jurists. The Spanish texts of the conventions and resolutions signed at the Conference at Geneva in 1958 are reproduced in a special appendix.

C. G. FENWICK

*Reports of International Arbitral Awards. Vol. VIII: Decisions of Mixed Claims Commission United States-Germany. Part II.* (United Nations Pub. Sales No. 58. V. 2. 1958.) New York: Columbia University Press, 1958. pp. xi, 520. Index. \$5.25.

This 8th volume in a series of *Reports of International Arbitral Awards* was prepared by the Codification Division, Office of Legal Affairs of the United Nations Secretariat.

The materials in Volumes VII and VIII, which as a unit constitute the republication of a broad selection of decisions of the Mixed Claims Commission under the Agreement between the United States and Germany of August 10, 1922, are well known in the literature of international law. This re-publication is carefully edited with references to the original source as well as to the principal commentaries on the work of the Claims Commission. At many points, the comments and editorials of Lester Woolsey in this JOURNAL are cited. Fully half of Volume VIII contains the now famous Sabotage Cases.

The usefulness and importance of this series of *Reports* as a whole is recalled by the publication of the latest volume, the general usefulness of which is perhaps more limited than some of the earlier ones. In the ten years of publication, the series has taken its place as one of the standard and important collections of international awards and decisions.

JAMES N. HYDE

*Les Réserves dans les Traités Internationaux.* By Kaye Holloway. Paris: R. Pichon & R. Durand-Auzias, 1958. pp. vi, 378. Fr. 3970.

The thesis of this interesting and useful study is that the International Court of Justice in its Advisory Opinion of May 28, 1951, on *Reservations to the Genocide Convention* unnecessarily cast grave doubt on a well-established rule of international law and that the Sixth (Legal) Committee of the United Nations General Assembly, in a mood more political than juridical, completed the debacle. Mme. Holloway is at great pains to demonstrate the remarkable uniformity of doctrine and practice which had resulted in what the dissenting judges in the *Genocide* Opinion characterized as "a rule of law requiring the unanimous consent of all the parties to a treaty before a reservation can take effect and the State proposing it can become a party." Like the dissenting judges, Mme. Holloway finds that

the recent Latin American aberration, which permitted a reserving state to become a party to the treaty in relation to states accepting its reservation but not in relation to others, "depends on the prior agreement of the contracting parties," and, therefore, does not affect the customary rule of international law. Moreover, as she points out, Latin American practice is scanty and by no means uniform.

The test propounded by the Court in the *Genocide* Opinion of the "compatibility" of the reservation with the object and purpose of the convention as determined by each party to the convention is criticized by the author as subjective and unworkable. After careful examination of the debates in the General Assembly's Sixth Committee, both before and after the Court's Opinion and the requested report on aspects of the subject by the International Law Commission, Mme. Holloway shows how the United States representatives, abandoning traditional United States practice on reservations to treaties, found themselves working hand-in-hand with the Soviets and the Latin Americans to thwart the centralized control function of the United Nations Secretary General in relation to reservations.

Much that Mme. Holloway includes in the book might have been omitted without affecting the value of her study. The first 100 pages do not deal with reservations to treaties, and she is often tempted to devote many pages to tangential issues. The tone is sometimes polemical, and both the Court and the inconsistencies of United States policy on the matter of reservations are severely castigated. The merits of the book lie in its thorough scholarship and its utility as a careful, analytical summary of a question on which the practice of states has yet to find a workable solution.

HERBERT W. BRIGGS

*The Unanimity Rule in the Revision of Treaties: A Re-Examination.* By Edwin C. Hoyt. Foreword by Philip C. Jessup. The Hague: Martinus Nijhoff, 1959. pp. xii, 264. Index. Gld. 21.85.

This excellent specialized study exemplifies the type of analysis and information which international law needs. That subject abounds with general principles, even though the question is frequently raised as to the effectiveness of these asserted principles. In this book, Professor Hoyt has taken one of these "sacred" principles, namely, the unanimity requirement for the revision of treaties, and subjected it to rigorous analysis and detailed factual inquiry. He points out that the proliferation of multipartite treaties and, especially, the growth of international organizations have created the problem of whether rules for revision that were appropriate for bilateral treaties were apt in this new context, where the treaty serves essentially as a quasi-legislative instrument. A survey of the opinions of writers and an analysis of the Declaration of London, the oft-cited basis for the doctrine under review, conclude the introduction.

Part I of the book considers the problem of revision in connection with general treaties. So-called non-political conventions are first considered. Here, one would expect to, and does, find the greatest flexibility. In this

area, binding *inter se* agreements between less than all of the original treaty parties is a frequent and effective method of revision. Secondly, the experience with "constitutional" treaties is examined. Express provisions for revision are common and are coupled with a right of withdrawal, express or implied, to safeguard national sovereignty. The final chapter in this part considers the record of revision of various multipartite peace settlements such as, for example, the Treaties of Vienna (1815) and Versailles. Here political considerations are predominant. Other special factors are the transitory nature of boundary provisions and the device of separability for confining participation in revision to the most interested states in a particular subject matter.

Part II is an analysis of the revision problem as it has developed in various specific territorial regimes. The international river regimes of the Rhine and the Danube, although different in character and origin, ultimately demonstrated the necessity of consent to change by riparians rather than by treaty parties as such. The Turkish Straits regime, through most of its history, was part of the Concert of Europe, in which unanimity prevailed as a political principle. In the more recent period, revisions were made without the consent of a particular great Power party concerned. International regimes in colonial Africa were frequently revised by the most interested parties without the consent of all, but the acquired substantive rights of non-consenting parties were also recognized. In practice this meant abandonment of their procedural rights to participate in the new regime unless the new regime was accepted. The Aaland Islands and the Suez Canal, characterized by the author as "treaty regimes reinforced by custom," were governed by principles rather than regimes, and the principles became customary international law for whose modification general consent of the most interested states, rather than treaty parties, was required. A third-party beneficiary explanation, sometimes suggested, is rejected as inadequate.

The author concludes that the supposed rule of unanimity for the revision of treaties does not exist in practice, and cannot be defended as desirable. He suggests that, instead of the supposed rule, the following principles apply: (1) no unilateral abrogation; (2) no state bound to a new obligation without its consent; and (3) no new treaty among other parties deprives a state of substantive acquired rights under the old treaty or prior custom.

The author insists rightly on the significance of the multilateral treaty as a quasi-legislative instrument for the world community. Imperfect as the treaty may be for this purpose, we must remember that it is the only peaceful instrument we have. But it must be noted that it is only "*quasi*." As the author admits, non-consenting states are not bound to the new change, and substantive acquired rights remain. Thus the true legal situation, as seen by the author, while permitting revision of treaties without undue rigidity, leaves substantial problems to be resolved.

The author's demonstration of the non-existence of the alleged unanimity rule in practice is convincing, but the proof of the alleged substitute prin-

ciples is less persuasive. He sees a trend toward a majority rule for revision, just as it is developing in the allied problems of conference procedure and reservations. But his own recital seems to reveal more of a pragmatic rejection of unanimity than any agreement on substitute principles. Moreover, some of his instances of revision without unanimity, such as the abrogation of the Italian arms limitations provisions in the Italian Peace Treaty, seem to this reviewer to pose some important questions of principle. (The author concedes this instance to be basically political.) Can the parties to such a limitation, especially the great Powers, have intended revision without their consent? Desirable as the result may have been, pragmatic revisions do seem to challenge the stability of treaties in principle, a theoretical objection which the author appears to deny.

The value of this study is clear. Similar examination of other asserted principles of international law should be welcomed. Such analyses should develop more detailed rules in place of unnecessarily broad principles, and thus assist in the formulation of a more adequate body of law. Professor Hoyt is to be congratulated for his contribution to this task. His and similar studies should be significant aids to the work of official bodies such as the International Law Commission.

BRUNSON MACCHESNEY

*Gli Effetti della Guerra sui Trattati.* By Agostino Curti Gialdino. Milan: Dott. A. Giuffrè, 1959. pp. xi, 271.

The problem of the effect of war on treaties has been the topic of an extensive literature in many languages and has also been treated in works on treaties and on the laws of war. This study reaches the conclusion that there is a positive rule of international law on this subject and that this rule prescribes that prewar treaties become in principle extinct with the outbreak of war. They remain extinct unless the peace treaty revives them. From this general principle there were already earlier recognized exceptions, such as treaties concerning territorial settlements, or treaties concluded exactly for the purpose of being applied *durante bello*. With the end of the first World War a further exception was recognized as to collective treaties of an economic and technical nature; with the peace treaties concluded at the end of the second World War, this exception was widened to all collective treaties. But more far-reaching assertions of the doctrine and of the Resolution of 1912 of the *Institut de Droit International*, according to which prewar treaties are merely suspended, are not in harmony with positive international law.

The important thing about this book is the method by which the author reaches this result. He starts with a classification, analysis and critique of the whole doctrine; then he makes a detailed research into the practice of states from the French Revolution to the present day, a searching investigation of all the peace treaties, of the *travaux préparatoires*, of the diplomatic correspondence and of the decisions of municipal courts of the principal states; the courts have overwhelmingly decided on the basis of the ex-

tinction of treaties; only United States courts have always stood—not always in harmony with United States diplomatic practice—on the liberal principle of mere suspension.

For many years this reviewer has asked for a combination of theoretical investigation and use of the literature with the study of the practice of states and of cases. It is interesting to note that this combination more and more is applied also in hitherto over-abstract Italian doctrine, not only by Sereni, but also by Mario Giuliano, Sergio Neri, Battaglini and the book under review. The author is to be congratulated on a fine piece of research.

JOSEF L. KUNZ

*Expropriation in Public International Law.* By B. A. Wortley. (Cambridge Studies in International and Comparative Law, VI.) Cambridge: The University Press, 1959. pp. xviii, 169. Index. \$5.50.

The key to Professor Wortley's treatment of the problem of expropriation is the notion that property rights are not created, but merely protected, by the state. Although the practice of states is extensively reviewed, decisive importance is attached to the logical implications of the concept of property:

The varying practice of States is not a conclusive argument as to legal rights in international law. The existence of a concept of property, and the general rule that expropriation must, generally, take place against adequate compensation, stand or fall together.

The state is regarded as merely the agent for the enforcement of individual rights. The high value attached by the author to property rights (which he regards as superior to sovereignty or to "the exercise of national liberty") is justified by their importance in "the economic order of most of the modern world" and in "mutual confidence in business," as well as by considerations of justice and fair dealing. The term "right" is nowhere defined. It is not explained how a *legal* right can exist unless it is protected by law. Austinian positivism is repudiated and called "totalitarian." The author thus places himself squarely in the camp of natural law doctrine. It is open to question whether this serves to strengthen the persuasiveness of his conclusions. There is ample evidence, perhaps insufficiently emphasized by the author, that the rule requiring full compensation for the taking of foreign-owned property (except in cases of justified confiscation) is accepted as positive law in the practice of states. This evidence lends objectivity to what must otherwise remain a subjective evaluation of the importance of property rights in relation to other interests.

Much attention is given to restitution as "the primary remedy" for improper expropriation. The paucity of recorded instances of successful claims of restitution in peacetime expropriations drives the author into heavy reliance on examples drawn from prize court practice and provisions in peace treaties. The relevance of these examples is questionable. This reviewer remains unconvinced that restitution is "the primary remedy."

Professor Wortley ranges widely over many problems related to expropriation. In addition to the central issues of restitution and adequate compensation, he deals with such matters as confiscation for penal and tax-collection purposes, exchange controls, restrictions on the use of property, exhaustion of local remedies, nationality of claims and protection of shareholders. Some of these topics are treated more thoroughly than others. The important distinction between taking and destruction of tangible property receives scant attention. The exposition is not always as lucid as it might be. There is needless ambiguity, for example, in the treatment of the differences between lawful and unlawful expropriation.

The author's rich background in private international law is evident throughout the book and enhances its interest for the public law specialist. There is also frequent and fruitful resort to analogies from municipal law, including the concepts of abuse of rights and unjustified enrichment. A current trend is reflected in the emphasis on the effects of the claimant state's own conduct and of recognition or acceptance by one state of the legislation or acts of another state.

Professor Wortley's little monograph is a valuable addition to the vast literature on expropriation. Its interest is enhanced by a rather unusual approach. It is not, however, a "definitive" work on the subject.

O. J. LISSITZYN

*Tratado sobre a Nacionalidade.* 3 vols. By Ilmar Penna Marinho. Vol. I: pp. 616, Index; Vol. II: *Do Direito Comparado da Nacionalidade.* pp. 732, Index; Vol. III: *Do Direito Brasileiro da Nacionalidade.* pp. 880, Index. Rio de Janeiro: Departamento de Imprensa Nacional, 1956, 1957.

Students of international law will accord a warm welcome to this comprehensive treatise on the *Law of Nationality*, covering as it does the whole field of the law, Volume I being a theoretical study of the nature and effects of nationality, Volume II a comparative study of the law, and Volume III an analysis and critical study of the law of Brazil on the subject.

The theoretical study is an exhaustive examination of all phases of the subject: the legal bond of nationality, its relation to international law, conflicts of nationality due to conflicting claims of allegiance, and the position of third states in cases of conflicts of nationality, the leading authors being cited on each point. The comparative study, forming the second volume of the treatise, gives a summary of the laws of the different countries, following the classification set forth in the first volume, making it convenient to balance the law of one country against that of another. This is followed by the texts of the laws of Brazil from 1824 to 1957, which are then examined in detail in the third volume.

The author and the Foreign Office of Brazil are to be congratulated upon the publication of a most useful treatise, which is a distinct contribution to the subject. Particularly to be commended are the elaborate bibliographies which accompany the separate topics of the first volume and the surveys of the nationality legislation of the separate countries.

C. G. FENWICK

*The Role of the Corporate Entity in International Law.* By Khalid A. Al-Shawi. Ann Arbor, Mich.: Overbeck Co. (in offset), 1957. pp. iv, 133. Table of cases. \$3.00.

This is a doctoral dissertation written at the University of Michigan Law School by a member of the faculty of the law school of the University of Baghdad. It is the first general, contemporary treatment of the topic which this reviewer has seen. No great new "breakthrough" theories are launched here; no special pleading for any particular point of view, including any regional one, is advanced. The book is a careful analysis and collection of authorities, primary and secondary, bearing upon the legal position of the private corporation when (1) it ventures outside the national state of its incorporation or (2) is infiltrated within the state of its incorporation by alien ownership. Two major problems are dealt with as to corporations in each of the foregoing categories: (1) diplomatic protection in time of peace and (2) seizure and control in time of war.

One has to wait until Chapter Four, page 64 of Part One, before getting to the World War II peace treaty provisions, which in the reviewer's opinion have greatly influenced the current law on the subject of diplomatic protection of nationally incorporated, foreign-owned companies. Although a good deal of what has gone before, including the well-known *Romano-Americana* and *Delagoa Railway* claims, is elsewhere available, the treatment of the older materials here will be a convenience for researchers. Chapter Four and those which follow it in Part One break new ground.

Part Two, dealing with enemy character and the control theory, should be cross-indexed in some way, mentally or otherwise, to enemy property seizure literature, to which the book brings good analysis. Likewise, Chapter Four of this second part, functionally viewed, deals with the sovereign immunity of corporations in relationship to their ownership or control by national states, and will be useful to the lawyer with a problem in the immunities area.

With respect to diplomatic protection in peacetime, the book mentions but does not highlight the difficult problems of defining how much ownership of a particular nationality is sufficient to cast around the corporation in question the aura—or the odor—of that nationality. How much foreign ownership should it take to make a New York corporation "alien," assuming that in peacetime it makes any difference? If there is a very substantial but minority United States interest through a Swiss holding company in a Cuban corporation, to what extent may, or will, the United States speak to Cuba for the American shareholders, and therefore, in the large, for the company? The author collects the authorities and the trends, but lets us come to the conclusion for ourselves that the interests of the international community would be well served by further efforts at international standardization in the several types of cases which might present the "how much" issue.

For the North American lawyer the rich citations of authorities from continental Europe and elsewhere outside the English-speaking world alone make the work a bargain, should he have, as he undoubtedly will have,



if he does much counseling about international trade or investment, problems of (a) choice of method of doing business, (b) characterization for tax purposes, (c) claiming treaty rights, (d) asserting rights under international law, or (e) seeking diplomatic protection.

COVEY T. OLIVER

*United Nations and Domestic Jurisdiction.* By M. S. Rajan. New York, London, Toronto: Longmans, Green and Co. Ltd., 1959. pp. xiii, 679. Index. \$12.75.

Mr. Dulles at San Francisco described the domestic jurisdiction clause of the United Nations Charter as "simple in conception," but as the U.N. Repertory of Practice of the Charter shows, the clause has been the subject of more controversy than any other provision of the Charter. This is not surprising, since Article 2 (7) furnishes the principal legal basis for opposing the assertion of United Nations interest in the affairs of national states. Moreover, as experience has demonstrated, the key terms of the paragraph ("intervention" and "essentially within the domestic jurisdiction") are susceptible of a wide range of interpretation and often require a complex assessment of factual conditions and legal obligations.

The present volume abundantly supports this conclusion by an extensive account of United Nations practice as revealed in more than twenty cases in which the issue of domestic jurisdiction has been raised. It also has a short but useful chapter on the drafting history of Article 2 (7), a chapter presenting various opinions on problems of interpretation, and a long concluding section mainly devoted to the author's views and arguments on United Nations jurisdiction in the light of the domestic jurisdiction clause. There are two interesting annexes<sup>1</sup> containing notes on French and German-language material, which should be helpful to scholars as a supplement to the considerable number of English-language references in the volume.

Notwithstanding the already voluminous literature on the subject, the present study constitutes a useful contribution and a stimulating work of scholarship. Its author, M. S. Rajan, is a well-known Indian scholar presently connected with the Indian School of International Studies at New Delhi. Not surprisingly, his arguments and conclusions coincide substantially with the views expressed by India and by other of the Asian and African governments in the United Nations. He enthusiastically supports what he regards as a "dynamic" and "liberal" construction of Article 2 (7), that is, one which he believes would permit the United Nations to assume an expanding rôle in keeping with changing conditions and ideas rather than in accordance with formulae derived from the past.

Accordingly, he considers that the term "intervention" should apply only to such recommendations as involve coercive measures against states; an example cited is the 1946 resolution on Spain, which called for withdrawal of diplomatic representatives and barred relations with United Nations agencies. As for the twin criterion of "essentially within domestic

<sup>1</sup> Written by Simone Dreyfus (French) and Gerhard Heuer (German).

jurisdiction," he suggests that its meaning depends on the discretion of the majority acting in the light of its conception of United Nations purposes and political reality.

Although Dr. Rajan's arguments are forcefully presented, they are by no means persuasive that United Nations practice is consistent only with his highly elastic (almost self-liquidating) interpretation of Article 2 (7). His descriptive study shows that resolutions which have condemned particular states for their conduct, or which have sought to mobilize action against them, have always been justified by reference to their international commitments, including, in some cases, the obligations laid down in the Charter. It is true that the applicability of such legal criteria to the particular situation has often been disputed, but the fact that reliance on legal principles is considered necessary for such "intervention" is significant, for it shows that a rational division between international and internal competence cannot be achieved without reference to the legal obligations of states.

OSCAR SCHACHTER

*Human Rights and the United Nations.* By Raghurir Chakravarti. Foreword by G. D. H. Cole. Calcutta: Progressive Publishers, 1958. pp. xvi, 218. Index. 22s. 6d.; Rs. 12.50.

Mr. Chakravarti's book is both a survey and an analytical essay concerning the legal aspects of human rights. It is somewhat brief, considering the scope of the material. It is difficult to do justice to the law of aliens, minority treaties, humanitarian intervention and more in 146 pages of text (there are another 56 pages of footnotes and the text of the Universal Declaration of Human Rights). Yet this shortcoming is more than balanced by the convenience of a very readable monograph which raises most, if not all, of the important legal questions about human rights in the United Nations framework. In addition to human rights and "classical international law," the reader is introduced to a thorough account of the *travaux préparatoires* leading to the human rights provisions of the Charter, an analysis of the legal effects of these, with special emphasis on the domestic jurisdiction clause (Article 2, Section 7), a discussion of the rôle of the Declaration of Human Rights, and a particularly interesting account of its application under the Trusteeship system. There is also a chapter each devoted to the Draft Covenants and "Self-Determination."

The most provocative parts of the book are the analyses of the Charter articles and the discussion of Non-Self-Governing Territories and the Trusteeship system. No doubt some will quarrel with the interpretations reached. If, as the author maintains (pages 52-55), Article 2, Section 7, is so broad as to exclude even *discussion* of matters "essentially within the domestic jurisdiction" of Member States, and if human rights are not to be considered matters of international concern by virtue of the Charter (page 55), surely there is very little left of the obligation of Members to co-operate with the United Nations in promoting human rights (Articles 55,

56). The reduction of express commitments to such an absurdity is a consequence, perhaps, of too much concern for documentary "proof," with *travaux préparatoires*, and too little for a dynamic concept of Charter practice. Mr. Chakravarti is, of course, very much aware that United Nations practice does not appear to support his view, but apparently, almost reluctantly, he is bound by a perspective of law which imposes absolutes in strict uniformity. This perspective makes it difficult for the reader to comprehend realistically the developmental character of the United Nations and its actual rôle in promoting human rights. There is hardly a hint, for instance, of the revolutionary changes that have taken place in the United Nations framework since 1945.

In his Conclusion Mr. Chakravarti soundly points out that classical international law will be radically altered (page 137) before human rights become, not principles, but rights, and quite properly suggests that United Nations Members should desist from either too idealistic or too political an approach to this serious problem, that they concentrate "... on what is possible rather than what is desirable" (page 140). He himself in the main fails to make clear that "what is possible" is a function of the dynamic relations he largely, if reluctantly, ignores. The Trusteeship system and the arrangements for Non-Self-Governing Territories are cases in point. Mr. Chakravarti acknowledges that the influence of the Declaration of Human Rights on trust agreements and the Standard Form of Information under Article 73(e) is of greater consequence than one might expect of a strictly declaratory and legally non-binding instrument (pages 126-129, 131-135), yet for him this fact seems to be of little significance in the development of "law."

One could wish for more recent references to secondary material; much of the latter dates from the 1940's. Important authors, such as Brierly, Jessup and Wright, are mentioned only in passing. It is unfortunate, too, that editorial defects mar the general appearance of the book: footnotes are missing, proof is replete with mistakes and pages are out of order. Despite these shortcomings—some of which admittedly are not the responsibility of the author—this remains a competent and useful statement of human rights problems from a legal point of view.

GERTRUDE LEIGHTON

*The United States and the United Nations: The Public View.* By William W. Scott and Stephen B. Withey. New York: Manhattan Publishing Co., 1958. pp. x, 314. Index. \$3.00.

This is not a constructive analysis of the organization and functions of the United Nations or of the policies of the United States in respect to its activities, but rather "a report on the views of the American people regarding the United Nations" during the first decade of the existence of the Organization. It expresses, therefore, not the scholarly criticism and comment of the authors, but rather the views of thousands of Americans whose reactions were expressed in their answers to the survey questions put

to them by a number of research agencies in the form of opinion polls. Some 89 tables are presented under the separate heads, from an initial question put in 1943, whether the United States should join a union of nations after the war, to a closing question asking what could be done to cut down the chances of an atomic war.

The volume is useful, therefore, as a study of social psychology, and as an indication to policy-makers of the extent to which public opinion might support a particular policy; but standing alone it would give an inadequate picture of the strengths and weaknesses of the United Nations. Fortunately, two additional volumes are to be published which will doubtless present an analysis by competent critics of the problems presented in the relations of the United States with the United Nations both in respect to organization and procedure and in respect to the solution of specific questions.

C. G. F.

*Uruguay and the United Nations.* Prepared under the auspices of the Uruguayan Institute of International Law. New York: Manhattan Publishing Co., 1958. pp. v, 129. Index. \$3.00.

This slim volume in the National Studies on International Organization series, directed by the Carnegie Endowment for International Peace, was prepared by Aureliano Aguirre, editor of Montevideo's *El País*, aided by University of Uruguay international law professor Eduardo Jiménez de Aréchaga, long a member of this Society. Those members of the Uruguayan Institute of International Law who gave their approval to the conclusions (Chapter 4) are listed by name in the foreword.

Uruguay's efforts to use its limited but active world position to promote international law and strengthen international institutions certainly receive emphasis here. First the book traces the country's official stand historically on the great issues of peace and human welfare up through the founding of the United Nations. Editorial and legislative opinion is surveyed amply and with frequent, useful quotations. Uruguayans were not happy with the text finally arrived at in San Francisco, but most felt that progress at the international community level is necessarily slow and that the Charter represented a major, if imperfect, step forward that time and good faith could improve.

A review of the Delegation of Uruguay's positions on salient issues contributes a generally sound summary of the nation's United Nations diplomacy down to 1957. For example, Uruguay has worked for expansion of the Organization's competence and for the principle that what is essentially within domestic jurisdiction is something to be determined by the organs of the community, not by the individual state. Extracts from the official documents testify to the extent to which Uruguay has been willing to pursue this logic (see pages 49-53 especially). She also has stood for universal (even compulsory) membership and "the widest possible" expansion (under the terms of the Charter) of the power of the

General Assembly, the "democratic" and "supreme" organ. Uruguayans strongly favor the developments which have promoted the General Assembly into the "axis" of the system; exercise of "secondary responsibility" for collective security is seen as implicit when the Security Council's primary responsibility cannot be carried out. Furthermore, Uruguay would like the Assembly to assume central determination of representation (credentials) in all United Nations organs; the General Assembly should have virtually unlimited power of investigation as implied necessarily from the power to recommend. Curtailment of the veto is another Uruguayan desire. Uruguay has pressed for the compulsory settlement of *all* disputes by legal means and accepts reluctantly the "prevailing view that some disputes are political in nature" (page 72).

Uruguay has always insisted that respect for, and protection of, human rights is a sacred mission of the United Nations, but she has viewed as unfortunate the efforts of the Commission on Human Rights to draft a covenant. Rather, she holds that the actual provisions of the basic Charter constitute a tangible binding obligation on the Members and the Universal Declaration a catalogue of specifics, "a natural complement of the Charter, and thus its enforcement and respect for its provisions would become one of the obligations of Member States" (page 75).

Given the limited ability to measure in any scientific way the actual thinking and preferences of the Uruguayan people at large, and given the marked tendency in this entire series toward uncritical "promotion" of national behavior and attitudes, this study is judged a careful, honest presentation. It nonetheless is lacking in any evaluation in perspective of the national policy goals, national experience and national attitudes, though this was requested expressly by the originators of the series.

ROBERT D. HAYTON

*The Nations and the United Nations.* By Robert M. MacIver. (National Studies on International Organization. Prepared for the Carnegie Endowment for International Peace.) New York: Manhattan Publishing Co., 1959. pp. xii, 186. Index. \$3.00.

In anticipation of a possible conference to review the Charter in 1955 or thereafter, the Carnegie Endowment in 1952 set in motion in some twenty-three carefully-selected countries studies of national policies and attitudes towards the United Nations and its future development. Robert M. MacIver, Lieber Professor Emeritus of Political Philosophy and Sociology of Columbia University, and Maurice Bourquin, Professor of International Law at the University of Geneva, were asked to summarize and appraise the results in two separate volumes, of which this is one. The choice was a fortunate one: Professor Bourquin, authority on international organization, was to be companioned by Professor MacIver, chosen, according to the Endowment's President, in the belief that he, "with his broad background in philosophy and sociology, would bring to this series fresh insights into the problems and potentialities of international organizations."

Broadly speaking, the Endowment's expectations have been realized. In working with the country studies, however, Professor MacIver labored under certain difficulties which he was the first to recognize. Not least of these was the fact that the Chinese, Soviet Union, Italian, and parts of the American, studies were unavailable at the time of writing. More important in terms of the value of the project as a whole was the fact that the Soviet study was to be prepared by the Hoover Institution at Stanford rather than in Russia, and the fact that Yugoslavia produced the only study to be made in a Communist country.

Part I of Professor MacIver's book contains brief summaries of the country studies and a chapter on public opinion. Part II is devoted to an analysis of the reports in terms of major issues—among them the trend towards universal membership, the problem of sovereignty, the veto, the issue of domestic jurisdiction, the evolving rôles of Council and Assembly, the problem of collective security, problems relating to trusteeship and non-self-governing territories, the non-political activities of the United Nations, and the rôle of the Court and of international law in international society. Part III consists of two chapters on "Present and Future."

The author's own views are stated forthrightly throughout the book. He agrees with the consensus of the country studies both on the continuing need for the United Nations and in the view that the United Nations' greatest contribution to peace lies in pacific settlement and economic and social co-operation, rather than in enforcement. He foresees the possibility of increased United Nations effectiveness, accompanied by some alteration in the functioning of the principal organs, and based on a growing awareness of common interest (in contrast to national interest of individual Members) and on changing concepts of the state and of the requirements of the domestic jurisdiction *caveat*.

The volume is eminently readable, and while not all of the experts will agree with all of Professor MacIver's views, the book should prove stimulating both to the experts and to the general reader.

M. MARGARET BALL

*Law in Diplomacy.* By Percy E. Corbett. Princeton, N. J.: Princeton University Press, 1959. pp. xii, 290. Index. \$6.00.

Following the path of *Law and Society in the Relations of States*, this "introductory study" asserts the theme, "law means government." As phrased otherwise in an admitted assumption in the preface, "the international sphere, not being one where any over-all constitutional authority reigns, is not in principle a realm of law." Consistently, future researchers are told (pages 275-276) to approach diplomacy from an "uncommitted point of view" that sees it "not as the interaction of entities living in a society governed by law, but as the political interaction of groups denying subordination to any collective authority, yet fortifying their claims with legal argument. . . ."

A quick "uncommitted" search is made for English uses of legal argument, mostly in the time of Elizabeth I, for American practice in regard to international custom, treaties, and recognition, and for Soviet attitudes chiefly as expressed by Korovin, Pashukanis, Vishinsky, and Tunkin. Sovereignty dominates. Legal language is useful to promote international aims. True, American evasion of treaties is found to be "rare" (page 57), but instances of faithfulness are not elaborated, nor are they valued as much by the connoisseur as are the rarities. Among Soviet theorists, Pashukanis in 1935 is found (page 95) "close to an accurate assessment" of the rôle of legal institutions in foreign policy. Unfettered and "developing the doctrine of the first chapter, which reduces what is euphemistically known as international law to the common practice of using legal arguments and forms as instruments of national interest, he might have gone on to an objective analysis of the use made of these implements by the Soviet and other governments . . ." (page 98).

With the diplomacy of Britain, the United States, and the Soviet Union in the foreground, the reader is led through developments in the law of the sea from the Anglo-Dutch dispute—without mention of Tromp's, de Ruyter's, or Blake's fleets—to the Geneva Conference of 1958, a survey of the record of American soreheadedness, Soviet bullheadedness, and British hesitation over arbitration, a review of the records of the League of Nations and the United Nations, and a glance at developments in the field of human rights. The set rules and procedures of international organizations, when accompanied by a special inducement to comply (page 187), "constitute the nearest approach to effective law in the international sphere." Hope is expressed that *de facto* adjustments in United Nations procedures may lead to authority with power and so to law, if nuclear weapons either allow time or speed voluntary surrender of sovereignty to a single authority. Hope is also placed in the more gradual approach to matters of human rights pursued since 1955.

Among the merits of this book are an admonition against assuming legal phraseology to be a true statement of law, an emphasis upon the importance to the researcher of intra-governmental communications over intergovernmental communications and public pronouncements, and an expression of a desire for a scientific study by scholars of many countries to discover, if possible, areas of agreement where rules control policy. This last needs to be done thoroughly, without "uncommitted" assumptions, and with freedom to prove either this book's theme or something else.

WESLEY L. GOULD.

*Guide to the Diplomatic Archives of Western Europe.* Edited by Daniel H. Thomas and Lynn M. Case. Philadelphia; University of Pennsylvania Press, 1959. pp. xii, 376. Index. \$7.50.

This volume of eighteen chapters by twenty of the former students of William E. Lingelbach brilliantly carries out the idea of a *Festschrift* for a historian. For each of the fourteen countries of Western Europe, in-

cluding Great Britain and Vatican City, for Bavaria as a former state, the League of Nations and United Nations together, and the United Nations Educational, Scientific and Cultural Organization, the writers give uniform accounts of the history, organization and classification, administration, regulations and facilities of the archives and their quarters. The bibliographies which yield that data also include records of what has been published from the archival material. The book is consequently as complete a *vade mecum* of the thousands of official files extant in the region from the Arctic Circle to the Mediterranean as one could wish for.

The histories of archives are fascinating. How Belgium kept its papers from the Germans in 1914 and 1940 is a good adventure story, with a serious overtone of how the Germans misused the papers they did get. All the archives are rich in the papers relating to the international relations of the countries, and the detailed descriptions of the collections enable the scholar to estimate what value he can extract from them. The writers of the country chapters have all had experience in the archives they review, and almost without exception emphasize the hospitable reception of scholars on the premises. Evidently a vast field exists in which the student of international law can follow the historian and assemble the experience of the past to elucidate the evolution of his science.

DENYS P. MYERS

*Gli Stranieri in Italia—Condizione Giuridico-Amministrativa secondo la Legislazione Italiana.* By Dante A. Caponera. Milan: Dott A. Giuffrè, 1957. pp. ix, 243. Index. L. 1000.

This is a much expanded second edition of Mr. Caponera's useful booklet outlining the Italian legal climate affecting aliens, published as the result of the rapid exhaustion of the first edition. That such a volume should be published at all is a phenomenon of very recent vintage; inasmuch as prior to World War II, emigration to Italy was practically unknown, and the number of foreign residents negligible.

The author discusses the conditions aliens must meet in order to enter, depart, reside and work in the country. He then passes to matters of more general scope and of greater interest to the international and comparative lawyer, namely, citizenship under Italian law, its rules and exceptions, the public and private rights and duties of the alien in Italy, and the relationship between the Italian and foreign legal systems (jurisdiction over the alien, service of process, rogatory commissions, extradition, execution of foreign judgments and arbitration awards).

Though treatment of these varied subjects is necessarily sketchy, the author has been careful to cite and on occasion quote pertinent articles of the Civil Code and of special laws and decrees, and to include a wealth of useful data in the Appendix.

All in all, this is a valuable booklet, which can well serve as a first source for serious students, in addition to being a legal and administrative Baedeker for the tourist and businessman.

GEORGE M. PAVIA



*International Bibliography of Political Science*. Vol. V. Prepared by the International Committee for Social Sciences Documentation in co-operation with the International Political Science Association. Edited by Jean Meynaud. Paris: UNESCO; New York: Columbia University Press, 1958. pp. 296. Index. \$6.00.

The fifth annual volume in the series of UNESCO bibliographies in political science represents further refinement in an art which UNESCO has brought to a high point. No international lawyer can afford to ignore these volumes, for the section on international relations (Section E) presents a comprehensive listing of books and articles on international law and organization from seemingly all countries of the world. Titles in all languages except French are translated into English, and full bibliographical information permits judging the length. Cross references to *International Political Science Abstracts* facilitates determination by reference to that indispensable publication of the desirability of full translation in aid of research. A thorough and sufficiently differentiated classification system, as well as an author index, aids discovery of titles without extensive search through irrelevant materials. Jean Meynaud is again to be congratulated as Editor for work well done.

JOHN N. HAZARD

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ELEANOR H. FINCH

## OFFICIAL DOCUMENTS

### ORGANIZATION FOR EUROPEAN ECONOMIC CO-OPERATION

#### STATUTE OF THE EUROPEAN NUCLEAR ENERGY AGENCY \*

*Adopted at Paris, December 20, 1957; in force  
February 1, 1958*

#### DECISION OF THE COUNCIL ESTABLISHING A EUROPEAN NUCLEAR ENERGY AGENCY

##### THE COUNCIL

Having regard to the Convention for European Economic Co-operation of 16th April, 1948,<sup>1</sup> and, in particular, Articles 13, 15 and 19 of that Convention;

Considering that, by virtue of Article 15 of that Convention, the Council may set up such technical committees or other bodies, as may be required for the performance of the functions of the Organisation;

Having regard to the Decision of the Council of 10th June, 1955, concerning Co-operation in the Use of Nuclear Energy for Peaceful Purposes, and the Decision of the Council of 18th July, 1956, concerning Joint Action by Member Countries in the Field of Nuclear Energy;

Considering that, by a Decision of 18th July, 1956, the Council set up a Steering Committee for Nuclear Energy instructed to submit to it proposals regarding the joint action to be undertaken by Member countries and to draw up a draft Statute for the European Nuclear Energy Agency, which will be instructed to promote this action for the development of the production and uses of nuclear energy for peaceful purposes;

Considering that the period provided for the Steering Committee was extended by the Council at its meeting of 13th February, 1957;

Considering that there is no contradiction between the principles which inspire the provisions of the present Decision and the principles which have inspired the Treaty instituting the European Atomic Energy Community (EURATOM) entered into at Rome on 25th March, 1957;<sup>2</sup>

Having regard to the Report of the Steering Committee for Nuclear Energy of 27th September, 1957;

##### DECIDES:

\* Published by the Organization for European Economic Co-Operation, Paris.

<sup>1</sup> Dept. of State Pub. 3145; 43 A.J.I.L. Supp. 94 (1949).

<sup>2</sup> Published by the Secretariat of the Interim Committee for the Common Market and Euratom, Brussels. Provisional English text in 51 A.J.I.L. 955 (1957).

Working Parties and the submission of questionnaires to participating countries, shall be adopted by a majority of the members of the Steering Committee present.

(d) Decisions which are binding on Governments and which are taken by the Steering Committee within the powers conferred upon it shall commit only those countries which have accepted them.

#### ARTICLE 15

(a) The Steering Committee may establish such Commissions and Working Parties as it may consider necessary to assist it in the performance of its duties and entrust them with the execution of any task relevant to the purpose of the Agency.

(b) Restricted bodies may be established to study questions or execute functions of interest to a group of participating or associated countries, in accordance with the conditions set forth in Article 5 above or in a decision of the Council. Special expenditure assignable to the work of these bodies, such as the cost of studies or the remuneration of experts, shall be chargeable to the countries concerned.

#### ARTICLE 16

(a) The Steering Committee shall perform its duties in collaboration with the competent bodies of the Organisation.

(b) The Steering Committee shall consult these bodies on questions which come within their terms of reference. These bodies shall consult the Steering Committee on all questions relating to the production and uses of nuclear energy for peaceful purposes.

#### ARTICLE 17

(a) The Steering Committee and its subsidiary bodies shall be assisted by the Secretariat of the Agency, which shall form part of the Secretariat of the Organisation.

(b) Expenditure relating to the working of the Agency shall be covered by the Budget of the Organisation. To this end, the Steering Committee shall prepare annual estimates of expenditure, which shall be submitted to the Council for approval.

(c) Expenditure of the Agency which is subject to special financial rules shall be covered by separate budgetary provisions and countries which make no financial contribution to such expenses shall abstain when the relevant item in the Budget is approved.

#### ARTICLE 18

(a) In the performance of its duties, the Steering Committee shall take account of the work done by other international Organisations concerned and shall, as far as possible, request their co-operation.

(b) The Steering Committee shall, in agreement with the Council, es-

establish relations with international governmental Organisations concerned with nuclear energy questions.

(c) The Steering Committee may establish contact with international non-governmental Organisations concerned, within the framework of decisions or arrangements approved by the Council.

#### ARTICLE 19

(a) The provisions of the present Decision do not affect rights and obligations resulting from treaties previously entered into by Governments participating in the present Decision.

(b) Since the present Decision does not affect the exercise of competences granted to the European Atomic Energy Community (EURATOM) by the Treaty entered into at Rome on 25th March, 1957, the Agency shall establish with the said Community a close collaboration, details of which shall be determined by common agreement.

#### ARTICLE 20

(a) Participating countries shall be countries the Governments of which participate in the present Decision. Associated countries shall be Canada and the United States of America.

(b) Any Government participating in the present Decision may terminate the application thereof to itself by giving twelve months' notice to that effect to the Secretary-General of the Organisation.

(c) The Decision of the Council of 18th July, 1956, referred to above, is repealed.

#### ARTICLE 21

The present Decision shall enter into force on 1st February, 1958.

### CONVENTION ON THE ESTABLISHMENT OF A SECURITY CONTROL IN THE FIELD OF NUCLEAR ENERGY AND ANNEXED PROTOCOL ON THE TRIBUNAL ESTAB- LISHED BY THE SAID CONVENTION

*Signed at Paris, December 20, 1957; in force  
July 22, 1959<sup>1</sup>*

THE GOVERNMENTS of the Federal Republic of Germany, the Republic of Austria, the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Kingdom of Greece, Ireland, the Republic of Iceland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Norway, the Kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Sweden, the Swiss Confederation and the Turkish Republic;

<sup>1</sup> Instruments of ratification have been deposited on behalf of Belgium, Denmark, Federal Republic of Germany, France, Ireland, The Netherlands, Norway, Switzerland, Turkey, and the United Kingdom.



HAVING RESOLVED to promote the development of the production and uses of nuclear energy in the Member countries of the Organisation for European Economic Co-operation (hereinafter referred to as the "Organisation") by co-operation between these countries and the harmonisation of national measures;

CONSIDERING that the joint action undertaken to this end in the Organisation is intended to develop the European nuclear industry for purely peaceful ends and must not further any military purpose;

CONSIDERING that at its meeting of 18th July, 1956, the Council of the Organisation (hereinafter referred to as the "Council") decided to establish to this effect an international security control;

CONSIDERING that by a Decision dated this day the Council has established, within the Organisation, a European Nuclear Energy Agency (hereinafter referred to as the "Agency") with the task of pursuing the joint action undertaken;

HAVE AGREED as follows:

## PART I

### ARTICLE 1

- (a) The object of the security control is to ensure that
- (i) the operation of joint undertakings established by two or more Governments or by nationals of two or more countries on the initiative or with the assistance of the Agency and
  - (ii) materials, equipment and services made available by the Agency or under its supervision, by virtue of agreements concluded with the Governments concerned

shall not further any military purpose.

(b) The security control may be applied, at the request of the parties, to any bilateral or multilateral agreement, or, at the request of a Government, to any activity for which that Government is responsible in the field of nuclear energy.

### ARTICLE 2

- (a) For the above purposes the security control shall apply to
- (i) any joint undertaking and to any undertaking which comes within the scope of an agreement concluded pursuant to Article 1 (a) (ii) or request made pursuant to Article 1 (b);
  - (ii) any facility using source materials or special fissionable materials recovered or obtained in such undertakings;
  - (iii) any facility using special fissionable materials recovered or obtained either from source materials or from special fissionable materials subject to control by virtue of Article 1.

(b) Nonetheless the Steering Committee of the Agency (hereinafter referred to as the "Steering Committee") may set aside the application of

the security control where special fissionable materials are exported outside territory under the jurisdiction of Governments party to the present Convention, provided that these materials are subject to an equivalent security control.

### ARTICLE 3

With respect to any undertaking or facility subject to control, the Agency shall have the following rights and duties to the extent determined by the security regulations provided for in Article 8:

(a) to examine the design of specialised equipment and facilities, including nuclear reactors, for the sole purpose of ensuring that the control can be effectively exercised as provided for in the present Convention;

(b) to approve the means to be used for the chemical processing of irradiated materials solely to ensure that the object defined in Article 1 shall be achieved;

(c) to require the maintenance and production of operating records to assist in ensuring accountability for source and special fissionable materials used or produced by the undertaking or facility;

(d) to call for and receive progress reports.

### ARTICLE 4

(a) Special fissionable materials recovered or obtained from source or special fissionable materials subject to control shall be used exclusively for peaceful purposes, under the control of the Agency, for research or in reactors specified by the Government or Governments concerned.

(b) Any excess of any special fissionable materials recovered or produced over what is needed for the above-stated uses shall remain subject to the control of the Agency, which may require it to be deposited with the Agency, or in other premises controlled or which may be controlled by the Agency, provided that thereafter at the request of the parties concerned special fissionable materials so deposited shall be returned promptly to the parties concerned for use under the same provisions as stated above.

### ARTICLE 5

(a) The Agency shall have the right and responsibility to send into territory under the jurisdiction of Governments party to the present Convention inspectors, designated by it after consultation with the Government or Governments concerned, who shall have access at all times to all places and data and to any person who by reason of his occupation deals with materials, equipment, or facilities subject to control, as necessary to account for source and special fissionable materials subject to control and to determine whether there is compliance with the obligations arising from the present Convention and from any agreement concluded by the Agency with the Government or Governments concerned.

(b) If these obligations are not observed, the Agency may request that

(c) The international inspectors shall be accompanied by representatives of the authorities of the Government concerned, if that Government so requests, provided that the inspectors shall not thereby be delayed or otherwise impeded in the exercise of their functions.

(d) The international inspectors shall also have the responsibility of obtaining and verifying the accounting referred to in Article 3 (c), relating to source materials and special fissionable materials, and for ascertaining whether there is compliance with the obligations arising from the present Convention and from any agreement concluded with the Government or Governments concerned. The inspectors shall report any infringement to the Control Bureau.

(e) Should a measure of inspection be resisted, the Control Bureau may ask the President of the Tribunal provided for in Article 12 for a warrant for the execution of the measure of inspection against the undertaking concerned. The President of the Tribunal shall give a decision within three days. The decision of the President shall not prejudice the determination by the Tribunal of any subsequent claims concerning the same case which might be introduced later under Article 13.

### PART III

#### ARTICLE 12

(a) There is hereby established a Tribunal consisting of seven independent judges appointed for five years by decision of the Council or, in default, by lot from a list comprising one judge proposed by each Government party to the present Convention.

(b) If the Tribunal includes no judge of the nationality of a party in a case submitted to it, the Government in question may choose a person to sit as additional judge in that case.

(c) The organisation of the Tribunal and the status of the judges shall be in accordance with the provisions of the Protocol annexed to the present Convention.

(d) The Tribunal shall adopt its own Rules of Procedure, which shall be subject to the approval of the Council.

#### ARTICLE 13

(a) Any Government party to the present Convention or any undertaking concerned may bring before the Tribunal set up under Article 12 appeals against decisions

- (i) relating to the application of Article 3; if no action has been taken within two months after the request for examination or approval, this is to be taken as a decision to reject the appeal;
- (ii) prescribing one or more of the measures provided for under Article 5 (b).

(b) When an appeal is brought before the Tribunal by virtue of the preceding paragraph, the Tribunal shall decide whether the decision ap-

pealed against is in conformity with the provisions of the present Convention, of the security regulations, and of the agreements provided for in Article 8. If it finds that the decision appealed against is contrary to these provisions, the Steering Committee shall take whatever steps are needed to execute the decision of the Tribunal.

(c) The Tribunal may oblige the Agency to make reparation for any damage which might be suffered by the requesting party by reason of the decision appealed against.

(d) Any undertaking may, in addition, request the Tribunal to order reparation to be made by the Agency for any exceptional damage which it has suffered by reason of an inspection carried out in application of Article 5.

#### ARTICLE 14

The Tribunal shall be competent to decide on any other question relating to the joint action of the Member countries of the Organization in the field of nuclear energy submitted to it by agreement between the parties to the present Convention concerned.

#### ARTICLE 15

(a) Appeals before the Tribunal in the cases provided for in paragraph (a) of Article 13 shall be brought within two months from the date of the decision appealed against, or, in other cases, within three years from the time when the undertaking became aware of the facts enabling it to seek compensation.

(b) Subject to the provisions of the next following paragraph, appeals lodged with the Tribunal shall not operate as a stay of execution. The Tribunal may, however, if it considers that the circumstances so require, order a stay of execution of the decision appealed against.

(c) Appeals lodged with the Tribunal against decisions taken by virtue of Article 5 (b) (ii) shall operate as a stay of execution. The Tribunal may, however, at the request of any Government party to the present Convention order the immediate execution of the decision.

### PART IV

#### ARTICLE 16

(a) An agreement shall be entered into between the Organisation and the European Atomic Energy Community (EURATOM) defining the arrangements under which the control established by the present Convention shall be carried out, within the territory to which the Treaty instituting the European Atomic Energy Community (EURATOM) signed at Rome on 25th March, 1957,<sup>2</sup> applies, by the competent bodies of EURATOM by delegation from the Agency in order to attain the objectives of the present Convention. Proposals to this effect shall be submitted to the European

<sup>2</sup> 51 A.J.I.L. 955 (1957).

Commission set up by the said Treaty as soon as it is constituted in order that such an agreement may be reached with the minimum delay.

(b) An agreement may also be entered into between the Organisation and the International Atomic Energy Agency<sup>3</sup> in order to define the co-operation to be established between the two institutions.

#### ARTICLE 17

A military purpose within the meaning of Article 1 includes the use of special fissionable materials in weapons of war and excludes their use in reactors for the production of electricity and heat or for propulsion.

#### ARTICLE 18

(a) The term "special fissionable material" means plutonium-239; uranium-233; uranium enriched in the isotopes 235 or 233; any material containing one or more of the foregoing; and such other fissionable material as the Steering Committee shall from time to time determine; but the term "special fissionable material" does not include source material.

(b) The term "uranium enriched in the isotopes 235 or 233" means uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

(c) The term "source material" means uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentrations as the Steering Committee shall from time to time determine; and such other material as the Steering Committee shall from time to time determine.

(d) The term "material" means source material and special fissionable material.

#### ARTICLE 19

(a) The Government of any Member or Associate country of the Organisation which is not a Signatory to the present Convention may accede thereto, provided that it joins the Agency, by notification addressed to the Secretary-General of the Organisation.

(b) The Government of any other country which is not a Signatory to the present Convention may accede thereto, provided that it joins the Agency, by notification addressed to the Secretary-General of the Organisation and with the unanimous assent of the Members of the Organisation. Such accession shall take effect from the date of such assent.

#### ARTICLE 20

Any Government party to the present Convention may terminate the application thereof to itself by giving twelve months' notice to that effect to

<sup>3</sup> For Statute, see *ibid.* 466.

the Secretary-General of the Organisation, but such withdrawal shall be without prejudice to the control exercised over materials previously supplied by the Agency or under its supervision.

#### ARTICLE 21

(a) The present Convention shall be ratified. Instruments of ratification shall be deposited with the Secretary-General of the Organisation.

(b) The present Convention shall come into force upon the deposit of instruments of ratification by not less than ten of the Signatories. For each Signatory ratifying thereafter, the present Convention shall come into force upon the deposit of its instrument of ratification.

(c) The implementation of the present Convention in the territory of the member countries of the European Atomic Energy Community (EURATOM) shall, however, be subject to the conclusion of the Agreement provided for in Article 16 (a), except—without prejudice to the arrangements which will be defined by this Agreement—as regards its implementation to facilities situated within the precincts of joint undertakings.

#### ARTICLE 22

The Secretary-General of the Organisation shall give notice to all Governments party to the present Convention of the receipt of any instrument of ratification and accession. He shall also notify them of the date on which the present Convention comes into force.

#### ANNEX

##### Interpretation Relating to Article 1

The provisions of Article 1 (a) (ii) relating to "services made available by the Agency or under its supervision" refer to the special aid which might be granted to a country by virtue of a special agreement entered into with the Government in question. They do not have the effect of extending the field of application of Article 2 by creating a right of pursuit involving the control of the activities of persons who have collaborated in joint undertakings or of the use of the knowledge which the participants in these undertakings have acquired.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly empowered, have signed the present Convention.

DONE in Paris, this twentieth day of December Nineteen Hundred and Fifty Seven, in the French, English, German, Italian and Dutch languages in a single copy which shall remain deposited with the Secretary-General of the Organisation for European Economic Co-operation by whom certified copies will be communicated to all Signatories:

PROTOCOL ON THE TRIBUNAL ESTABLISHED BY THE  
CONVENTION ON THE ESTABLISHMENT OF A  
SECURITY CONTROL IN THE FIELD  
OF NUCLEAR ENERGY

THE GOVERNMENTS party to the Convention on the Establishment of a Security Control in the Field of Nuclear Energy dated this day (hereinafter referred to as the "Convention");

DESIROUS of determining in accordance with Article 12 of the Convention the organisation of the Tribunal established by the said Article and the status of its judges;

HAVE AGREED upon the following provisions which shall be annexed to the Convention:

ARTICLE 1

The Tribunal established by Article 12 (a) of the Convention shall perform its duties in accordance with the provisions of the Convention and of the present Protocol.

ARTICLE 2

(a) The appointment of the judges provided for in Article 12 (a) of the Convention shall take place within a period of six months after the coming into force of the Convention; subsequent appointments shall take place within six months of the occurrence of vacancy or vacancies.

(b) Any vacancy shall be filled for the remainder of the term by the same method as that laid down for the first appointment.

ARTICLE 3

(a) The judges shall be highly qualified persons of known impartiality who satisfy the conditions required in their own countries for appointment to the highest judicial office or who are legal experts of wide repute.

(b) No judge may participate in the decision of any case in which he has previously taken part as representative, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity. Any doubt on this point shall be settled by decision of the Tribunal.

(c) No two judges may be nationals of the same State.

ARTICLE 4

(a) The judges shall be immune from legal process in respect of any act done by them in their judicial capacity. This immunity shall continue after they have ceased to hold office. Such immunity may be waived by the Tribunal.

(b) No judge may be removed from office unless, in the unanimous

opinion of the other judges, he has ceased to satisfy the required conditions for his appointment or to carry out the obligations of his office.

(c) The judge concerned shall not take part in the deliberations and decisions under the present Article.

#### ARTICLE 5

- (a) The Tribunal shall elect its President.
- (b) The Tribunal shall appoint a Registrar.

#### ARTICLE 6

The rules relating to the payment of fees to the judges shall be determined by the Council of the Organisation for European Economic Co-operation (hereinafter referred to as the "Organisation").

#### ARTICLE 7

- (a) The President shall convene the Tribunal when necessary.
- (b) The Tribunal shall sit at the Headquarters of the Organisation.
- (c) The President shall preside at the proceedings of the Tribunal. If the President is unable to preside or in cases where the President is of the same nationality as one of the parties, the eldest of the other judges shall preside.

#### ARTICLE 8

- (a) The proceedings of the Tribunal shall be valid if five judges are present.
- (b) All questions shall be decided by a majority of the judges present.
- (c) In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

#### ARTICLE 9

- (a) Hearings shall be in public unless the Tribunal of its own motion or at the request of the parties shall decide otherwise.
- (b) The deliberations of the Tribunal shall be secret. The Tribunal shall state the reasons on which its decisions are based and shall give the names of the judges taking part therein.

#### ARTICLE 10

- (a) The Member countries and the Organisation shall be represented before the Tribunal by a representative appointed for each case; the representative may be assisted before the Tribunal by counsel or advocates.
- (b) Other parties may be represented by persons entitled to plead before courts of any Member country.
- (c) The representatives, counsel and advocates referred to in the present Article shall enjoy immunity from legal process in regard to statements made and writings produced by them, in connection with the performance



of the duties contemplated in the present Article. In addition, their documents shall be inviolable and they shall enjoy freedom of movement between the seat of the Tribunal and their habitual place of residence.

(d) The immunities are granted solely in the interest of due administration of justice and so far as they are necessary to the persons concerned for the performance of their duties. The Tribunal may waive these immunities if it considers that such waiver is not contrary to the due administration of justice.

(e) The Tribunal shall have, with respect to the counsel and advocates who appear before it, the powers normally accorded to courts and tribunals, under conditions which shall be determined by the Rules of Procedure.

#### ARTICLE 11

(a) Witnesses and experts may be heard under conditions which shall be determined by the Rules of Procedure.

(b) Witnesses and experts may be heard either under oath in the form determined by the Rules of Procedure or in the manner laid down by the municipal law of the witness or expert.

#### ARTICLE 12

(a) The Tribunal may request that a witness or expert be heard by the judicial authorities of his place of residence.

(b) The request shall be sent to the Government in question who shall convey it to the competent judicial authorities.

#### ARTICLE 13

(a) Any violation of an oath committed by witnesses or experts before the Tribunal shall be regarded as the equivalent of a violation committed before courts, dealing with a case in civil law, of the country in which the session of the Tribunal took place.

(b) If such an offence has been committed in the course of a hearing before a national judicial authority as provided for in Article 12 hereof, the national legislation of the country of this judicial authority shall apply.

#### ARTICLE 14

The Tribunal shall determine the amount and the incidence of costs.

#### ARTICLE 15

Expenses relating to the functioning of the Tribunal shall be entered in the budget of the Organisation.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly empowered, have signed the present Protocol.

DONE in Paris, this twentieth day of December Nineteen Hundred and Fifty Seven, in the French, English, German, Italian and Dutch languages

in a single copy which shall remain deposited with the Secretary-General of the Organisation for European Economic Co-operation by whom certified copies will be communicated to all Signatories.

CONVENTION ON THE CONSTITUTION OF THE EUROPEAN  
COMPANY FOR THE CHEMICAL PROCESSING OF  
IRRADIATED FUELS (EUROCHEMIC)

*Signed at Paris, December 20, 1957; in force July 27, 1959.<sup>1</sup>*

THE GOVERNMENTS of the Federal Republic of Germany, the Republic of Austria, the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Italian Republic, the Kingdom of Norway, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Sweden, the Swiss Confederation and the Turkish Republic;

CONSIDERING that, in accordance with a Decision taken by the Council of the Organisation for European Economic Co-operation on 18th July, 1956, a Study Group has been formed among a number of Member countries of that Organisation, interested in the constitution of a joint undertaking for the chemical processing of irradiated fuels;

CONSIDERING that, on the basis of the studies made by the Study Group, the Government of the Federal Republic of Germany, the Government of the Republic of Austria, the Government of the Kingdom of Belgium, the Government of the Kingdom of Denmark, the Commissariat à l'Énergie Atomique in Paris, the Comitato Nazionale per le Ricerche Nucleari in Rome, the Government of the Kingdom of Norway, the Government of the Kingdom of the Netherlands, the Junta de Energia Nuclear in Lisbon, Aktiebolaget Atomenergi in Stockholm, the Government of the Swiss Confederation and the Government of the Turkish Republic have agreed to join in constituting a joint undertaking under the registered name of "The European Company for the Chemical Processing of Irradiated Fuels (EUROCHEMIC)";

CONSIDERING that this Company, both as regards its composition and its aims, has an international character and is in the general interests of the countries taking part;

CONSIDERING that the object of this Company is to carry out any research or industrial activity connected with the processing of irradiated fuels and the use of products arising therefrom, to contribute to the training of specialists in this field and thus to promote the production and peaceful uses of nuclear energy by the Member countries of the Organisation for European Economic Co-operation and, in furtherance of this object, to

<sup>1</sup> Instruments of ratification have been deposited on behalf of Austria, Belgium, Denmark, Federal Republic of Germany, France, The Netherlands, Norway, Portugal, Switzerland, and Turkey.

build before 1961 and operate a plant for the chemical processing of irradiated fuels and a research laboratory;

DESIROUS, in those circumstances, to give this Company all the support which it requires;

RECOGNISING that the constitution of the Company and its operations should be facilitated by special measures taken by the Governments of the countries taking part, without, however, the facilities accorded to the Company constituting a precedent for other joint undertakings which might later be set up;

HAVE AGREED as follows:

## PART I

### ARTICLE 1

(a) A joint undertaking under the registered name of "The European Company for the Chemical Processing of Irradiated Fuels (EURO-CHEMIC)" (hereinafter referred to as the "Company") shall be constituted.

(b) The constitution of the Company shall take place, in accordance with the provisions of the Statute annexed to the present Convention (hereinafter referred to as the "Statute"), after the signature of the Statute and upon the coming into force of the present Convention.

### ARTICLE 2

(a) The Company shall be governed by the present Convention, by the Statute and, residually, by the law of the State in which its Headquarters are situated, insofar as the present Convention or the Statute do not derogate therefrom.

(b) The Company shall possess juridical personality. It shall have power to do any act connected with its objects and in particular to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings.

(c) The character of public interest shall be recognised, in accordance with national laws, as regards the acquisition of the immovable property necessary for the establishment of the installations of the Company. The procedure of expropriation for reasons of public interest may be introduced by the Government in question in accordance with national law, with a view to acquiring such property in the absence of amicable agreement.

### ARTICLE 3

The Governments party to the present Convention will take all action necessary, within their competence, to facilitate the Company doing any act connected with its objects, and in particular with processed fuels and recovered products.

## ARTICLE 4

(a) The provisions of the present Convention do not affect the rights and obligations resulting from the Treaty instituting the European Atomic Energy Community (EURATOM) signed at Rome on 25th March, 1957.<sup>2</sup>

(b) Contracts relating to source materials or special fissionable materials consigned from or destined for countries not members of the European Atomic Energy Community (EURATOM) shall benefit from the exceptions provided for in Article 75 of the said Treaty.

## ARTICLE 5

The security control provided for by the Convention of 20th December, 1957, on the Establishment of a Security Control in the Field of Nuclear Energy<sup>3</sup> shall be applicable to the operations of the Company and to its products and shall be exercised in accordance with the provisions of that Convention and of the Agreement provided for in Article 16 (a) thereof.

## ARTICLE 6

(a) The installations and archives of the Company shall be inviolable. The property and assets of the Company, together with the materials despatched to it or by it, shall be immune from all administrative forms of requisition, expropriation or confiscation.

(b) The property and assets of the Company may not be seized or be the subject of measures of enforced execution, except by an order of a court. Nevertheless, the installations and the materials necessary for the Company's activity may not be seized or be the subject of measures of enforced execution.

(c) The provisions of the present Article shall not prevent the competent authorities of the Headquarters State or of other countries where installations and archives of the Company are situated from having access to the installations and archives of the Company in their respective territories in order to ensure the execution of judicial decisions or regulations for the protection of public health and the prevention of accidents.

## ARTICLE 7

(a) The Company shall be exempt in the Headquarters State from all fees and taxes whether fiscal or quasi-fiscal at its constitution and when its capital is subscribed or increased, its shares are issued, as well as from various formalities which its activities may require in the Headquarters State. Similarly, it shall be exempt from all fees and taxes on its dissolution or winding up.

(b) The Company shall be exempt in the Headquarters State as well as in other countries where its installations are situated from fees and taxes

<sup>2</sup> 51 A.J.I.L. 955 (1957).

<sup>3</sup> Above, p. 1018.

payable upon the acquisition of immovable property and from inscription and registration fees.

(c) The Company shall be exempt in the Headquarters State from all direct taxes which might be imposed as regards its property, assets and income.

(d) The Company shall be exempt from taxes of an exceptional or discriminatory nature levied by the Headquarters State, such as *ad hoc* capital levy or any tax not payable by other companies engaged in similar activities.

(e) The exemptions laid down in the present Article shall not apply to any fee or tax charged in respect of any public utility service.

#### ARTICLE 8

(a) Such raw materials, capital equipment and scientific and technical material as are necessary for the installations and for the operations of the Company shall, subject to the provisions of Article 9, be exempt from all customs duties or charges of like effect and from all import restrictions.

(b) Products thus imported must not be resold on the territory of the country into which they were imported, except under conditions agreed with the Government of that country.

(c) The import and export of fissionable materials destined for the Company as well as materials produced or recovered by the Company which are destined for the countries whose Governments are party to the present Convention and which are shareholders or have nationals who are shareholders in the Company (hereinafter referred to as "countries taking part") shall be exempt from all customs duties or charges of like effect and from all restrictions.

#### ARTICLE 9

(a) The Company may, for the fulfilment of its objects, acquire, hold, and use currency of the Contracting Parties to the Agreement of 19th September, 1950, for the Establishment of a European Payments Union and of other countries whose Governments are party to the present Convention. The Governments party to the present Convention shall grant to the Company, where appropriate, any necessary authority in accordance with the procedure laid down in the regulations and agreements applicable.

(b) The Governments party to the present Convention shall grant to the Company, as freely as possible, any authority necessary to enable it to acquire, hold, and use currency not covered by paragraph (a) of the present Article.

#### ARTICLE 10

(a) The Company may recruit, without let or hindrance, technical, clerical and skilled manual staff from among the nationals of the countries taking part.

(b) In particular, the Headquarters State will not apply provisions on immigration or alien registration in such a manner as to impede the recruit-

ment or repatriation of skilled staff from the other countries taking part, except when this would be contrary to public policy, national security or public health.

(c) Persons employed by the Company

- (i) shall have the right, at the time of first taking up their position in the country in question, to import free of duty their furniture and effects from the country where they last resided or of which they are nationals, and to re-export free of duty their furniture and effects on the termination of their employment, subject in both cases to any conditions deemed requisite by the Government of the country in which the said rights are exercised;
- (ii) shall have the right to import free of duty any motor car owned by them for their personal use obtained in the country where they last resided or of which they are nationals, under the normal internal market conditions prevailing in that country and to re-export the same free of duty, subject in both cases to any conditions deemed requisite by the Government of the country in which the said rights are exercised.

## PART II

### ARTICLE 11

(a) The Company shall report each year to the Governments of the countries taking part on its development and financial position.

(b) The reports of the Company shall be submitted to a Special Group of the Steering Committee of the European Nuclear Energy Agency (hereinafter referred to as the "Special Group") composed of representatives of the Governments of the countries taking part.

### ARTICLE 12

(a) The Special Group shall consider any problems of common interest to the Governments party to the present Convention which may be raised by the operations of the Company and shall propose the measures found necessary in that connection.

(b) If it subsequently appears that the legislative provisions applied in the Headquarters State or in any other country taking part may give rise to difficulties in the operations carried out by the Company in pursuance of its objects, the Special Group shall propose measures for resolving such difficulties in the spirit of the present Convention.

(c) Proposals formulated by the Special Group under the present Article shall be adopted by a simple majority.

### ARTICLE 13

(a) Any director or shareholder of the Company may submit to the Special Group difficulties arising in connection with

- (i) the processing of fuel consigned from the countries taking part or the allocation of the products recovered;
- (ii) the use of the resources of the Company for the development of research;
- (iii) the communication of the results of research.

(b) When such application is made to the Special Group it will take a decision by a three-quarters majority of its members which will be binding upon the Company.

#### ARTICLE 14

(a) The approval of the Special Group shall be required for amendments to the Statute concerning

- the headquarters of the Company (Article 2);
- its objects (Article 3);
- the conditions for the admission of new shareholders (Article 8);
- the adoption of decisions of the General Assembly (Article 15);
- the composition of the Board of Directors (Article 18);
- the adoption of decisions of the Board of Directors (Article 23);
- knowledge and patents (Article 26);
- the interim period (Article 27).

(b) The approval of the Special Group shall be required for decisions of the Company concerning

- (i) the extension of the period fixed for the duration of the Company;
- (ii) the conclusion of contracts relating to the processing of fuel consigned from countries not taking part or to the delivery of special fissionable materials to such countries;
- (iii) the construction by the Company and the fixing of the site of any new plant and any extension of the existing plant leading to a new plant of large size.

(c) In the case of transfer of shares or of subscription rights to any person who is not of the same nationality as the transferor, the choice of the transferee shall be subject to the approval of the Special Group. However, the Special Group shall not have the power to prevent the transfer of shares by a Government, which has declared its intention to give notice under Article 18 (a) of the present Convention, or by shareholders nationals of such a Government, to Governments party to the present Convention or their nationals.

(d) Decisions taken by the Special Group under the present Article shall be adopted unanimously by its members.

#### ARTICLE 15

(a) The approval of the Special Group shall also be required for

- (i) amendments to the provisions of the Statute other than amendments contemplated in Article 14;

- (ii) any increase or reduction of capital which would result in changing the distribution of capital between the shareholders.
- (b) Decisions taken by the Special Group under the present Article shall be adopted by a three-quarters majority of its members.

#### ARTICLE 16

Any dispute arising between Governments party to the present Convention concerning the interpretation or application thereof shall be examined by the Special Group and, in the absence of friendly settlement, may be submitted by agreement between the Governments concerned to the Tribunal established by the Convention of 20th December, 1957, on the Establishment of a Security Control in the Field of Nuclear Energy.<sup>4</sup>

#### ARTICLE 17

(a) The present Convention shall be concluded for a period of fifteen years. It will be automatically extended for periods of five years, if, at the end of the preceding period, the Company is still in existence.

(b) However, the continuation in force of all or part of the provisions of Article 7 and paragraphs (a) and (b) of Article 8 of the present Convention beyond the first period of five years shall be subject to a decision of the Special Group adopted unanimously by its members which will fix the duration of such further period.

(c) The present Convention shall cease to be in force upon the completion of the period of the winding-up of the Company.

#### ARTICLE 18

(a) A Government party to the present Convention which is not or is no longer a shareholder and has no national who is or continues to be a shareholder in the Company may, insofar as it is concerned, after a period of fifteen years, terminate the application of the present Convention by giving three months' notice to the Secretary-General of the Organisation for European Economic Co-operation.

(b) Nevertheless, should this country be the Headquarters State, or a country in which any installation of the Company is situated, the present Convention shall not be terminated insofar as that country is concerned, unless the headquarters or installation of the Company shall have been transferred to another country.

#### ARTICLE 19

(a) The Government of any Member or Associate country of the Organization for European Economic Co-operation<sup>5</sup> which is not a Signatory to the present Convention may accede thereto, provided that it becomes a party to the Convention of 20th December, 1957, on the Establishment of a

<sup>4</sup> Above, p. 1018.

<sup>5</sup> 48 A.J.I.L. Supp. 94 (1949).



Security Control in the Field of Nuclear Energy, by notification addressed to the Secretary-General of the Organisation.

(b) The Government of any other country which is not a Signatory to the present Convention may accede thereto, provided that it becomes a party to the Convention of 20th December, 1957, on the Establishment of a Security Control in the Field of Nuclear Energy, by notification addressed to the Secretary-General of the Organisation and with the unanimous assent of the Special Group. Such accession shall take effect as from the date of such assent.

#### ARTICLE 20

(a) The present Convention shall be ratified. Instruments of ratification shall be deposited with the Secretary-General of the Organisation for European Economic Co-operation.

(b) The present Convention shall come into force when it has been ratified by the Government of the Headquarters State and when that part of the authorised capital allotted under Article 4 of the Statute to the Governments which have deposited their instruments of ratification, or to nationals of those Governments, amounts to 80 per cent of the capital of the Company.

(c) For each Signatory ratifying thereafter, the present Convention shall come into force upon the deposit of its instrument of ratification.

#### ARTICLE 21

The Secretary-General of the Organisation for European Economic Co-operation shall give notice to all Governments party to the present Convention and the Company of the receipt of any instrument of ratification or accession, or of any notice of withdrawal. He shall also notify them of the date on which the present Convention comes into force.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, duly empowered, have signed the present Convention.

DONE in Paris, this twentieth day of December Nineteen Hundred and Fifty Seven, in the French, English, German, Italian and Dutch languages, in a single copy which shall remain deposited with the Secretary-General of the Organisation for European Economic Co-operation by whom certified copies will be communicated to all Signatories.

### STATUTE OF THE EUROPEAN COMPANY FOR THE CHEMICAL PROCESSING OF IRRADIATED FUELS (EUROCHEMIC)

*Signed at Paris, December 20, 1957; in force July 27, 1959*

#### PART I

##### *Name, Objects, Headquarters, Duration and Capital*

#### ARTICLE 1

There is hereby constituted a joint undertaking under the name of "The European Company for the Chemical Processing of Irradiated Fuels

(EUROCHEMIC)" which shall take the form of a joint stock company governed by the International Convention on the Constitution of the said Company (hereinafter referred to as the "Convention"), by the present Statute and, residually, by the law of the State in which its headquarters are situated.

#### ARTICLE 2

The headquarters of the Company shall be at Mol (Belgium).

The Company is established for a duration of fifteen years.

#### ARTICLE 3

The Company will build before 1961 and operate a plant and a laboratory for the processing of irradiated fuels; it will also ensure the development of techniques and the training of specialists in this field.

The Company will carry out any research or industrial activity with a view to enabling Member countries of the Organisation for European Economic Co-operation to process the fuels used in their nuclear reactors under economic conditions.

When the quantity of irradiated fuels which Member countries of the Organisation for European Economic Co-operation wish to send for processing in a joint installation seems likely to exceed the capacity of this plant, the Company should examine means to meet the demand of these countries under economic conditions.

#### ARTICLE 4

The authorised capital of the Company shall be 20 million European Payments Union units of account. It shall be divided into 400 shares, each of the nominal value of 50,000 units of account, initially subscribed and allotted in full as follows:

The Government of the Federal Republic of Germany .....	68 shares	3,400,000
The Government of the Republic of Austria .....	20 shares	1,000,000
The Government of the Kingdom of Belgium .....	44 shares	2,200,000
The Government of the Kingdom of Denmark .....	22 shares	1,100,000
The Commissariat à l'Énergie Atomique in Paris ...	68 shares	3,400,000
The Comitato Nazionale per le Ricerche Nucleari in Rome .....	44 shares	2,200,000
The Government of the Kingdom of Norway .....	20 shares	1,000,000
The Government of the Kingdom of the Netherlands	30 shares	1,500,000
The Junta de Energia Nuclear in Lisbon .....	6 shares	300,000
Aktiebolaget Atomenergi in Stockholm .....	32 shares	1,600,000
The Government of the Swiss Confederation .....	30 shares	1,500,000
The Government of the Turkish Republic .....	16 shares	800,000

## ARTICLE 5

The shares of the Company shall be paid up to 20 per cent when the Company is constituted. The General Assembly shall have power to decide when other portions shall be paid up, according to the Company's needs and the progress of its work, bearing in mind the objects as laid down in Article 3.

If, within six months of the date on which the Convention comes into force, any Signatory is not in a position to ratify it, the General Assembly will be summoned in order to decide upon measures to be taken to ensure that the whole of the capital is subscribed.

## ARTICLE 6

The shares shall be registered in the name of the holder.

They shall not be transferable except with the agreement of the General Assembly. Nevertheless, the General Assembly shall not have the power to prevent the transfer of shares by a shareholder to a person having the same nationality, provided that the Government having jurisdiction over such a person has given its approval.

If, however, a Government declares its intention to give notice under Article 18 (a) of the Convention, the transfer of shares by this Government or by its nationals to Governments party to the Convention or their nationals cannot be prevented by the General Assembly.

The Company shall maintain a Share Register in which the names and addresses of the shareholders shall be entered. The Company shall recognise as shareholders only those whose names are entered in this register.

## ARTICLE 7

The capital of the Company may be increased, by the creation of new shares representing holdings in money or in kind, or reduced, by a vote of the General Assembly. When the capital is increased each shareholder shall be entitled to subscribe for a number of the new shares in proportion to the total number of shares registered in his name at the time of the increase, subject to the provisions of Article 8. Should any shareholder not exercise his right to subscribe, such right may, with the approval of the General Assembly, be transferred to another shareholder, without the General Assembly being able to prevent such transfer in the case provided in the second sentence of the second paragraph of Article 6.

The General Assembly shall lay down the conditions under which new shares may be issued and the rules governing the paying up of such shares in kind.

## ARTICLE 8

Any Government or any person deriving his right to shares from or through a Government party to the Convention may be admitted as a shareholder in the Company by a decision of the General Assembly, either by a

transfer of shares or by subscription to an increase in the capital of the Company. In this case, all or a part of the new shares will be allotted for the new shareholder by decision of the General Assembly.

## PART II

### *General Assembly*

#### ARTICLE 9

The bodies of the Company shall be the General Assembly and the Board of Directors who will carry out their duties subject to the powers reserved to the Special Group established by the Convention.

#### ARTICLE 10

The General Assembly shall be composed of all the shareholders of the Company. A representative of the European Nuclear Energy Agency and a representative of the European Atomic Energy Community (EUR-ATOM) shall take part in the General Assembly in an advisory capacity.

It shall be the superior body of the Company, and shall have the following powers:

1. To appoint the members of the Board of Directors and their Alternates and fix the remuneration of the members of the Board of Directors.
2. To appoint the Auditors.
3. To amend the present Statute.
4. To decide upon the paying up of new portions of the capital.
5. To decide upon any increase or reduction in the authorised capital.
6. To make any decision as to the transfer of shares or subscription rights.
7. To declare the extension of the period fixed for the duration of the Company.
8. To declare the dissolution of the Company.
9. To appoint the liquidators.
10. To approve the rules of management referred to in Article 21.
11. To consider the auditors' report, to examine and approve the management report, balance-sheet and profit and loss account, to decide on the allocation of the net profit and to receive the Directors' report on their conduct of the Company's business.
12. To approve the annual report to the Governments of the countries taking part.
13. To fix the maximum amount which may be borrowed during a given period.
14. To decide any other question reserved by law to it or submitted to it by the Board of Directors.

## ARTICLE 11

The first meeting of the General Assembly shall be convened by the Secretary-General of the Organisation for European Economic Co-operation within one month of the coming into force of the present Statute.

An ordinary meeting of the General Assembly shall be held each year and shall be convened by the Board of Directors within six months of the date to which the accounts are made up.

## ARTICLE 12

Extraordinary meetings shall be convened:

1. On the decision of the General Assembly or of the Board of Directors;
2. At the request of the Special Group provided for in Article 11 of the Convention;
3. At the request of the Board of Auditors;
4. At the request of one or more shareholders whose shares together amount to at least one-tenth of the authorised capital. Such request shall be made in writing and shall specify the purpose for which the meeting is to be held.

The method of summoning an extraordinary meeting and the procedure thereat shall be in the same form as those of an ordinary meeting.

## ARTICLE 13

The shareholders shall be summoned to a meeting of the General Assembly by registered letter at least two weeks before the date of the meeting.

The summons shall specify the business to be transacted at the meeting and, if such business includes any amendment to the present Statute (sub-clauses 3, 5, 7 and 8 of Article 10), the purport of such amendment shall be fully set out.

No decision shall be made on any matter not specified in the notice summoning the meeting, except in the case of a proposal made at the meeting to summon an extraordinary meeting of the General Assembly.

The General Assembly shall meet at the headquarters of the Company, unless the Board of Directors otherwise decides.

## ARTICLE 14

The number of votes held by shareholders at a meeting of the General Assembly shall be proportional to the nominal value of all the shares registered in their respective names. Each share shall carry the right to one vote.

## ARTICLE 15

On a meeting of the General Assembly being summoned, it shall be entitled to proceed to business as soon as a majority of the shares are repre-

sented. Should this quorum not be present at the first session, a further session shall be convened upon at least two weeks' notice, and such a session shall be entitled to proceed to business whatever may be the number of shares represented.

The General Assembly shall take its decisions by the majority vote of the shares represented.

Decisions in the case of the powers set out in sub-clauses 3 to 8 and 13 of Article 10 shall require a majority of two-thirds of the authorised capital.

Voting shall take place by show of hands, unless a shareholder asks for a secret ballot.

#### ARTICLE 16

The Chairman of the Board of Directors, or, should he be unable to attend, one of the Vice-Chairmen, or, in default thereof, one of the Directors appointed by the Board shall be Chairman of the meetings of the General Assembly.

The General Assembly shall, by show of hands, appoint two tellers. It shall also appoint a Secretary, who need not necessarily be a shareholder.

#### ARTICLE 17

The discussions and decisions of the General Assembly shall be recorded in Minutes.

The Minutes shall be signed by the Chairman of the meeting, the tellers and the Secretary.

Copies or extracts shall be signed by the Chairman or one of the Vice-Chairmen of the Board.

### PART III

#### *Board of Directors*

#### ARTICLE 18

The Board of Directors shall be responsible for managing the business of the Company.

The Board of Directors shall consist of 15 Directors. The Directors and their Alternates shall be appointed by the General Assembly regardless of nationality. A representative of the European Nuclear Energy Agency and a representative of the European Atomic Energy Community (EURATOM) shall take part in the sessions of the Board of Directors in an advisory capacity.

Each shareholder or group of shareholders holding at least 5 per cent of the Company's shares shall be entitled to a seat on the Board of Directors and shall propose to the General Assembly the appointment of a Director and an Alternate.

The Directors and their Alternates shall be appointed for a period of three years. They may be re-elected. After the first period of three years,

one-third of the Board will be replaced each year. To that end, at the meeting of the General Assembly following the expiry of the Company's third financial year, lots will be drawn to determine which Directors shall retire at the end of the Company's fourth and fifth financial years.

All the Directors shall have an equal vote.

#### ARTICLE 19

The Directors and their Alternates shall be elected at an ordinary meeting of the General Assembly. The same procedure shall be followed upon a casual vacancy, unless a shareholder requests the vacancy be filled forthwith. In that event, the Board of Directors shall immediately summon an extraordinary meeting of the General Assembly to elect a new Director.

#### ARTICLE 20

The Chairman and Vice-Chairmen of the Board of Directors shall be appointed annually by the Board of Directors. They may be re-appointed. The Board shall appoint a Secretary who may not necessarily be one of its members.

Should the Chairman be unable to attend, one of the Vice-Chairmen or, in default, the eldest Director present at the meeting shall take the chair of the Board.

#### ARTICLE 21

The Board of Directors shall have power to determine any matter not coming within the competence of another body of the Company.

The Board of Directors shall have power to delegate all or any part of the management of the Company to one or more of its members or to third persons, who need not necessarily be Directors. It shall draw up rules of management which shall define the rights and duties of the Board of Directors, its delegates and the Managerial Staff.

In these rules, which must be approved by the General Assembly, the Board of Directors must, however, reserve to itself the right of determining the following matters:

1. Composition of the Managerial Staff, and the establishment of conditions of appointment and dismissal for members thereof including the acceptance of their resignation.

2. Appointment of the Directors and persons not on the Board of Directors (members of the Managerial Staff and signing clerks) empowered to sign on behalf of the Company.

3. Appointment of the Managing Director of the Company.

4. Negotiation of loans, in whatever form, subject to any limits imposed by the General Assembly.

5. Conclusion of contracts relating to the processing of irradiated fuels or to the allocation of the special fissionable materials recovered.

6. Conclusion of contracts relating to patents, rights of provisional protection, or utility models owned by the Company.

7. Necessary arrangements for the exercise of security control and any arrangement whatsoever with the European Nuclear Energy Agency.

8. Construction by the Company and the fixing of the site of any new plant and any extension of the existing plant leading to a new plant of large size.

9. Preparation of the management report, the annual report to the Governments of the countries taking part, the annual balance-sheet and the substance of any proposal to be submitted to the General Assembly. It shall cause the accounts to be audited by accountants who have no part in the management of the Company.

#### ARTICLE 22

The Board of Directors shall meet on the summons of the Chairman or one of the Vice-Chairmen as often as business requires and at least once every three months. Members of the Board shall be summoned by registered letter which shall specify the business to be transacted and which shall be despatched at least eight days before the date of meeting.

The Chairman must summon the Board on the written request of a Director, specifying the matter to be considered at the meeting. In this event, such meeting shall be held not later than two weeks after the receipt of the letter of request.

The summons shall indicate the place of meeting.

A Director who is unable to attend a meeting, and whose Alternate is also unable to attend, may vote in writing or may appoint another Director or Alternate expressly empowered to vote on his behalf, as his proxy. No Director or Alternate can act as proxy for more than one of his colleagues.

In urgent cases, decisions may be taken by letter or telegram, unless any of the Directors requests that a meeting should be summoned for the purpose.

#### ARTICLE 23

The Board of Directors has power to hold discussions and take decisions only if it has been regularly summoned and if the majority of the Directors is present or represented by Alternates or by proxy.

Decisions of the Board shall be taken by a majority of the Directors present or represented by Alternates or by proxy. Should the votes be equally divided, the Chairman of the meeting has a second or casting vote. Exceptionally, for decisions on the matters enumerated in sub-clauses 3 to 8 of Article 21, a two-thirds majority is required.

#### ARTICLE 24

The discussions and decisions of the Board of Directors shall be recorded in Minutes.

The Minutes shall be signed by the Chairman of the meeting and by the Secretary.

Copies or extracts shall be signed by the Chairman or one of the Vice-Chairmen.



## ARTICLE 25

The remuneration of the Directors shall be fixed by the General Assembly.

## PART IV

*Knowledge and Patents*

## ARTICLE 26

(a) The shareholders shall be informed of the results of the scientific research and of the information obtained from the activities of the Company, except for knowledge obtained by the Company and which is not freely at its disposal. However, this obligation shall not prevent the Company from taking the necessary steps to ensure the protection of its inventions.

(b) The results and information mentioned in the preceding paragraph shall be circulated through reports to the shareholders, who may, in addition, send trainees to the installations of the Company; the shareholders shall be responsible for the remuneration of trainees. The Board of Directors shall prepare rules for the admission of trainees. The maximum number of trainees for each shareholder shall be determined, taking into account his participation in the Company's capital.

(c) The shareholders shall be entitled to acquire non-exclusive licences under patents, rights of provisional protection, or utility models belonging to the Company. They are also entitled to obtain sub-licences of licences of which the Company has the right to grant sub-licences. The conditions for these licences and sub-licences shall be fixed for all the interested shareholders without discrimination.

(d) The communication of knowledge obtained from the Company by shareholders as well as the granting by shareholders, who are licensees of the Company, of sub-licences to third persons shall be subject to the consent of the Board of Directors. Nevertheless, the Board of Directors shall not have the power to prevent the communication of knowledge or the granting of a sub-licence by a Government or a public institution to an enterprise, which undertakes to exploit, in its country, the knowledge or the invention in question.

(e) The employees and trainees of the Company may not, without authorisation, communicate knowledge which they may have acquired concerning the work of the Company.

## PART V

*Accounts. Liquidation*

## ARTICLE 27

The Company shall take over rights and obligations assumed by, and will reimburse for any special expenditure incurred by, the Organisation for

European Economic Co-operation in pursuance of the objects of the Company.

#### ARTICLE 28

The accounts of the Company shall be audited by a Board of three auditors elected by the General Assembly for a period of three years. The auditors may be re-elected.

Any shareholder or group of shareholders representing 20 per cent of the authorised capital may require appointment of an additional auditor.

The auditors shall, in particular, be responsible for ascertaining whether the balance-sheet and the profit and loss account tally with the books, whether the latter are carefully kept and whether the Company's assets and the financial management are in conformity with the rules governing the Company under Article 1.

In the execution of their work, the auditors shall be entitled to consult the Company's books of account and all relevant papers. The balance-sheet and the profit and loss account must be submitted to them at least thirty days before the date of the ordinary meeting of the General Assembly.

They shall report in writing and submit their proposals to the meeting of the General Assembly at which a decision on the accounts is to be taken.

#### ARTICLE 29

The accounts and balance-sheet must be closed at the end of each calendar year.

The balance-sheet must be drawn up in conformity with the recognised principles of sound business management.

#### ARTICLE 30

Out of the balance remaining after the deduction of depreciation, a sum amounting to 5 per cent shall firstly be allocated to the ordinary reserve fund, until the latter attains one-fifth of the authorised capital already paid up. The reserve fund can only be drawn on to cover deficits.

#### ARTICLE 31

In case of dissolution of the Company, the Company shall go into liquidation, and shall, from that time, be deemed to exist for the purpose of liquidation.

It shall be wound up by liquidators appointed by the General Assembly. Any shareholders or group of shareholders representing 20 per cent of the authorised capital may require the appointment of an additional liquidator. The liquidators shall have full power to realise the assets of the Company.

Once the liabilities of the Company have been satisfied and the shares repaid, the balance remaining shall be distributed between the shareholders in proportion to the nominal value of the shares of which they are registered holders.

## ARTICLE 32

Upon the liquidation of the Company an agreement shall be concluded with the Government of the Headquarters State, and possibly with the Governments of countries in which installations of the Company are situated, as regards the possible taking over of all or part of the installations as well as the storage and control of radioactive wastes.

## PART VI

*Final Clauses*

## ARTICLE 33

Correspondence addressed to shareholders shall be forwarded by registered letter.

Publication in the *Moniteur Belge* shall be deemed to be official notification by the Company of the matter published.

In the case of any other matter to be published, the Board of Directors shall decide the means of publication and, if necessary, shall designate newspapers or other publications for this purpose.

## ARTICLE 34

Any amendment made to the present Statute shall be notified to the Government of the Headquarters State.

## ARTICLE 35

The present Statute shall come into force at the same time as the Convention.

DONE in Paris, this twentieth day of December Nineteen Hundred and Fifty Seven, in the French, English, German, Italian and Dutch languages, in a single copy which shall remain deposited with the Secretary-General of the Organisation for European Economic Co-operation by whom certified copies will be communicated to all the shareholders having subscribed to the present Statute.



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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article]

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